Allan R.
Brewer-Carías

PRINCIPLES OF THE RULE OF LAW

(Etat de droit, Estado de derecho, Stato di diritto, Rechtsstaat)

HISTORICAL APPROACH

CUADERNOS DE
LA CÁTEDRA MEZERHANE
SOBRE DEMOCRACIA,
ESTADO DE DERECHO
Y DERECHOS HUMANOS
Nº 5

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FOREWORD

By Asdrúbal AGUIAR

In the first edition in Spanish of this book: *Principios del Estado de Derecho* (Principles of the Rule of Law), whose author, Professor Allan R. Brewer Carías, is one of the most important references of public law in Latin America, and upon noticing that the Collection of *Cuadernos of the Chair on Democracy, Rule of Law and Human Rights of Miami Dade College* was inaugurated with this book, I pointed out that in 2015 the *Chair* was born in the framework of the First Presidential Dialogue of the *Democratic Initiative of Spain and the Americas (IDEA Group)* to pay a just tribute to the Mezerhane saga.

Mashud A. Mezerhane Bessil, emigrated from the land of his parents to Venezuela and settled in Achaguas, Apure State, after being a victim, as a Maronite Catholic, of the fundamentalist persecution at the beginning of the 20th century in his homeland of origin, Lebanon. Subsequently, his son Nelson J. Mezerhane Gosen, together with his wife, children, and grandchildren, took the path of exile to the United States of America, persecuted by a totalitarian revolution of Marxist lineage installed in the country that welcomed his progenitor, just at the beginning of the 21st century.

Both Mezerhane dedicated to business life, forged social media, and gave their contribution as the fruit of two generations to Venezuelan modernization, with recognized

social responsibility and in open adherence to the civil and democratic creed, its ethical values, and freedoms.

The aforementioned foundational *Chair*, initially promoted through a cooperation agreement signed between *Miami Dade College* and the *José Ortega y Gasset - Gregorio Marañón Foundation* of Spain, within the framework of its *Goberna Las Américas Program*, remains and is nowadays maintained with the support of the *IDEA Group*. It is made up of former Heads of State and Government of Latin America, who, as its website indicates, observe and analyze democratic processes and experiences; reflect on the ways and means that allow the installation of democracy where it does not exist or its reconstitution where it has deteriorated; and promote its defense and respect by the governments where it is established.

In short, it is the shared purpose of the *Chair* and the *IDEA Group* to guide and recommend to the civil and political societies of the Americas and Spain, as well as to their governments, the necessary solutions, measures or initiatives that allow the modification of the trends that negatively affect their respective democratic experiences and to cooperate with them, with a view to strengthening the rule of Law and in particular the essential elements of democracy – a human right of the peoples – and the fundamental components of its exercise.

Hence, the *Mezerhane Chair*, through its teaching and research activities, including the publication of studies and essays related to the triad democracy-rule of law-human rights, goes beyond the walls of academia. It intends to serve as a backbone of ideas in the realization of the long term social and political tasks that commit the former presidents of *IDEA Group.*

The seminal book by Professor Brewer Carías, whose English edition introduces these Foreword, can only be measured, then, in its importance, in the light of what was

stated by the Judge and former President of the Inter-American Court of Human Rights, Sergio García Ramírez, when in 2009, when casting his vote in the *Escher v. Brazil* Case, he warns that, to favor their excesses, the

> "classic" tyrannies that overwhelmed many countries in our hemisphere, invoked motives of national security, sovereignty, public peace. With that reasoning they wrote their chapter in history. In those invocations there was a clear ideological component; powerful interests were at work behind them. Other forms of authoritarianism, more of this time, invoke public security, the fight against crime, to impose restrictions on rights and justify the undermining of freedom. With a biased discourse, they attribute insecurity to constitutional guarantees and, in short, to the rule of law itself, to democracy and freedom".

Thus, in my Foreword to the Spanish edition of this book, I pointed out that today – perhaps consequently or effect of the phenomenon of the globalization of communications and its strong impact on the traditional impermeable nature of the political and legal, social and cultural borders of each State – we are witnessing a crisis of democracy within democracy itself or one that overflows its limits, pushing them beyond democracy. Thus, today, elective populisms are emerging, dissolving all forms of social aggregation or political institutionalists, based on social networks and mass propaganda. But they can and already do imply, from a different angle, a challenge for the necessary renewal demanded by democracy itself, the rule of law and the protection of human rights, in view of the different coordinates shown and demanded by the 21st century.

I wondered, then, whether the contemporary challenge of democracy is perhaps different from the one that has animated it throughout its millennial history: how to bring

about change without violence, clinging to a culture of peace, or about what actions can be taken that are representative of the aspiration of the *demos*; how to control the abuses of those who hold power or can they be enabled to bring about the actions of change without violence; how can the *demos* have a voice to legitimize actions and their doers, or through what process that voice is organized, debates properly, does so fully informed, and achieves clear, constructive and lasting conclusions? These were all issues of important and urgent consideration in the light of the historical evolution or the change of paradigm of civilization that occurred after 1989, looking towards the sources that would once again ensure the identity of contemporary societies, meet the demands of the immediate present – which challenges with its pressing demands and overflows the response capacity of the institutions known during the 20th century – and do not underestimate the new things that the future poses.

"It is not so much a question of form as a question of substance", which points to the reinvention of democracy, which ceases to be a mere form for the organization of power and becomes a way of life, a human right integrating all rights, which must be guaranteed, perhaps, by unprecedented constitutional categories – local and global – pending their formulation within a rethought State of Law.

Thus, I also said on that occasion that the text provided by Professor Brewer Carías – *Principles of the Rule of Law: Historical Approach* – as support of the *Mezerhane Chair* and inaugural of its *Cuadernos*, could not, in fact, be more relevant. The very definition of the Rule of Law provided by the author was already a solid basis and a necessary anchor for its review and analysis within a framework that bets on its contemporary negation – at that time, only the cases of Venezuela, Ecuador, Bolivia, as paradigms – based on another perspective, that of the emerging regime of the lies. This is situated halfway or is

a river between two frontiers, that of the law and that of dictatorial illegality, giving rise to the simulation of legality or to the legally organized fraud of illegality.

"The rule of law (*état de droit, Rechtstaat; stato di diritto, Estado de derecho*) as a system of political organization of contemporary society in the Western world, is that governed by a Constitution, which as a political pact must have been adopted by the people in exercise of their sovereignty; in which its representatives, democratically elected by universal and secret suffrage, govern and exercise public power subject to controls in accordance with the principle of the separation of powers, and with full subjection to the Constitution and the laws, in a framework in which the primacy of human dignity is guaranteed, and the rights of man are constitutionally declared and protected, and in which citizens can demand judicial control of all acts of the State", states Brewer Carías, and then explains how its conformation was reached from the absolute State.

The idea of the Constitution and its supremacy, that of representative government based on popular sovereignty, that of the separation and independence of powers as a guarantee of freedom, that of the subjection of the State and its powers to the rule of law and of judicial control of the constitutionality and legality of their acts, and on the purpose of all this, such as the respect and guarantee of fundamental rights and freedoms, seen in retrospect, are the issues that this *Cuaderno* of the *Collection of the Mezerhane Chair* raises. It is a contribution to any reflection on the matter or attempt at reformulation with a view to the new time and its different manifestations in progress.

It is not by chance that the Inter-American Court itself, in its reiterated jurisprudence, recalls, on the one hand, since ever, that

> "the law in the democratic State is not simply a mandate of the authority coated with certain and necessary formal elements. In a democratic society, the principle of legality is inseparably linked to the principle of legitimacy.... which translates into the popular election of the organs of that creates laws, the respect for the participation of minorities and the ordering to the common good"; and on the other hand, it then repeats on "the obligation of the States to offer, to all persons subject to their jurisdiction, an effective judicial recourse against acts that violate their fundamental rights... The existence of this guarantee constitutes one of the basic pillars... of the Rule of Law itself in a democratic society", teaches the Court.

The relevant point, then, is that after thirty years, if calculated between 1989, since the great epochal break occurred, and 2019, when the Covid-19 pandemic caused millions of deaths all over the planet, before another war between East and West was announced – the invasion of Ukraine by Russia – the horizon shows us challenges of greater depth.

It is no longer a matter of accidents that threaten democracies in Latin America, but of a global tendency for democracies and the rule of law to remain behind within the internal affairs of each people or nation. This is what China and Russia preach, antagonized by the West, yes, but a West that is ashamed of its Greco-Roman and Judeo-Christian culture and traditions and that, in practice, today accepts, within a framework of relativism imposed by globalization itself, the recreation of "retail democracies" or tailor-made for the dictators of the 21st century.

It goes without saying that the deconstructive agendas set in motion, first by the Sao Paulo Forum followed by that of the United Nations 2030 and, in 2019, those of the *Puebla Group* – a screening of the aforementioned Forum –

and the *World Economic Forum* in Davos, all together, addressing the most diverse rights to social difference that the aforementioned deconstruction seeks, coincide in omitting references or concrete commitments to the Rule of Law and democracy. Thus, the concern mentioned and expressed by Judge García Ramírez acquires certainty and the significance of the methodical and pedagogical work presented by Professor Brewer Carías is fully understood. It is demonstrative, *ad nauseam*, that it is an oxymoron, to say the least, to speak of human rights and democracy, apart from the Rule of Law. This is how I put it in a recent essay ("The empire of lies, as physiology of power", 2023), observing that throughout the transitional period in the West (1989-2019) there is, in fact, a blurring of the idea of the dignity of the human person, as it emerges after the Holocaust to subject the constitutional systems born after the Second War of the twentieth century.

This time gods are dethroned and the isolated man – male or female – is stimulated in everything that gives him an immediate sensation of pleasure, the misnamed Good Living, to integrate him to Nature or Mother Earth and impose its evolutionary laws, as if he were an object within it. And the promoters of the reconversion of this ancient indigenous thesis of Good Living – which better implies quality of life within a historical brotherhood – argue to defend the right to difference and to the homologation of all men only in their relationship with Nature: but within a clear aporia that they fail to resolve: "the advance towards post-racial and post-patriarchal societies" at the expense of the experience of the nation and the republic, of democracy and the party regime as well as the ideologies that animated them until the end of the twentieth century.

This is not the case, by the way, of the new ideologies, recreated as figureheads and used as mobilizing symbols of the social imaginary for the stimulation and exacerbation of their emotions; those that artificially increase the cata-

log of human rights by trivializing them, and that the dictatorships of the 21st century announce to protect under the criteria and discretion of the State, but without the rule of law.

As if this were not enough, the above takes place in a context that abdicates precisely the idea of the transcendence of Being. It flaunts the value of immediacy in humans, which is irreligious in itself and to whose effect "beliefs" are cultivated at the retail level for hedonistic peace of mind. Also for its electoral exploitation and access to power as a means and as an end. "Common emancipatory projects have been pulverized" in the framework of a "hyper-individualized" society such as the present one, refers César Cansino quoting Lipovetsky (See his essay in *Fake News: A threat to democracy?,* Miami Dade College, Notebooks No. 4 of the Mezerhane Chair, 2020).

I welcome, therefore, once again the publication of the first issue of the *Cuadernos of the Chair Mezerhane on Democracy, Rule of Law and Human Rights*, now in English, and I thank Professor Allan R. Brewer Carías for his valuable and very timely contribution.

Broward County, May 29, 2023

Prof. Dr. Asdrúbal AGUIAR
Director of the Chair.
Executive Director of IDEA Group

INTRODUCTION

I. FROM THE ABSOLUTE STATE TO THE RULE OF LAW STATE

The concept of the Rule of Law State, equivalent to the German *Rechtsstaat*, the French *État de droit*, the Spanish *Estado de derecho* and the Italian *Stato di diritto,* had its origin in the basic ideas and principles generated after the English Glorious Revolution of the seventeenth century, from the American and the French Revolutions of the eighteenth century, when the Modern Constitutional State began to be conceived in substitution of the Absolut State. This provoked a radical change in the organization and functioning of the State, based on the principle that not only must all the powers of the public bodies forming the State stem from the law, or be established by law, but also that those powers are limited by law.

In fact, it is a comprehensive concept that, when referred to the contemporary Modern Constitutional State as a State subject to the law, logically implies much more than the "principle of legality" or the "prevalence of the law,"[1] referring concurrently to the State in which there

---

[1] A few decades ago, the International Commission of Jurists translated "Rule of Law" into Spanish as "*El imperio de la Ley*" (See the Report "*El Imperio de la ley en la Sociedades Libres*;" available at: Rule-of-Law-in-free-society-conferen ce-report-1959.pdf (icj2.wpenginepowered.com)); and into French as "*Le*

exists: *first,* a Constitution, as a supreme norm, to which the State organs are subject as well as to the principle of legality, generally; *second,* a system of representative democratic government elected by the people, as sovereign; *third*, a system of limitation of the State's power by means of the distribution, separation or division thereof, whereby the public power is controlled as a guarantee of public freedoms; *forth,* the principle of legality, or the submission of all organs of the state to the law; *fifth*, the declaration of fundamental rights and freedoms of citizens embodied in the Constitution that all organs of the State must enforce and guarantee; and *sixth*, a system of judicial or jurisdictional control of the constitutionality and legality of the State's acts exercised by autonomous and independent courts.

Therefore, our purpose in this essay is to remember and analyze the historical background of the concept and, in particular, of each of its elements, starting with the Revolution that took place in the former Colonies of North America in 1776, where, for the first time in Modern history, a process of building a new State under a new Constitution was developed, departing from what until then had been English colonies. They were located far away from the Metropolis and its sovereign Parliament, having developed independently of each other for more than a century through their own means and enjoying a certain autonomy; a trend that a few decades later, with its obvious differences, was followed from 1811 on in the constitutional process of Hispanic America, with the building of new States from the former Spanish Colonies.

Principe de la légalité". See the Report "*Le principe de la légalité dans une societé libre*", 1959; available at: Rule-of-law-in-a-free-society-conference-report-1959-fra.pdf. (icj2.wpenginepowered. com)

In the case of the French Revolution, it was not a question of constructing a new State, but of replacing, within the same existing unitary and centralized organization of the State, a monarchical constitutional political system, typical of an Absolute Monarchy, by a totally different regime of a Monarchical constitutional representative nature; a trend that was followed in Spain in the Constitution of Cádiz of 1812 and in the rest of the European countries, even imposing republicanism in some cases.

In both cases, the constitutional configuration of the States in the modern world was made in accordance with the aforementioned basic principles of the Rule of Law, which served as its foundation, and which have been developed during the last two centuries, giving rise to a State governed by a Constitution that, as a political pact, must have been adopted by the people in the exercise of their sovereignty; in which their representatives, democratically elected by universal and secret suffrage, govern and exercise public power subject to controls in accordance with the principle of the separation of powers, and in full compliance with the Constitution and the laws, in a framework in which the primacy of human dignity is guaranteed, and the rights of man are constitutionally declared and protected, and in which citizens may demand judicial control of all acts of the State.

In other words, the *Rule of Law* is characterized, among others, by the following fundamental principles:

In the first place, there is the principle of limitation of state power by its classical division into the legislative, executive and judicial branches, in order to guarantee liberty and curb any possible abuse of power by one branch in relation to another; and the enshrinement of the necessary autonomy of the judicial branch, to ensure the submission of the State to the law.

The second principle that characterizes the *Rule of Law* is the subjection of the state to the law, which implies not only the subjection to formal law, but also to all the sources of the legal order of a given state. This implies, therefore, that all state bodies are subject to the law of that same state and, particularly, to the law as enacted by Parliament. This has especially given rise to the principle of legality applied to government or administrative actions, according to which, the administration must act in accordance with the law and can be judicially controlled to that end. Consequently, a set of procedures has been established, not solely for controlling administrative action, but also the constitutionality of the laws as a protection against despotism on the part of the legislative power.

These principles have led to others inherent in the *Rule of Law*: on the one hand, that of the primacy of the legislation regulating all state activity, both of the executive and of the judiciary, the law being understood in this context to basically mean the formal law, that is to say, the laws enacted by the legislative bodies of the state (Parliament); and, on the other hand, the establishment of a hierarchical system of the legal order and, consequently, of the various rules comprised therein. This system classifies the different rules in various ranks, according to their respective sphere of validity, usually in relation to a supreme or higher law, which is the Constitution.

The third principle that identifies the *Rule of Law* is the recognition and establishment of entrenched fundamental rights and liberties, as a formal guarantee contained in constitutional texts and provides for their effective enjoyment, as well as the political and judicial means of control to ensure such enjoyment.

These are all principles or expressions of a common objective essential to the Rule of Law: the limitation of power, which emerged in contrast with the unlimited power of the Absolute monarch in what has been considered the first historical form of the continental modern state, namely the Absolute State.

This model of the Rule of Law, which in the contemporary world is also formally defined in many of the Constitutions of Western countries enacted during the twentieth century, has its roots in the principles of modern constitutionalism that emerged from the American Revolution that resulted in the Independence of the United States of America (1776), the French Revolution (1789), and the Hispanic American Revolution (1810), the latter initiated in the former provinces of the General Captaincy of Venezuela.

Hence, in political history and in the framework of the Modern State that emerged at the end of the first half of the last millennium, the form of the Rule of Law replaced that of the Absolute State, which had been the product of the consolidation of the power of the Monarchs after the disintegration of the feudal regime.

1. *On the Absolute State*

Such Absolute State, in fact, came into being when the feudal regime was dissolved as a result, among other factors, of a process of centralization of power, giving rise to the European continental monarchies, in which political power was concentrated in a Sovereign, as a superior political unit, in contrast with the territorial dispersal of power that was characteristic of feudalism. Thus, the Modern State came into being as an Absolute State, a concept in which the idea of concentration of power was added to that of the absolute and perpetual sovereignty of the Monarch, constituting the supreme, absolute and perpetual power over the citizens of a state.

Hence, Bodino[2] or Bodin, in his *Six Books of a Commonwealth* published in 1576, translated into English in 1606,[3] referred to Sovereignty as a condition for the existence of a State (a Commonwealth), including it in his definition. He said:

> "A Commonwealth may be defined as the rightly ordered Government of a number of families, and of the things which are of their common concern, by a sovereign power.
>
> Sovereignty is that absolute and perpetual power vested in a commonwealth that in Latin is termed *majestas*..."[4]

The Modern State, represented in this sovereign monarchy, was what Hobbes termed the Leviathan (1651) the unitary personification of a multitude of men.

In Hobbes' own words:

> "A multitude of men are made one person, when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the unity of the representer, not the unity of the represented that maketh the person one. And it is the representer that beareth the person and, but one person; and unity, cannot otherwise be understood in multitude."[5]

---

2 I. BODIN, *The Six Books of a Commonwealth*, London 1606 (ed. by Kenneth Douglas MC RAE), Cambridge, Mass 1962, Book I, Clap. VIII, p. 84.

3 P. ALLOTT, "The Courts and Parliament: Who whom? *Cambridge Law Journal*, 38, (1) 1979, p. 104.

4 Quoted by P. ALLOTT, *loc. cit.*, p. 104 from trans. Tooley (1960), Chaps. I and VIII of Book I.

5 T. HOBBES, *Leviathan* (ed. John Plamenatz), London 1962, Chap. XVI, p. 171. *Cf.* M. M. GOLDSMIDT, *Hobbes' Science of Politics*, NY 1966, p. 138.

This *Leviathan* was, no doubt, the Modern State.[6]

During the seventeenth and eighteenth centuries, this Modern State was identified, as we said, with the absolute monarchies of the European Continent, in which all power was concentrated in one person, "the king," who exercised it in an unrestricted manner. Moreover, sovereignty was a personal attribute of the Monarch, and for this reason, he was totally exempt from control in the exercise of his power in view of his divine origin.[7] The Monarch had only one duty, namely that of ensuring public order and the happiness of his subjects in the interest of the State, which is the reason for the existence not only of the recourse to the *Raison d'État*,[8] but also for the exercise of the full powers characteristic of absolutism, in which the Monarch was exempt from responsibility. This exemption from responsibility is reflected in the classical expression "The crown can do no wrong" or *le roi ne peut mal faire*.

So ingrained was this principle in the system that, in cases such as the English, it did not change until 1947, when, following the *Crown Proceeding Act,* it became possible to hold the Crown responsible before the Courts.[9] However, despite this and contrary to the situation of the European continental systems, the British experience was

6 A. PASSERIN D'ENTRÈVES, The Notion of the State. An Introduction to Political Theory, Oxford 1967, p. 11.

7 *Idem* p. 44-202.

8 *Idem* p. 44.

9 J.A. JOLOWICZ, "Torts", *International Encyclopaedia of Comparative Law*, Vol. XI, Chap. 13, (Procedural Questions), p. 13-41; H.W.R. WADE, *Administrative Law*, Oxford 1971, p. 17.

very particular, in the sense that absolutism never developed in English history, except for a brief period under the Commonwealth (1653), and even then, only moderately.[10]

In fact, since the beginning of the thirteenth century, the king's authority in England was limited by his barons and that struggle is clear in the Magna Carta of 1215, considered the origin or source of English constitutional law.[11] This Great Charter, as is well known, did not legislate for Englishmen generally, but really attempted to safeguard the rights of different classes according to their different needs, and therefore, churchmen, lords, tenants, and merchants were separately provided for.[12]

Even though the Magna Carta, with its clauses placing limitations upon arbitrary power, has been considered the first attempt to express in precise legal terms some of the leading ideas of constitutional government in England, its interpretation by lawyers, historians and politicians and mainly by the courts, has subsequently led to the consideration of the document as a mean of safeguarding people's liberties even if the *liberi homines* were originally excluded from its clauses.[13]

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10 I. JENNINGS, *The Law and the Constitution*, London 1972, p. 46. "No King of England has ever been regarded by his contemporaries as an Absolute Monarch. The very concept is unknown in English Law", I. JENNINGS, *Magna Carta*, London 1965, p. 13. King Charles I in the trial opened in Westminster Hall 20-1-1649 refused to plead, as he would not recognize the jurisdiction of the Court or indeed of any court. He said, "The King cannot be tried by any superior jurisdiction on earth." On 1-21-1649 he was sentenced to death. See M. ASHLEY, *England in the Seventeenth Century,* 1972, p. 89.

11 W. HOLDSWORTH, *A History of English Law*, Vol. II, Fourth Ed., London 1936, Reprinted 1971, p. 209.

12 *Idem* p. 211.

13 *Idem* p. 211.

In any case, in the course of the history of Great Britain, despite the pact between the King and the barons contained in the Magna Carta, the kings, to consolidate their power as *primus inter pares*, had to fight against the landowners and they did not always win. When the feudal lords disappeared, there was already a Parliament strong enough to limit royal authority, take over part of the king's power, discuss its limits and even, at times, to destroy a king whose ideas and actions transcended the limits considered reasonable by Parliament.[14]

2. *The English revolution: the Imposition of Parliament over the Monarch*

In this context, the Revolution of 1642 was not really a social revolution, like the French, aimed at destroying a despotic system of government and the society on which it was based. Fundamentally, it was the result of a political struggle between king and Parliament.

The result of the Civil War that developed in England from the year 1642 and lasted 18 years was to make personalized monarchies impossible in future as well as to impede Parliament from attempting to perpetuate itself in defiance of public opinion. Thus, when the monarchy was restored after the Civil War, the whole position both of the monarchy and of Parliament had been altered.

Particularly after that Revolution, Parliament attained a position in the state that it had never possessed before, in the sense that it became as permanent a part of the government as the king himself, no longer a body to be called occasionally to assist the king's government by sanctioning new legislation.[15]

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14 I. JENNINGS, *The Law and the Constitution*, *cit*. p. 46-47.

15 W. HOLDSWORTH, *op. cit*., Vol. VI, p. 161-162.

It must be stated also that if it is true that, as a result of that Revolution, the authoritative position of Parliament had been secured, so had the supremacy of the law, mainly because of the increased national desire to see the law become really supreme after the nation's experience under the Protectorate, which had constantly found itself needing to violate the law.

That is why Sir William Holdsworth, in his book *A History of English Law,* said that the alteration of the relationship between King, Parliament and the courts and, consequently, of the executive, legislative and judicial powers, led them to begin to assume the legal position which they hold in modern law.[16] That was undoubtedly facilitated because of the enactment of the *Instrument of Government* of 1653, considered the first written constitution in the modern world[17] in the sense of a higher law not to be modified by Parliament.

However, the political developments in England up to the Restoration eventually led to the final victory of Parliament in 1689, vis-à-vis the other powers of the state, beginning to consolidate its own sovereignty.

With this Parliamentary supremacy, it can be said that the Rule of Law system, in the liberal sense, has existed in England, and it was, as a matter of fact, an Englishman, John Locke, theoretician of the English Revolution, who laid the basis for the doctrine of the Liberal State, which had so much influence on continental law and on the notion of the modern Rule of Law.

16 *Idem* p. 163.

17 P. ALLOT, *loc. cit*., p. 97.

3. *The American, French and Hispanic American Revolutions, and the principles of the Rule of Law that disrupted the Absolute State*

The system of Absolute Monarchy, as a form of the State, dominated the political organization of European states from the Renaissance and Discovery until the late eighteenth century, when the American (1776) and French (1789) Revolutions changed the history of the State.

These were the events that began to disrupt all the principles that until then had dominated monarchical constitutionalism, giving rise, in contrast, to the Rule of Law, that is, to a form of political organization in which the bodies and authorities of the government of the State began to have their origin in the exercise of popular sovereignty; and all of them, including the Monarch, not only derived their powers from the Constitution and the law, but were also limited by them.

This conception of the Rule of Law was also chosen by the civil founding fathers in Hispanic America when they formulated the political project of the independent State, which was embodied for the first time both in the Federal Constitution of the Provinces of Venezuela of 1811, and in the Provincial Constitutions that were dictated in the various political entities of the Union in 1811 and 1812, rejecting monarchical formulas, responding to the new fundamental principles that characterize the Rule of Law.

These principles,[18] as aforementioned, are the following:

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[18] See, in general, Allan R. BREWER-CARÍAS, *Principios del Estado de Derecho. Aproximación Histórica,* Cuadernos de la Cátedra Mezerhane sobre Democracia, Estado de Derecho y Derecho Humanos, Miami Dade College, Editorial Jurídica Venezolana, Miami 2016.

II. PRINCIPLES OF THE RULE OF LAW

1. *The principle of the Constitution as the supreme law*

The first principle of the Rule of Law State is that a Constitution must exist as a written or unwritten political charter, emanated from the people's sovereignty, having a rigid and permanent character, containing norms of higher rank, immutable in certain aspects.[19] Currently, such Constitution not only organizes the State, that is, not only has an organic part, but also has a dogmatic part, where the fundamental values of society and the rights and guarantees of citizens are declared.

Until the late eighteenth and early nineteenth centuries, this idea of Constitution did not exist in the Absolute State, and the Constitutions, at most, were charters granted by the Monarchs to their subjects, because the Monarch was the sovereign. Only when the people began to be the sovereign, did the meaning of the constitutions change.

The first written Constitution of the modern world, product of popular sovereignty, was the United States of America's Constitution of 1787, followed by the French Constitution of 1791. The third modern, republican Constitution was adopted in Hispanic America, in Venezuela in 1811. The third and fourth Constitutions in Modern history were the one sanctioned in Haiti in 1804, creating an Empire, and the Federal Constitution of the United Provinces of Venezuela, sanctioned in 1811, the fifth Constitution in the Modern world being the Constitution of the Spanish Monarchy sanctioned in 1812.

This idea of the Constitution, as the supreme norm, has in all cases led to the development of a hierarchical system of norms that make up the legal order or system of the

[19] See *Part One* of this book.

country at different levels, according to their sphere of validity, normally established in relation to the supreme law.

Among the different sources of the legal order, the primacy of legislation has been generally accepted, regulating all the activities of the State, both the executive and judicial branches. In this context, the concept of legislation is basically understood to be the formal law, that is, the laws sanctioned by the Legislative body or Parliament.

This idea of the Constitution as a law of laws has additionally imposed the principle of legality, which is another of the global principles that characterize the Rule of Law State. It implies the subordination of all bodies of the State to the Constitution and to the law, understood not only as the specific formal act emanating from the representative legislative body, but encompassing all other sources of the legal order, including regulations.

This implies, therefore, that all organs of the State are subject to the laws enacted by their own bodies, particularly, those emanating from the legislative organ; consequently, all acts of State organs being subject to control.

2. *Popular sovereignty and democratic representation*

Second, from the American and the French Revolutions of the eighteenth century there also emerged a new political idea about the new role that the people assumed as sovereign, expressed in the process of the constitutionalization of the organization of the State, electing their representatives and their government.[20]

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[20] See *Part Two* of this book.

Departing from these Revolutions, therefore, constitutions began to be the product of popular sovereignty, and ceased to be a mere emanation or concession of a Monarch. It was in that sense that in the United States of America, the Colonial Assemblies conformed by representatives of the people, assumed sovereignty, and from 1776 dictated their own Constitutions; and in France, sovereignty was transferred from the Monarch to the people and to the Nation; and through the idea of the sovereignty of the people, all the bases of democracy and republicanism emerged, which also constitutes another of the great contributions of these Revolutions.

Likewise, in Hispanic America, particularly in Venezuela, the Supreme Junta constituted in the Municipality of Caracas from April 19, 1810, among the first constitutional acts that it adopted, following the steps adopted that same year in Spain for the election of the deputies to the *Cortes*, was the call for elections of deputies for a General Congress with deputies representing all the Provinces that made up the former General Captaincy of Venezuela. Those deputies were the ones who, representing the people, on December 21, 1811, sanctioned the Federal Constitution of the States of Venezuela, after having solemnly declared their independence on July 5, and enacting the Declaration of Rights of the People on July 1 of the same year.

On the other hand, it must be stressed that from the American and French Revolutions it can be said that there resulted the conception of democracy as a political regime, and the representative democratic systems of government that dominate the modern world, based on the popular election of representatives by the sovereign people through suffrage, as well as the presidential and parliamentary systems of government.

The first one, presidentialism, a product of the American Revolution; and the second, parliamentarism, as a system of government that prevailed in Europe after the French Revolution, and which has been applied even in parliamentary monarchies. With them, representative democracy thus began to become part of the roots of the Rule of Law.

In Hispanic America, presidentialism was first established as a form of government in Venezuela as of 1811, initially as a three-head executive power, and afterwards, from 1819, unipersonal; a system of government that was then followed in all Latin American countries.

3. *The limitation of public power, the principle of the separation of powers and a system of control of the exercise of power*

Third, in the same spirit of limitation of public power to guarantee the freedom of citizens, the French and American Revolutions contributed to modern constitutionalism with the fundamental idea of the separation of powers as a guarantee of freedom.[21]

The principle was formulated, first, on the occasion of the American Revolution, in the Constitutions of the independent Colonies from 1776, and later in the constitutional structure designed in the Constitution of the United States of 1787, which was structured entirely on the basis of the organic separation of powers.

The principle, of course, was reflected even more strongly in the constitutional system that resulted from the French revolutionary process, not only in the Declaration of the Rights of Man and of the Citizen of 1789, but in the Constitutions enacted from 1791, where there were added

21 See *Part Three* of this book.

as additional elements, the principle of the supremacy of the Legislator resulting from the consideration of the law as an expression of the general will; and even prohibiting judges from interfering in any way in the exercise of legislative and administrative functions.

In the Hispanic American world, the Venezuelan Federal Constitution of December 1811, was also the third constitutional text of the modern world to establish expressly and precisely the principle of the separation of powers, although more within the line of the North American balance than of the extreme French conception.

From this constitutional principle of the Rule of Law derives the other fundamental principle that the Public Power is and must be limited, which must be guaranteed by a system of separation, division, or horizontal distribution thereof, at least between the Legislative, Executive and Judicial branches, in order to guarantee freedoms and try to avoid potential abuses by one branch of power in relation to another. And, within such separation, by e enshrinement the necessary autonomy and independence of the Judicial Power with the power to control the subjection of all organs of the State to the Constitution and law.

Finally, the distribution of power in the Rule of Law State is also characterized by the establishment of a system of territorial distribution of power that gives way to political decentralization and the extended exercise of democracy at the local levels of the State.

Thus, in contrast with the Absolute Monarchies organized on the basis of centralism, these revolutions also gave rise to new forms of territorial organization that lead, on the one hand, to federalism, particularly derived from the American Revolution with its essential bases of local government; and, on the other, to municipalism, originating particularly from the French Revolution.

In Hispanic America, it was also in the Venezuelan Federal Constitution of 1811, where for the first time in the history of the modern world after the American Constitution, the federal form was adopted in the organization of the State; and, at the same time, it was the first country in the new world, after the Revolutions, to have adopted in 1812 the municipal territorial organization bequeathed by the French Revolution.

All this contrasts with the scheme of the former Absolute State, in which the Monarch accumulated all the powers: he was the legislator, the ruler, the administrator and the one who imparted justice. Nothing and no one controlled the Sovereign, nor were his powers limited, nor could they be limited. (*The King can do no wrong; Le roi ne peut mal faire*).

In the Rule of Law State, on the other hand, within the context of the separation of powers, there predominates principle of control between the powers, particularly, that of judicial control which, although initially developed in relation to the acts of the Executive Power and the Public Administration, whose organs must act in accordance with the law, it was gradually extended to all State acts including those of Parliament.

For this reason, the control of power was also implemented in relation to the acts of the legislative body itself, – putting an end to absolute parliamentarism –, and of the government, by adopting a system of judicial review or jurisdictional control of the constitutionality of the laws and other acts of the State issued in direct enforcement of the Constitution, as a protection against the despotism of the Legislator and of the government.

On the other hand, in order to judicially control the activity of the Administration, specialized courts were created as contentious-administrative jurisdiction; and there emerged the Constitutional Jurisdiction made up of special

Constitutional Courts or the Supreme Courts themselves, in order to control the constitutionality of the legislator and the government.

This, in contrast to the scheme of the Absolute State according to which the Monarch was Sovereign and infallible, so that since he could never make mistakes or cause evil, his acts were not subject to any control. The law that governed him was his own will, so that there could be no higher regulatory body to limit it or control his decisions.

4. *The principle of legality*

The *forth* main feature of the concept of the Rule of Law is the submission of the state to the law, which implies that all the actions of the public bodies of a given state and its authorities and officials must be carried out subject to the law and within the limits set by the law.[22]

This principle is, perhaps, one of the main features of today's legal system, although there are certainly as many interpretations as there are legal systems and even authors. It is also referred to by various expressions: for instance, in the Continental and Latin-American legal systems, this principle of the submission of the state to the law has been always identified with the "principle of legality"; in the American system, with the whole idea of constitutionalism or government under the law; and in the British constitutional system, by the classical expression "Rule of Law."

All these expressions ultimately mean that state bodies should be subject to the law, although it is certain that these assertions do not always have the same meaning and scope in every system.

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22 See *Part Four* of this book.

5. *Declarations of fundamental rights*

Fifth, from the same two revolutions of the late eighteenth century, the formal declaration of the existence of natural rights of man and citizens began to be solemnly recognized with constitutional rank, and therefore, with the obligation to be respected by the State.[23]

Freedom was constituted within these rights, as a limitation to the State and its powers, thus producing the end of the absolute and irresponsible State.

Therefore, the Constitutions of the North American Colonies, upon their independence in 1776, were all preceded by extensive Declarations of Rights, followed by the Declaration of the Rights of Man and of the Citizen of France of 1789, and the Bill of Rights contained in the first Amendments to the Constitution of the United States of the same year.

The third of the declarations of fundamental rights in the history of modern constitutionalism was also adopted in Hispanic America, the "Declaration of Rights of the People" sanctioned on July 1, 1811, by the General Congress of Venezuela, a text that months later was included and expanded in Chapter VIII of the Federal Constitution of December 1811.

This recognition of fundamental rights and freedoms is therefore another of the principles that globally identify the Rule of Law, as a formal guarantee contained in constitutional texts, which ensure both their effective enjoyment and the various means of judicial and political control to guarantee them.

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[23] See *Part Five* of this book.

In contrast, in the scheme of the absolute State, citizens had no rights; they had only duties and, among them, that of subjection to the Monarch. Therefore, the very idea of constitutionally declared fundamental rights, as stated, a product of the American and French Revolutions, is another characteristic of the Rule of Law.

6. *Judicial Review and the role of the Judiciary*

Fifth, the American and French Revolutions also disrupted the very idea of the judicial branch and its role, since justice would cease to be administered by the Monarch and would begin to be dispensed by independent officials, in the name of the Nation. [24]

Furthermore, regarding the contribution of the American Revolution to the Rule of Law, the judges assumed a function that is fundamental in modern constitutionalism, which is the control of the constitutionality of laws.

That is, from the idea that the Constitution is the supreme norm, there derives the principle that there must be some control to guarantee its supremacy, and that control was attributed to the Judicial Power. Hence, the important political role that the Supreme Court of Justice acquired in the United States of America, giving rise to the so-called diffuse method of judicial review, according to which all courts have the power to control the constitutionality of the laws they must apply when deciding specific cases. The system was almost immediately followed in many Hispanic American countries.

It was in Venezuela, in the Federal Constitution of 1811, where – under the influence of the North American experience –, the role of the Judicial Power, as a trusted balance between the powers of the State, was adopted,

[24] See *Part Sixth* of this book.

even including in the text of the Constitution itself the principle of its objective guarantee, by declaring null and void any laws that contradict the constitutional norms.

Also in Hispanic America, since the nineteenth century, and in Europe, since the beginning of the twentieth century, the other method of judicial review, the so-called concentrated method also developed, assigning to the Supreme Court of the country or to a special Constitutional Court or Tribunal created independently from all branches of government, the power to declare the nullity of unconstitutional laws challenged by an interested party.

This subsequently gave rise to the development in almost all Hispanic American countries of the comprehensive systems of control of constitutionality of laws, concentrated, diffuse and mixed, that characterizes Hispanic American constitutionalism.

Consequently, in current times, other of the key elements that distinguish the Rule of Law State is the indispensable existence of a judicial review system to guarantee the supremacy of the Constitution.

Furthermore, the Rule of Law also imposes the need for the development of a jurisdictional system of control of the administrative action (contentious administrative jurisdiction), which is generally assigned to special courts.

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All these principles or contributions that resulted from the American and French Revolutions logically implied, as said, a radical change in constitutionalism, resulting from a transition that was not slow but violent, even when developed in different circumstances and situations. Hence, the contributions of the American and French Revolutions to constitutionalism, followed by their adoption in the Hispanic American Revolution, even in the five common basic ideas mentioned above, had different roots and motivations.

The intention of this book is to remind and study these principles, from the historical perspective of their consolidation, wherefore it is divided into the following six parts in which we will analyze: (i) The Idea of the Constitution and its Supremacy; (ii) Popular Sovereignty, Republicanism and Representative Democratic Government; (iii) The Separation and Limitation of Power as a Guarantee of Freedom; (iv) The Submission of the State to the Law (principle of legality); (v) The Declaration of Fundamental Rights and Civil Liberties; and (vi) Judicial Review of the Legality and Constitutionality of the Actions of the State.

PART ONE

THE IDEA OF THE CONSTITUTION AND ITS SUPREMACY

The first of the principles of the Rule of Law or *État de droit* in Modern Constitutionalism is the idea of Constitution, whose consolidation and development, from the beginning of the nineteenth century, led to the establishment of a system of norms of a higher level in a given legal order, comprehensively setting forth the basic rules related to the fundamental functions of the state, its different bodies and powers and their interrelations, and the fundamental rights and liberties of the citizens.

Thus, the constitutionalization of the state according to law started two hundred years ago with the introduction of written constitutions in the practice of politics.

These written constitutions were conceived as formal documents containing the will of the people, considered as sovereign, regarding the political organization of a nation. Precisely because of this process, the organs of the state, including kings and parliament, were converted into such organs of the state, and the sovereignty was depersonalised, in general, and attributed to the people represented by those organs.

During the last two centuries, after the approval of the first of the written constitutions of modern times, the Constitution of the United States of America, in 1787, the practice of written constitutions has spread and written

constitutions exist in almost every country in the world today with very few exceptions, among which, that of the United Kingdom.

Of course, the fact that in this country, and in a few others such as Israel or New Zealand, there is no "written constitution," does not mean that there is no Constitution at all. On the contrary, in these countries there exists a collection of rules, partially written, partially unwritten, that establishes, regulates and controls their government.[25] Hence, the constitutionalization of the state according to law has also taken place in constitutional systems that have no written Constitutions.

In any case, this process of constitutionalization of the Rule of Law, reflected in a constitution, has produced a system of guarantees of individual liberties, which are specified in the recognition of fundamental rights, the establishment of the division of powers, the provision for the people's participation in legislative power by means of popular representation, and the submission of the state to the Rule of Law. Most important of all, in the context of modern constitutions, it has produced a system that responds to a political decision of society, adopted by the people, as a constituent power through a particular constituent assembly.

Specifically, the principle of separation of powers, with its distinction between legislative, governmental, and administrative bodies and courts of justice, since the eighteenth century has been considered a necessary content of any constitution, except in socialist countries, because it is thought, in itself, to be the organic guarantee against abuse of power on the part of the state. We have only to remember article 16 of the 1789 French Declara-

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25 M.C. WHEARE, *Modern Constitutions*, Oxford 1966, p. 1, 2.

tion of the Rights of Man and the Citizen, which reads as follows:

> "Every society in which the guarantee of rights is not assured, or the separation of powers not determined has no Constitution at all."[26]

Following this principle, the first written constitutions in modern times were the Constitutions of the former British Colonies of North America organized since 1776 as independent states, followed by the American Constitution of 1787. Accordingly, the United States was the first common law country to have parliamentary sovereignty replaced by the paramount law of a constitution given by the people, and its enforceable fundamental rights.[27] Notwithstanding, the idea of a higher and fundamental law established as a social contract had also English origins and antecedents in the process of colonization of North America.[28]

In fact the higher law background of the American Constitution,[29] can be traced back to the medieval doctrine of the supremacy of law, drawn from the pages of the works on the Laws of England, by the greatest English medieval lawyer, Bracton (1569), mainly interpreted by Sir Edward Coke.

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26 See in W. LAQUEUR and B. RUBIN, *The Human Rights Reader*, 1979, P. 120.

27 A. LESTER, "Fundamental Rights: The United Kingdom Isolated", *Public Law,* 1984, p. 58.

28 See in general, Allan R. BREWER-CARÍAS, *Reflexiones sobre la Revolución Norteamericana (1776), la Revolución Francesa (1789) y la Revolución Hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno,* 2ª Edición Ampliada, Universidad Externado de Colombia, Editorial Jurídica Venezolana, Bogotá 2008.

29 See in general, F. CORWIN, "*The Higher Law" Background of American Constitutional Law*, New York 1955

This principle led to a reaction against the doctrine of the divine right of kings, based on the doctrine of divine origin of law upon which the basis of civil society is built, and on the principle that the law is supreme above king and people equally.[30]

1. *Historical Origins*

Written constitutions of modern times are said to have their formal historical origins in the *Instrument of Government* issued by Oliver Cromwell (1653), considered to be the first written constitution in constitutional history; nevertheless, they have their remote antecedents in the medieval formal pacts made between a prince and his vassals, or between a prince and popular representation, which was subsequently taken as the expression of the will of the people.

In the Middle Ages, these written agreements, which were called Charters, were established between the princes and their barons, the most famous of them being the *Magna Carta* of 1215. However, these documents were not constitutions in the modern sense of the word, although their legal nature has been interpreted in various ways. They have been termed laws, because they were issued by the king and took the form of royal concessions, and as such, they have even been described as public law contracts. They were present throughout British history, acting either as a factor of real integration, or as the ideological content of competition between parties, or as a symbol of the parliamentary party. Moreover, as of the eighteenth century, they even symbolized the spirit of the constitution in its entirety.

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30 T.F.T. PLUCKNETT, *A Concise History of the Common Law*, London 1956, p. 49.

The *Magna Carta* was the result of a resistance movement by the privileged barons against the crown's policy during the reign of King John (1199-1216).[31] It was just one of the many general charters established between the prince and his barons, guaranteeing them privileges in exchange for certain commitments on their part, which were created in feudal times.

Consequently, none of the trends belonging to modern constitutional law can be applied to these medieval relations. The *Magna Carta* was a *stabilimentum*, that is, an agreement or stipulation lacking any precise sense of political law. The fact that it was in writing is no argument in favor of a constitution, and its very name, *Magna Carta*, is not explained historically by the fact that it contained a fundamental law in the sense of modern constitutions; it was a popular description to distinguish it from the *Carta Foresta* or Chart of the Forest of 1217 relating to hunting rights.[32]

The original name of the Magna Carta was *Cartam Libertatis* or *Cartae Baronum*. It was only centuries later, during the Revolution, with the Parliament's struggle against the absolutism of the Stuarts, that the modern sense was attributed to it, making it the origin of a Liberal constitution. But, as Carl Smith pointed out, it would be a historical error to see, even if only by approximation, anything in it analogous to a modern liberal or democratic constitution.[33] Nevertheless, in medieval times, it was considered to be an unalterable, fundamental and perpetu-

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31 See, in general, I. JENNINGS, *Magna Carta*, London 1965, p. 9.

32 W. HOLDSWORTH, *A History of English Law*, Vol. II, 1971, p. 207, 219.

33 C. SCHMIDT, *'Teoría de la Constitución* (Spanish ed.), Mexico 1961, p. 52-53.

al[34] part of the enacted law, and was confirmed by different kings more than thirty times, thus being an important part of the progress of common laws.[35]

In the same English context, the first example of a modern written constitution is undoubtedly the *Instrument of Government* 1653, which was the result of the only real break that had occurred in English constitutional history and its political continuity.[36]

In effect, the Great Civil War, which started in 1642 and divided the country into Parliamentarians and Royalists, can be thought of as the final step in the long struggle between the parliament and the king. With its religious, economic, and political causes and mutual accusations of breaking and subverting the fundamental law,[37] it brought about the execution of King Charles I, the destruction of the whole system of central government and the assumption of the government of the country by the Long Parliament (1649-1660).

Charles I was tried and executed in January 1649, and soon afterwards the monarchy and the House of Lords were abolished and England was named a Commonwealth (*Commonwealth of England, Scotland and Ireland*) or free state, under the control of the Army and of Oliver Cromwell.[38]

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34 Ch. H. MCILWAIN, The High Court of Parliament and its Supremacy, Yale 1910, p. 64–65.

35 W. HOLDSWORTH, *op. cit*., Vol. II, p. 219.

36 M.C. WHEARE, *Modern Constitutions*, Oxford 1966, p. 9. *Cf.* J.D.B. MITCHELL, *Constitutional Law*, Edinburgh 1968, p. 27.

37 M. ASHLEY, *England in the Seventeenth Century*, London 1967, p. 76, 79, 80, 82.

38 *Cf.* W. HOLDSWORTH, *op. cit*., Vol. VI, p. 146; M. ASHLEY, *op. cit*., p. 91–92.

Parliament carried out the wishes of the army, except when setting a limit on its own powers and its own existence.

After long and futile negotiations, Cromwell finally dissolved Parliament by force in 1653. To take its place, he invited a number of proven Puritans to form an Assembly of Saints that shortly afterwards resigned their powers and gave back their authority to Cromwell. Then the Council of army officers produced a written constitution for the government, known as the *Instrument of Government* 1653,[39] which shows all the features of a constitution, as we understand it today.

The *Instrument of Government* made Oliver Cromwell "Lord Protector" of the Commonwealth of England, Scotland, and Ireland, which he had united under one government. It conferred executive powers upon the Protector, assisted by a Council of State containing both civilian and military members conceived as a body independent of both Protector and Parliament, that was to be elected including representatives of Scotland, Ireland, and England.[40] However, when the Parliament met, not all its members accepted the "fundamentals" of the Protectorate Government and refused to accept the constitution under which it was assembled.

Eventually it was dissolved, mainly because it attempted to deprive Cromwell of sole control over the army; and Cromwell again found himself obliged to rule by means of the army.[41] This happened again and again, until his death in 1658. As Sir William Holdsworth said of Cromwell:

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39 W. HOLDSWORTH, *op. cit*., p. 146; M. ASHLEY, *op. cit*, p. 106.

40 W. HOLDSWORTH, *op. cit*., p. 154-155.

41 W. HOLDSWORTH, *op. cit*., p. 147; M. ASHLEY, *op. cit*., p. 102.

> "He was the only man who could control the army, and consequently, the only man who could have any chance of establishing civil, as opposed to, military government."[42]

Therefore, King Charles II was restored soon afterwards by a new Parliament under the terms of the Declaration of Breda 1660, which contained four principles or conditions: a general amnesty, liberty of conscience, security of property and payments of arrears to the army.[43] This Declaration was, indeed, not a constitution in the sense of the *Instrument of Government*, because, in fact, the Restoration meant a return to the old form of government, and no constitution was needed to that end. As K.C. Where said:

> "Those who speak of an unbroken line of development in the history of English government... have a good deal of truth on their side. There was a break and an attempt to make a fresh start with a constitution, but it failed, and the former order was restored."[44]

As we have said, the *Instrument of Government* (1653) and its modifications mainly through the Humble Petition and Advice[45] has been unanimously considered as the first written constitution in constitutional history of modern times. The immediate purpose of it was to establish a permanent and inviolable rule vis–à–vis the changing majority resolutions of Parliament. In all governments, Cromwell said, something fundamental is required, something like a Great Charter which is permanent and invariable or, if you wish, absolutely invulnerable. For example, the stipulation

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42 W. HOLDSWORTH, *op. cit*., p. 148.

43 *Ibid*, p. 165.

44 K.C. WHEARE, *op. cit*., p. 10.

45 W. HOLDSWORTH, *op. cit*., p. 157.

that Parliament can never declare itself to be a permanent corporation was, in Cromwell's opinion, one such fundamental principle.[46]

Thus, historically speaking, one can say that the idea of a constitution arose out of the need to formally determine the composition or fundamental functions of the instruments of government. It is generally a sign of order, following institutional chaos created by a great political or social revolution, when a nation is liberated from a foreign conqueror, or when a nation is formed by the merging of small political units.

It is on such occasions of historical and political decisions to reorganize or create a state that constitutions have come into being.

As Jennings has pointed out, that need arose in England in 1653, when the Parliament, having created an army to destroy the king, was destroyed by its own creation.[47] In this sense, the *Instrument of Government,* which made Cromwell *Lord Protector* and established a new legislature, was the first and only example of a written constitution in England. It only remained in force for a few years, and almost survived Cromwell himself.

However, this constitution anticipated many of the constitutional developments of the nineteenth and twentieth centuries. As Sir William Holdsworth pointed out, this *Instrument of Government* and its immediate modifications:

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46 Quoted by C. SCHMIDT, *op. cit*., p. 45.

47 I. JENNINGS, *The Law and the Constitution*, London 1972, p. 7.

> "Were the first attempt that Englishmen had made to construct a written constitution, and therefore they raised for the first time all the problems connected with its construction. Thus, we get the idea of a separation of powers as a safeguard against the tyranny both of a single person and a representative assembly; the idea of stating certain fundamental rights of the subject; and the idea of rendering these rights permanent, by denying validity to any legislation which attempted to affect them."[48]

2. *The British Constitution*

In any case, with that sole exception, England has never had a written constitution, which, I insist, does not mean that it has no constitution.

The institutions required for the performance of various functions of the modern legal state have been set up in the United Kingdom, in keeping with political needs and following a permanent process of invention, reform and transformation. Hence Jennings' statement:

> "If a constitution consists of institutions and not of the paper that describes them, the British Constitution has not been made, but has grown, and there is no paper."[49]

As was stated by the High Court of Justice *(Queen's Bench Division, Divisional Court*) of the United Kingdom, in its decision of November 3, 2016, issued in the Case *Gina Miller et al. v Secretary of State for Exiting the European Union*:

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48 W. HOLDSWORTH, *op. cit*., p. 157.

49 I. JENNINGS, *op. cit*., p. 8.

> "The United Kingdom has its own form of constitutional law […]. Some of it is written, in the form of statutes, which have particular constitutional importance. Some of it is reflected in fundamental rules of law recognized by both Parliament and the courts.
>
> These are established and well-recognized legal rules which govern the exercise of public power, and which distribute decision-making authority between different entities in the State and define the extent of their respective powers."[50]

Therefore, the British Constitution, which exists, even if not written, is, above all, conditioned by the principle of parliamentary sovereignty, which has its origin in the Glorious Revolution of 1688 with the triumph of parliament over the King. That is, in the United Kingdom's legal system, the idea of parliamentary sovereignty has been traditional, breaking with the continental and American principle of separate powers, which mutually curb each other.

This principle of parliamentary sovereignty is characterized *inter alia,* by the following elements:

In the first place, because of the absence of any formal distinction between constitutional and ordinary laws, which implies that in the absence of a written constitution, Parliament can, at any time, institute, by the ordinary method of law-making, reforms of a constitutional nature.

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50 See the case Gina Miller et al. v the Secretary of State for Exiting the European Union (Case No: CO/3809/2016 and CO/3281 /2016). Available at: https://www.judiciary.gov.uk /judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union-accessible /

Therefore, "the authority of Parliament to change the law is unlimited" and "since the sovereignty of Parliament is recognized by law, – said T.R.S. Allan, it would be contrary to the Rule of Law to deny full force to enactments which change existing law."[51]

The second element that characterizes the principle of sovereignty of Parliament is the absence of any possibility of control over parliamentary activity. This implies that there is no court competent to decide upon the constitutionality of laws or acts of Parliament. Consequently, any act of Parliament, whatever its content, must be applied by the courts of justice, and in no case can those courts fail to apply the said rules.

As Dicey said at the very beginning of his An Introduction to the *Study of the Law of the Constitution*,

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the Legislation of Parliament."[52]

In addition, regarding the courts, in the case *R. v. Jordan* in 1967, a Divisional Court stated clearly that, as Parliament was supreme, "there was no power in the courts to question the validity of an Act of Parliament."[53]

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51 T.R.S. ALLAN, *loc. cit*., p. 122.

52 A.V. DICEY, *An Introduction to the Study of the Law of the Constitution*, (Introduction by E.C.S. WADE), 10th Ed. 1973, p. 39-40.

53 O. HOOD PHILLIPS, Leading Cases in Constitutional and Administrative Law, London 1979, p. 1.

A mention must also be made of the very important decision of the House of Lords, in 1974, in the case of the *British Railways Board* v. *Pickin* in which Lord Reid stated that:

> "The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution", adding, "no court of justice can inquire into the manner in which (an Act) was introduced into Parliament, what was done previously to its being introduced, or what passed in Parliament during the various stages of its progress through both Houses of Parliament," concluding precisely that: "The function of the Court is to co construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions."[54]

The third point that emerges from the principle of the supremacy of Parliament is that the law created by Parliament, that is to say, *the statutes*, have primacy over common law and over any form of legal creation. As stated by the Chancery Division in the case of *Cheney* v. *Conn (Inspector of Taxes)* in 1968:

> "What Statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the Court to say that a parliamentary enactment, the highest law in the country, is illegal."[55]

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54 *Idem*, p. 2-5.

55 *Idem*, p. 28. That is why, we think, George Winterton said that "the rule of law comes to mean rule of law as enacted by Parlia-

The fourth principle derived from the sovereignty of Parliament is that of the power of Parliament to prevail over judicial decisions themselves, since a bill could even be approved for the purpose of legalizing an illegal act or exempting somebody from the legal consequences of a committed act. This is why it is said that "the legal authority of Parliament is absolute, not limited."[56]

For instance, Parliament's term of office, according to one of the conventions, is five years, but this period might be extended. Parliament can also regulate succession to the Throne, exclude persons who are not members of a particular religion, limit royal prerogatives, change the state religion, in short, make any decision with no limitation whatsoever. The principle implies that any act of Parliament can always be revised and changed by a subsequent act, either expressly or, in the case of conflict, implicitly. Consequently, important acts of Parliament such as the *Habeas Corpus Act* 1679, the *Bill of Rights* 1689, the *Act of Settlement 1700*, the *Statute of Westminster* 1931 and even the *European Economic Communities Act* 1972 (as it happened with the withdrawal of the United Kingdom), can very well be revised by Parliament. No special majority is needed for this.[57]

Parliamentary sovereignty in this form, is without doubt, one of the most important features of the constitutional system of the United Kingdom, which contrasts, as mentioned in the *Brexit* case (*Gina Miller et al. v the Secretary of State for Exiting the European Union*) on

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ment, and not the rule of the ancient common law," in "the British Grundnorm: Parliamentary Supremacy re-examined." *The Law Quarterly Review*, Vol. 92, 1976, p. 596.

56 T.R.S. ALLAN, *loc. cit*. p. 129. Also, see E.C. WADE and G. GODFREY PHILLIPS, *op. cit*., pp. 61-62.

57 H.W.R. WADE, *Administrative Law*, 5th ed. Oxford 1984, p. 27.

November 3, 2016 (followed by the Supreme Court of the United Kingdom's decision of January 24, 2017),[58] with the rest of the constitutional systems.

The principle was highlighted by the High Court of Justice of the United Kingdom in such case, stating: "that Parliament is sovereign and, as such, can make and unmake any law it chooses;" it being one of the aspects of Parliament's sovereignty that the Government cannot exercise its prerogative powers to repeal legislation enacted by Parliament.

On the principle of the sovereignty of Parliament, and of the "supreme" character of its primary legislation, the High Court in such decision considered it as to be the primary rule of the United Kingdom's constitutional law, meaning that only Parliament can enact and change the laws, and that there are no laws above primary legislation, except the cases in which Parliament itself has expressly provided that this be otherwise; as was precisely the case of the European Community Act of 1972, in which case,

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58 Case *Gina Miller* et al. v *the Secretary of State for Exiting the European Union* (Case No: CO/3809/2016 and CO/3281/ 2016). See the text of the decision: https://www.judiciary. gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union-accessible/; Case: *R (on the application of Miller an another) v Secretary of State for Exiting the European Union)* ([2017 UKSC 5) (UKSC 2016/0196), in: https://www.supremecourt.uk/cases /docs/ uksc-2016-0196-judgment.pdf See press information on the decision in https://www.supremecourt.uk/cases /docs/uksc-2016-0196-press-summary.pdf. See the comments in Allan R. BREWER-CARÍAS, **"**The "Brexit" Case Before the Constitutional Judges of the United Kingdom: Comments regarding the Decision of the High Court of Justice of November 3, 2016, confirmed by the Supreme Court in Decision dated January 24, 2017," in *Revue européenne de droit public*, *European Review of Public Law,* ERPL/REDP, vol. 31, no 1, Spring/Printemps 2019, *European Group of Public Law* (*EGPL*), pp. 77-103.

considered as a "constitutional statute," precedence was granted to the law of the European Union over the acts of Parliament.[59]

The principle of Parliamentary sovereignty, on the other hand, has among its many consequences, as pointed out by H.W.R. Wade, that there are no constitutional guarantees in the United Kingdom, nor is there anything similar to what happens with written and rigid constitutions, which can only be changed by special procedures.

This is undoubtedly an exception in the modern world, since most countries, even in the English-speaking world, have a written constitution represented by a formal document, protected, as a fundamental law, against any attempt by simple majorities to introduce reforms.[60]

However, not only are constitutional guarantees non-existent in the United Kingdom, nor does it seem possible to create them, as H.W.R. Wade said, since, if an ordinary act of Parliament can reform any law, then it is impossible for Parliament itself to declare a law or statute to be non-reformable, or only reformable subject to certain conditions. In other words, Parliament cannot modify or destroy its own "continuing sovereignty" for the courts will always obey its commands.[61]

In any case, parliamentary sovereignty in the United Kingdom as it exists today has a profound effect on the position of judges. They are not guardians of a constitution or of constitutional rights, with, for example, power to declare certain legislative acts unconstitutional, as is the case with the Supreme Court of the United States and almost all countries.

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59 H.W.R. WADE, *Administrative Law*, *cit,* p. 27

60 *Idem*, p. 28.

61 *Idem*, p. 28. See also G. WINTERTON, *loc. cit*., p. 597.

That is why no entrenched Bill of Rights can be adopted in the United Kingdom. The adoption of it would, of course, involve the exercise of judicial review by the courts, that is to say, the power of domestic courts to protect certain fundamental freedoms even against the legislature itself,[62] and that would be against the principle of the sovereignty of Parliament. However, this has undoubtedly changed since the ratification by the United Kingdom of the *European Declaration of Human Rights*, which became law in Great Britain; and remains so despite the separation of the United Kingdom from the European Union (Brexit).

Sir Ivor Jennings summarized the consequences of this main principle of the constitution of this country saying that parliamentary sovereignty essentially means two things. In the first place, it means that Parliament can legally pass legislation dealing with any matter: in Ivor Jennings' words,

> "Parliament may remodel the British constitution, prolong its own life, legislate ex-post facto, legalize illegalities, provide for individual cases, interfere with contracts and authorize the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Commonwealth, introduce communism or socialism, or individualism or fascism, entirely without legal restriction."[63]

That is to say, that as there is no written or rigid constitution in the United Kingdom, Parliament is not limited by any text or superior fundamental rule. Therefore, there is no possibility of exercising any kind of judicial control

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62 D.G.T. WILLIAMS, "The constitution of the United Kingdom," in *The Cambridge Law Journal*, 31, (1), 1972–B, p. 279.

63 I. JENNINGS, The Law and the Constitution, cit., p. 147.

over the conformity of Parliamentary acts with a higher law, which means in our perspective that the principle of the Rule of Law is not applicable to Parliament.[64]

But, in spite of everything that is said about the unlimited, absolute, omnipotent, all-powerful or unrestrained powers of Parliament that we find in almost all written works about constitutional law in Britain, it must be admitted that Parliament has, in fact, a lot of limitations, precisely those that have kept the British constitution more or less unaltered since the end of the Glorious Revolution and the Declaration of Rights in 1689.

Holmes' famous statement that "Parliament can do everything but make a woman a man and a man a woman",[65] although not entirely impossible nowadays, is no more than an exaggeration tending to mean that Parliament has no legally entrenched limits upon its actions, because of the absence of a written and rigid constitution. However, this does not mean that there could be arbitrariness in the exercise of Parliamentary Powers and that, in certain aspects, in political practice, there are absolutely no limits over Parliaments.

First, there are some Acts of Parliament that can be considered at least from the perspective of constitutional law, as "constituent documents" limiting parliamentary action. In this respect, J.D.B. Mitchell qualified as "cons-

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64 This however changed while the UK was a Member State in the European Union. As JOHN BELL noted: "UK judges have no power to overrule Westminster Parliamentary legislation, except in the limited area of its compatibility with EU law." See John Bell, "Constitutional Courts as Positive Legislators. British National Report1," in the book Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2011, pp. 808 ss.

65 I. JENNINGS, *Parliaments*, Cambridge 1961, p. 2.

tituent documents" the *Acts of Union* of 1707 and the *Ireland Act* of 1800, even though the limitations imposed by them upon Parliament –he said–, are established "in such a way that any infringement of them is improbable."[66] He also mentions as limits upon Parliament, those established by convention, that is to say, habits of thought that are the product of Parliamentary life. Like that related to the "doctrine of mandate" which states that a government that has lost general support in the country should not force major legislation through Parliament shortly before an election, even though such legislation may have been in its electoral program.[67]

There are, moreover, limits in political practice, imposed by Parliament itself, that undoubtedly bind other Parliaments in such a way that Parliament cannot reverse what a previous Parliament had done. For instance, one cannot imagine that Parliament could reverse the *Statute of Westminster* 1931, which limits the power of Parliament to legislate over a dominion without its consent;[68] nor can one imagine that Parliament could reverse the acts granting

66 J.D.B. MITCHELL, *op. cit.*, p. 69–75.

67 *Ibid*, p. 56, 66, 67.

68 Section 4 of the Statute of Westminster, provides: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." *Cf.* C. TURPIN, *British Government and the Constitution*, London 1985, p. 27. In a contrary sense, Ilamish R. GRAY said that "The general tendency of constitutional lawyers is to reject the interpretation of section 4 which requires Parliament, as a matter of law, to act in a particular way for any particular purpose", in "The Sovereignty of the Imperial Parliament", *The Modern Law Review*, 23 (6), 1960, p. 647.

independence to the dominions or territories overseas and thus try to take away their independence.[69]

In the same context, discussions took place, concerning the primacy of European community law in relation to domestic statutes, both before and after the *European Communities Act* 1972 was passed. In accordance with that Act, Community law, up to the United Kingdom's withdrawal from the European Union in 2020, had primacy over domestic law, and therefore, Parliament could not enact future acts that conflicted with Community Law, unless it amended the European Community Act itself. While the United Kingdom remained a member of the Community, in was difficult in practice, for Parliament, to exercise its legislative power through acts contradicting the application of Community Law.[70]

On the other hand, we can also say that limitations upon arbitrary powers have been fixed in the national tradition of this country, and perhaps it has been because of the absence of real threats against the constitution that the need to establish entrenched limits to the power of Parliament has not arisen.

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69 For example, The Zimbabwe Act, 1979, Section I (2) provides: "On and after Independence Day, Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Zimbabwe; and no Act of the Parliament of the United Kingdom passed on or after that day shall extend or be deemed to extend to Zimbabwe as part of its law'. *Cf.* C. TURPIN, *op. cit*., p. 27.

70 *Cf.* F.A. TRINDADE, "Parliamentary Sovereignty and the Primacy of European Community Law", *The Modern Law Review*, 35 (4), 1972, p. 375–402; S.A. DE SMITH, "The Constitution and the Common Market: a tentative appraisal", *The Modern Law Review*, 34 (6), 1971, p. 597–614; H.W.R. WADE, "Sovereignty and the European Communities", *The Law Quarterly Review*, 88, 1972, p. 1-5.

As J.M. Snee in 1955:

> "No British Parliament today would dare to put into practice the statement made by Lord Chancellor Northington in 1766 during the debate on the repeal of the Stamp Act:
>
> Every Government can arbitrarily impose laws on all its subjects; there must be a supreme dominion in every state: whether monarchical, aristocratic, democratic, or mixed. And all the subjects of each state are bound by the laws made by government."

Nonetheless, – Snee said – the absolute supremacy of Parliament remains the orthodox doctrine of English constitutionalism, as expressed by Sir Hartly Shawcross in a speech reported in *The Times* May 13, 1946:

> "Parliament is sovereign; it can make any laws. It could ordain that all blue-eyed babies shall be destroyed at birth; but it has been recognized that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, these laws will be supported and can be enforced.
>
> The English, of course, with an irritating but sublime confidence in their institutions are sure that no Parliament would so act."[71]

This confidence is largely justified in the United Kingdom even though there is no judicial review or control of the constitutionality of acts of Parliament, mainly because of the continuity of constitutional rule in the last three hundred years. Also, as Goodhart pointed out many years ago, in spite of the absence of judicial review of Statutes:

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[71] J.M. SNEE, S.J. "Leviathan at the Bar of Justice", in A.E. SUTHERLAND (ed.), *Government under Law*, Cambridge, Mass 1956, p. 106-107.

"Judges, however, usually manage to get their own way: The House of Lords has been able to attain some of the same results which in the United States are achieved by the first ten amendments. By a convenient fiction, it assumes that Parliament always intends that its statutes will accord with natural justice; no statute will therefore be constructed to be retrospective or to deprive a person of a fair hearing or to prevent freedom of speech unless Parliament has so provided in the most specific terms."[72]

3. *The American Constitution (1787)*

Apart from the important antecedent of the Cromwell's *Instrument of Government* of 1653, the modern practice of written constitutions actually began in the United States of America when the Colonies separated from England, declaring themselves independent States (1776), formulating their constitutions in writing. A Continental Congress in 1776 even invited all the Colonies of the Union to draw up their own Constitutions, as a political decision of the people.[73]

The movement towards independence from England began in the United States long before independence was finally declared in 1776, and the independent spirit develo-

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72 A.L. GOODHART, "Legal Procedure and Democracy", *The Cambridge Law Journal*, 22, 1, April 1964, p. 52. *Cf.* J.D.B. MITCHELL, *op. cit.*, p. 13.

73 A. C. MCLAUGHLIN A. Constitutional History of the United States, New York 1936, pp. 106-109. See, in general, Allan R. BREWER-CARÍAS, Reflexiones sobre la Revolución Norteamericana (1776), la Revolución Francesa (1789) y la Revolución Hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno, 2ª Edición Ampliada, Serie Derecho Administrativo No. 2, Universidad Externado de Colombia, Editorial Jurídica Venezolana, Bogotá 2008.

ped through the colonial assemblies, which had grown in power and influence during the first half of the eighteenth century, by resolving many of the colonists' problems at a local level.[74] This assembly spirit was undoubtedly one of the main factors in the independent process. That is why the *Declaration and Resolves of the First Continental Congress*, October 14, 1774, bearing in mind that "assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances, resolved that 'the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts", had their own rights, among which was:

> "A right peaceably to assemble, to consider their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."[75]

Therefore, the process of separation of the English colonies in America from the mother country took place on the basis of two fundamental elements: the process towards independence of each one of the colonies, through their own representative governments; and the process towards the unity of the colonies, through the continental congresses. According to what was said by one of its principal protagonists, John Adams, "The Revolution and the Union developed gradually from 1770 to 1776."[76]

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74 R.L. PERRY, (ed.), Sources of our Liberties. Documentary Origin of Individual Liberties in the United States Constitution and Rights, 1952, p. 261

75 *Idem*, p. 287, 288.

76 Quoted by M. GARCÍA-PELAYO, *Derecho constitucional comparado*, Madrid 1957, p. 325.

During that period, it was initially a process of intercolonial agreements designed to establish economic boycotts in resistance to the tax pretensions of England. In this context, the first joint meeting of historical and constitutional significance among these colonies was the New York Congress of 1765, which met to demonstrate the colonies' rejection of the *Stamp Act* passed by the English Parliament on March 22, 1765. This Act placed stamp duties on all legal documents, newspaper, pamphlets, college degrees, almanacs, liquor licences and playing cards, and aroused hostility that spread in the colonies.

Besides the social and economic causes of this rejection, the political reaction was based on the expression "no taxation without representation." Hence, the 3rd, 4th and 5th rights declared in the Resolutions of the *Stamp Act Congress* of October 19, 1765, stating:

> "3rd That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.
>
> 4th. That the people of these colonies are not, and from their local circumstances, cannot be represented in the House of Commons in Great Britain.
>
> 5th. That the only representatives of the people of these colonies, are persons chosen therein by themselves; and that no taxes ever have been, or can be constitutionally imposed on them, by their respective legislatures."[77]

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77 R.L. PERRY (ed.), *op. cit*., p. 270.

In this Congress, although a "due subordination to that august body, the Parliament of Great Britain," was declared, its representative character was questioned on the grounds that the taxes established in the *Stamp Act* had not been approved by the Colonial Assemblies. England annulled the *Stamp Act* but imposed a series of customs duties on colonial products.

By 1774, it had become clear that the problems of the individual colonies were really the problems of all of them, and brought about the need for united action by the Colonies, with the result that Virginia proposed that an annual Congress be held to discuss the joint interests of America. Thus, in 1774, the First Continental Congress met in Philadelphia with representatives from all the Colonies, except Georgia.

The main political element discussed in this Congress was the authority that the Colonies should concede to the Parliament, and on what grounds: either the law of nature, the British Constitution, or the American charters.[78] It was decided that the law of nature should be recognized as one of the foundations of the rights of the colonies, and therefore not only the common law. Thus, the Congress declared, as a Right of the inhabitants of the English Colonies in North America, in the same sense of the Resolutions of the *Stamp Act* Congress:

> "That the foundation of English Liberty, and of all free government, is a right in the people to participate in their legislative council; and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and

[78] Ch. F. ADAMS (ed.) *The Works of John Adams*, Boston 1850, II, p. 374 quoted by R.L. PERRY, *op. cit*., p. 275.

> exclusive power of legislation in their several provincial legislatures, where their rights of representation can alone be preserved in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed..."[79]

Thus, in these Resolutions, loyalty to the king was maintained, but the Parliament was denied competence to impose taxes on the Colonies.

As a result of this Congress, economic war was declared with the suspension of imports and exports to England. The economic war rapidly became a military one and the Congress met again in Philadelphia and adopted the *Declaration of the Causes and Necessity of Taking up Arms* of July 6, 1775, as a reaction against the "enormous", and "unlimited power" of the Parliament of Great Britain.

Therefore, the American Revolution can be considered a revolution against the sovereignty of the English Parliament.

One year later, the Second Continental Congress, in its session of July 2, 1776, adopted a proposition whereby the colonies declared themselves free and independent:

> "That these United Colonies are, and of right, ought to be, Free and Independent States; that they are absolved from all allegiance to the British Crown, and that all political connexion between them, and the state of Great Britain, is, and ought to be, totally dissolved."[80]

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79 R.L. PERRY (ed.), *op. cit*., p. 287.

80 *Idem*, p. 317.

The Congress agreed to draw up a declaration proclaiming to the world the reasons for the separation from its mother country, and on the 4th of July 1776, the *Declaration of Independence* was adopted, in formal ratification of the act already executed.

This document is of universal historical interest, for it was the first time that juridical-political-rationalist legitimacy had made its appearance openly in history. There was no longer the recourse to *common law*, nor to the rights of Englishmen, but exclusively to God and to the laws of nature. There was no longer the recourse to the *Bill of Rights*, but to self-evident truths, namely:

> "That all men are created equal; that they are endowed, by the Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles and organizing the powers in such form, as to them shall most likely effect their safety and happiness."[81]

Consequently, anything that was not rationally adapted to the objectives established was unjustified and illegitimate, and the state was organized in the most adequate way to achieve the said objectives.

Apart from the importance of this document for the United States, it is undoubtedly also of universal significance: its basic premise, as a syllogism, is constituted by all those acts of the Crown which, according to Locke,

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[81] *Idem*, p. 319.

define tyranny, and the conclusion of the syllogism is obvious: by violating the pact uniting the King to his American subjects, he had lost all claim to their loyalty, and consequently, the Colonies became independent states.

Obviously, once the colonies had acquired their independence, they had to regulate their own political organization. Moreover, after the King's *Proclamation of Rebellion* on August 23, 1775, the Congress, just before the *Declaration of Independence,* urged all Colonies to form separate governments for the exercise of all authority. It resolved:

> "That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general."[82]

Thus, the *Bill of Rights* and the *Constitution or Form of Government of Virginia* were adopted on June 12, 1776, and the other Constitutions of the States were adopted after the *Declaration of Independence*, in New Hampshire, New Jersey, South Carolina, Pennsylvania, Delaware, Maryland, North Carolina; in 1777 in Georgia, and New York; and in 1780, in Massachusetts. Connecticut and Rhode Island converted their former colonial Charters into their republican Constitutions.[83]

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82 *Idem*, p. 318. A.C. MCLAUGHLIN, *op. cit*., p. 107-108.

83 See the references in RODRIGO GONZÁLEZ QUINTERO, "Las Primeras Constituciones Norteamericanas: Aquel lugar donde iusnaturalismo y constitucionalismo se encuentran," in *Revista de la Facultad de Derecho*, Universidad panamericana, México 2011, pp. 85-86.

These colonial Constitutions were of fundamental importance both for constitutional history in general and for the history of the United States itself, since they undoubtedly represented the triumph of the rational normative concept of the Constitution, which could already be glimpsed in the *Declaration of Independence*. Furthermore, there were written, systematic and coded Constitutions, many of which were preceded by a table of rights inherent in human beings. In accordance with that table of rights the organic part of the Constitution was set, adopting, naturally, as a fundamental principle, the division of powers, which also made its entry for the first time in constitutional history with the principle of the sovereignty of the law.

Therefore, the rational normative concept of the Constitution, with its table of rights, its division of powers, its sovereignty of the law, its distinction between constituent and constituted power, and its division of the Constitution into a dogmatic and organic part, comes from America and its colonial constitutions, from where it proceeded to Europe, to the French Declaration of 1789, and through it, to modern constitutional law.

The idea of a Confederation or Union of Colonies was also formulated at the same time as the *Declaration of Independence*, thereby satisfying the need for a political union mainly derived out of the conduct of the war. Hence, the adoption by the Congress, on November 15, 1777, of the *Articles of Confederation,* is considered to be the First constitution.[84] It established a confederation and perpetual union between the States, the aim of which was the "common defence, the security of their Liberties and

[84] R.B. MORRIS, "Creating and Ratifying the Constitution", *National Forum. Towards the Bicentennial of the Constitution*, fall 1984, p. 9.

their mutual and general welfare"[85] in a system in which each state retained "its sovereignty, freedom and independence"[86] and any power, jurisdiction and right not expressly delegated to the United States in Congress.

The result was that the sole body of the Confederation was the Congress, in which each state had a vote. Consequently, the Confederation lacked direct taxation power, depended economically on the contributions of the States, had no executive body and only an embryonic form of judicial organization. Despite its weakness, the Confederation succeeded in carrying on the war for seven years until it won. Following the victory, the precariousness of the Confederation made it necessary to establish a greater power to achieve national integration, and a Federal Convention was called to meet, "for the sole and express purpose of revising the Articles of Confederation."[87]

This led, in 1787, to the adoption by the Congress of the Constitution of the United States that was the result of a series of general compromises[88] between the political and social components of the independent colonies, of which the following are the most outstanding:

In the first place, the compromise between Federalists and Antifederalists, which provided the Union with the necessary competences for its existence, while maintainning the autonomy of the Federate States. From this compromise emerged the form of the Federal state,[89] which appeared for the first time in constitutional history as a

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85 A.C. MCLAUGHLIN, *op. cit.*, p. 131.

86 *Idem*, p. 137; R.L. PERRY, (ed.), *op. cit.*, p. 399.

87 R.L. PERRY (ed.), *op. cit.*, p. 401.

88 M. GARCÍA-PELAYO, *op. cit.*, p. 336–337.

89 R.B. MORRIS, *loc. cit*., p. 12, 13; M. GARCÍA-PELAYO, *op. cit.*, p. 336; A.C. MCLAUGHLIN, *op. cit.*, p. 163.

political organization of States, through a system of political decentralization or vertical distribution of powers. This compromise was one of the main contributions of the North American Constitution to modern constitutional law.

The second great compromise reflected in the constitution was, because of a long brewing confrontation, the compromise regarding representation between large and small States of the Union. That is, between a Congress in which the States would be represented in proportion to their population and a Congress with a confederate type of representation. The result was a bicameral system in which the House of Representatives was to be made up of a number of deputies proportional to the population of each state, whereas the Senate would comprise two representatives per state, regardless of its size, thus providing equality among the states.[90]

In relation to the latter, the third compromise of the Constitution was that between the North and the South, that is to say, the compromise between free states and pro-slavery states, according to which the slave population was estimated at three fifths in relation to the white population for the purposes of determining the population of each state, both for the appointment of representatives and for tax purposes.

The great slavery issue was also to produce a fourth compromise concerning the question of import and export duties and, therefore, on the import of slaves or its abolition.

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[90] M. GARCÍA-PELAYO, *op. cit.*, p. 336; R.B. MORRIS, *loc. cit*., p. 10; A.C. MCLAUGHLIN, *op. cit.*, p. 179.

The middle ground solution led to the adoption of a clause impeding the Congress from making any decision prohibiting slave importation for twenty years, until the year 1808.[91]

The fifth compromise that we can identify in the American Constitution is that between democracy and the interests of the ruling classes, to avoid despotism when voting. Thus, limited mechanisms for voting were established, based on private property, as well as a mechanism for direct election of representatives to the House of Representatives as established by each state, and indirect election to the Senate.

The last and final compromise reflected in the constitution was the establishment of a system of separation of powers at the federal level, thus, a checks and balances system. Therefore, in addition to the legislative body, a strong presidency was provided for, to be occupied by a President elected for four years by means of a system of indirect suffrage; and a Supreme Court was created, made up of judges elected for life by the two bodies furthest from the masses, the president and the Senate, being granted power to declare the unconstitutionality of acts issued by the other powers against the Constitution. Separation of powers and judicial review of the constitutionality of legislative acts are another two main contributions of the American constitution to modern constitutional law.

In addition to these compromises of the Constitution of the United States, we must turn our attention to another two main contributions made by North America to constitutional law: First, constitutionalism itself, in the sense of the adoption of all those compromises of forms of government in a written constitution as fundamental law; and

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91 R.B. MORRIS, *loc. cit*., p. 11; A.C. MCLAUGHLIN, *op. cit.*, p. 185.

second, republicanism, as an ideology of the people against monarchy and hereditary aristocracies,[92] based on political representation according to the ideas expounded by Thomas Paine in his famous book *Common Sense. Addressed to the Inhabitants of America*, which initially appeared anonymously in Philadelphia in January 1776.[93]

In that book, whose authorship Paine acknowledged months later, he explained all the causes and necessity for independence based on the confrontation of republicanism against the monarchical regime, raising the need to devise a new alternative government for the new world, confronted with the only one known until then and during the previous centuries, which was the hereditary absolute monarchies.

Thus, when in *Common Sense*, Paine pronounced himself for the separation of the North American Colonies from the British Monarchy and formulated the idea of independence, he did so making it clear that the new political regime to be established could not be that of the "folly of hereditary right in kings," or that of "the absurdity of hereditary succession," which he regarded as:

> "An insult and an imposition on posterity. For all men being originally equal, no *one* by *birth* could have a right to set up his own family in perpetual preference to all others."[94]

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92 G.S. WOOD, "The Intellectual Origins of the American Constitution", *National Forum*, *cit*., Fall 1984, p. 5.

93 See the text of Thomas PAINE's Common Sense, in MICHAEL FOOT and ISAAC KRAMNICK (editors), *Thomas Paine. Reader* Penguin Books, 1987, pp. 65-116.

94 T. PAINE *Common Sense* in *Idem*, 75-76 ff.

Paine's proposal, which he then embodied in many of his later writings, was based on the simple idea that he outlined later in 1795, of what he called the primary division of the forms of government, which was: first, government by election of representatives; and second, government by hereditary succession. And it was this simple division what gave rise, precisely, to the revolution in the United States, which was followed by the Revolution in France, based, in Paine's words, on the conflict between "the representative system founded on the rights of the people; and the hereditary system founded in usurpation,"[95] which was not only formed with monarchs of blood, but even established by dictators, citing none other than Maximillien Robespierre, who years later would be his persecutor – as was also of Francisco de Miranda[96] – in representation of the Convention in France. The world of monarchical government or usurpation was, for Paine, the opposite of the "representative system" which, in his opinion, was "the invention of the modern world."[97]

And so it was in *Common Sense*, in a chapter on "the Monarchy and hereditary succession," that Paine laid the foundation for these approaches, setting forth the contrast between hereditary monarchy and the republic, stating that "hereditary government has no right to exist," cannot be established on any principle of law; being "a degradation and lessening of ourselves." In short, he concluded:

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95 See Thomas PAINE, "Dissertation on First Principle of Government" in Michael FOOT and Isaac KRAMNICK (editors), *Thomas Paine. Reader* Penguin Books, 1987, p. 454.

96 See Allan R BREWER-CARÍAS, *Sobre Miranda. Entre la perfidia de uno y la infamia de otros, y otros escritos***,** Segunda edición corregida y aumentada**,** Editorial Jurídica Venezolana, Caracas / New York 2016.

97 See in MichaeL FOOT and Isaac KRAMNICK (editors), *Thomas Paine. Reader, cit,* p, 90.

> "Monarchy and succession have laid (not this or that kingdom only) but the world, in blood and ashes. 'Tis a form of government which the word of God bears testimony against, and blood will attend it."[98]

We must place ourselves in 1776, at the height of the monarchical regime in the world, to grasp the transcendence of this diatribe, which Paine explained in the chapter on "the Monarchy and hereditary succession" – which in 1811 would be translated into Spanish by Manuel García de Sena.[99] To that chapter, however, Paine added another, perhaps the most important, referring precisely to the subject of North American independence, where he made "thoughts on the present state of American affairs." There, Paine posed directly, based on arguments derived from "the principles of nature and common sense,"[100] the necessary independence of the Colonies, dismantling the arguments that had been formulated in favor of the reconciliation with the Crown, explaining what could be expected if the Colonies separated or remained dependent on the Crown.

Paine analyzed each of the arguments that had been put forward for the Colonies to remain dependent, such as the economic progress they had achieved, the relationship between them through the metropolis, the common descent of the English, to ultimately conclude in the end, that "the authority of Great Britain over this continent is a form of government which sooner or later must have an end,"[101] and that it was "repugnant to reason, to universal order of things, to former examples from the former ages, to sup-

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98 T. PAINE, *Common Sense* in *Idem*, p. 78.

99 T. PAINE, *Common Sense* in *Idem*, pp. 71-79.

100 T. PAINE, *Common Sense* in *Idem*, p. 80.

101 T. PAINE, *Common Sense* in *Idem* p. 84

pose that this continent can longer remain subject to an external power."[102] Moreover, Paine added: "Reconciliation is and was a fallacious dream,"[103] considering it "very absurd in supposing a continent to be perpetually governed by an island," for "England to Europe, America to itself."[104]

In short, *Common Sense* was the means of expression of "the doctrine of separation and independence[105] of America, to which effect Paine in the book materially designed the manner in which the Colonies were to be organized, how they were to elect their Assemblies, and how to establish a Continental Congress for the new government, and the adoption of a Continental Charter or Charter of the United Colonies, responding to the principle that a "government of our own is our natural right,"[106] The Republican proposal was, in short, that "in America the law is King. For as in absolute governments the King is Law, so in free countries the Law *ought* to be King; and there ought to be no other."[107] Paine concluded his manifesto, proposing that America adopt "an open and determined declaration of independence,"[108] further coining the phrase "United States of America"[109] to identify the new State.

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102 T. PAINE, *Common Sense* in *Idem*, p. 85

103 T. PAINE, *Common Sense* in *Idem,* p. 85-86

104 T. PAINE, *Common Sense* in *Idem*, p. 86

105 T. PAINE, *Common Sense* in *Idem*, p. 86

106 T. PAINE, *Common Sense* in *Idem*, p. 90

107 T. PAINE, *Common Sense* in *Idem*, p. 92

108 T. PAINE, *Common Sense* in *Idem*, p. 102

109 See Michael FOOT, "Introduction," in Thomas PAINE*, Rights of Man*, Alfred Knopf, New York, 1994, p. xi; Christopher HITCHENS, *Thomas Paine, Rights of Man. A Biography*, Manjul Publishing House 2008, p. 36; and Craig NELSON, *Thomas Paine.*

All this was affirmed by Paine in January 1776, and it was precisely in accordance with these ideas that the republican regime was forged in North America, based on election and representation, that is, on a representative government, developed in each Colony, grouped together in a Continental Congress; a regime opposed to the system of hereditary monarchical government, Paine considering simply, as he repeated in 1795, that the latter had "no right to exist."[110]

In any case, as a result of the whole process analyzed above, Eighteenth Century Americans decided upon revolution to repudiate royal authority and to erect a republic in its place. Thus, Republicanism and to become republican was what the American Revolution had been about. That is why "the people" who then became the sovereign in constitutional history gave the Constitution.

The Constitution adopted in 1787, however, was conceived basically as an organic document, regulating the separation of powers within the bodies, organs of branches of government of the new state, both horizontally and vertically among the legislative, the executive and judicial powers and between the states and the United States in accordance with the Federal system.

Despite the colonial antecedents and the proposals made in the Convention, it did not contain a Bill of Rights, except for the right to representative government. It was the protests of the opponents of the new Federal system, led particularly by the antifederalists, during the ratification process that brought about the adoption of the First

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Enlightenment, Revolution and the Birth of Modern Nation, Penguin Books, 2007, p.8.

110 See in Michael FOOT and Isaac KRAMNICK (editors), *Thomas Paine. Reader* Penguin Books, 1987, p. 454.

Ten Amendments to the Constitution, on the 15th of December 1791, containing the American *Bill of Rights*.[111]

4. *The French Constitution (1791)*

After the American Revolution, the process of constitutionalization of the Rule of Law continued with the French Revolution in 1789 that lead to the adoption of the third modern constitution in the world, the French one, dated September 3, 1791, the second being the Polish Constitution promulgated on the 3rd of May of the same year, 1791.[112]

The French Revolution (1789) took place two years after the approval of the American Constitution and thirteen years after the Declaration of Independence of the United States, developed as a social revolution aimed at liquidating the *Ancien Régime*, represented by an absolute and personal monarchy.[113] The problem here was not how to find a common denominator between thirteen independent states and build a new state from the remains of the English colonies, as was the case in the American constitutional process, but rather how to transform an overcentralized state constructed around the old French monar-

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111 See the text in R.L. PERRY (ed.), *op. cit.*, pp. 432-433.

112 See A. P. BLAUSTEIN, "The United States Constitution. A Model in Nation Building," in *National Forum, cit*., p. 15. See, in general, Allan R. BREWER-CARÍAS, *Reflexiones sobre la Revolución Norteamericana (1776), la Revolución Francesa (1789) y la Revolución Hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno,* 2ª Edición Ampliada, Serie Derecho Administrativo No. 2, Universidad Externado de Colombia, Editorial Jurídica Venezolana, Bogotá 2008.

113 See Alexis DE TOCQUEVILLE, *L'Ancien Régime et la Révolution,* 1856; *The Old Regime and the Revolution*, translated by Jon Elster, Cambridge University Press, 2011; *El Antiguo Régimen y la Revolución*, Alianza Editorial, Madrid 1982.

chy, where the State was the Monarch (*L'État c'est Moi*), into a new form of state in which the people, through the concept of the Nation, were to participate. A revolution was needed, and its first result was the weakening of the monarchy itself.

After the 14th of July 1789, two main decisions were made by the French National Assembly: the abolition of seigniorial rights on August 4, and the Declaration of the Rights of Man and Citizen on August 26, both in 1789. Two years later, the First French Constitution of September 3, 1791, was adopted, which although still a monarchical constitution, it conceived the King as a delegate of the Nation and subject to the sovereignty of the Law.

The fact was that, from that process onwards, the State was no longer the King, as an absolute monarch, but the organized people in a Nation subject to a constitution.

The Constitution of 1791 adopted a structure that later proved to be classical for the development of modern constitutional law and which has followed in some of the American States' constitutions. This structure established a clear distinction between a dogmatic part, containing individual rights and the limits and obligations of the state power, and an organic part, establishing the structure, attributions, and relations between the various state bodies.[114]

The Constitution began with the Declaration of the Rights of Man and of the Citizen, which had already been adopted by the Assembly on August 26, and approved by the King on the October 5, 1789. This text was inspired by the then recent Declarations issued by the American States emancipated from England, mainly the Virginia Bill of Rights (1776). However, this does not mean that the De-

[114] M. GARCÍA–PELAYO, *op. cit.*, p. 463.

claration was not basically a French one, a pure work of rationalism, inspired directly by the thoughts of Rousseau and Montesquieu.[115]

The Declaration of Rights that preceded the Constitution can be characterized by the following major features: In the first place, its content constituted a formal adhesion to the principles of natural law and to the "natural" rights with which Man is born, so that the Law simply recognizes or declares them, but does not establish them. Thus, the declaration had a universal character. It was not a declaration of Frenchmen's rights, but the acknowledgement by the revolutionaries of the existence of the fundamental rights of man, for all time and for all States.

That is why de Tocqueville compared the political Revolution of 1789 with a religious revolution, by saying that in the fashion of great religions, the political revolution established general rules, and adopted a message that spread abroad. This important aspect of the Declaration is related to the fact that the rights declared were natural rights of Man.[116]

Second, under Rousseau's influence, the Declaration was based on man's natural bounty, which implicitly rejected the idea of original sin, for, as it stated:

> "Ignorance, forgetfulness, and contempt of the rights of Man are the sole causes of public misfortunes and of the corruption of governments."

Third – and this is fundamental – from the legal and political point of view, the powers of the State were limited, since it had to act within the limits imposed on it by such rights and, consequently, under the sovereignty of the law, a principle which was established in the Constitution.

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115 J. RIVERO, *Les Libertés Publiques*, Vol. I, Paris 1973, p. 38-42.

116 See the comment in Y. MADIOT, *Droits de l'Homme et Libertés Publiques*, Paris 1976, p. 46.

Moreover, both the Declaration of Rights and the Constitution itself were based on the affirmation of national sovereignty, introducing a concept that has been fundamental in French constitutional law, as it marked the beginning of a new basis for the legitimization of State power, as opposed to the monarchical legitimacy of the past, as well as a new premise for the reorganization of State bodies.

In the French Constitution, the idea of the Nation emerged for the purpose of depriving the King of his sovereignty; but since sovereignty existed only in a person who exercised it, the concept of Nation emerged, as a personification of the people. To use Berthelémy's words:

> "There was a sovereign person who was the King. Another sovereign person had to be found to oppose him. The men of the Revolution have found that sovereign person in a moral person: the Nation. They have taken the Crown away from the King and have placed it on the head of the Nation."[117]

However, in revolutionary theory, the Nation was identified with what Sieyès called *le Tièrs (the Third),* which in the revolutionary *État-Généraux* (Estates General), compared to the other two "estates" (the nobility and the clergy), was the lower state or the nation as a whole. *Qu'est-ce que le Tièrs-État?* Was the question posed by Emmanuel Sieyès in his book, and the answer he gave was *tout* (all), "the entire Nation."[118] The privileged strata was excluded from the concept of Nation, and then confined to the bourgeoisie.

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117 See BERTHELEMY–DUEZ, *Traité elémentaire de droit constitutionnel*, Paris 1933, p. 74, quoted by M. GARCIA-PELAYO, *op. cit.*, p. 461.

118 See E. SIEYES, "*Qu'ést–ce que le Tiers État?*" (Ed. R. ZAPPETI), Genève 1970, p. 121.

The bourgeoisie, as stated by Sieyès, sought the "modest intention of having in the Estates-General or Assembly an influence equal to that of the privileged,"[119] but the real situation, and particularly because of its economic power and the reaction against privileges, led the bourgeoisie to obtain power, through the French Revolution, with popular support.[120]

The people, in fact, supported the Third Estate, that is, the bourgeoisie, because they had no alternative, in the sense that they could support neither the nobility nor the clergy, who represented the privileges.[121] The French Revolution, therefore, has been considered a Revolution of the bourgeoisie, for the bourgeoisie, and by the bourgeoisie,[122] and was basically an instrument against privileges and discrimination, and for seeking the equality of all men in the enjoyment of their rights.

Thus, the Declaration of Rights of Man and Citizen was qualified as being "the ideological expression of the triumph of the bourgeoisie."[123]

And the sovereignty was in the Nation, as expressly established in the Declaration of Rights:

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119 *Idem*, p. 135.

120 "The people – the non-privileged, of course –, where the ones that supported the Third Estate, that is to say, the bourgeoisie, because they did not have other alternative, in the sense that they could not support the nobility or the clergy, which represented the privileges." G. DE RUGGIERO *The History of European Liberalism*, Boston 1967, p. 74.

121 As expressed by G. DE RUGGIERO, *The History of European Liberalism*, Boston 1967, p. 74.

122 See G. DE RUGGIERO, *op. cit.*, p. 75, 77.

123 See J.L. ARANGUREN, *Ética y política*, Madrid 1963, p. 293, 297, quoted by E. DÍAZ, *Estado de derecho y sociedad democrática*, Madrid 1966, p. 80.

> "The source of all sovereignty is essentially in the nation; no body, no individual can exercise authority that does not proceed from it in plain terms."[124]

Therefore, after the Revolution, the basis of public authority in France ceased to be the divine right of the personal monarch and started to be the sovereignty of the Nation (*souveraineté nationale*), that was not to be exercised directly by the Nation, but through its representatives.[125]

Thus, the French Constitution although having a monarchical character, was also a representative constitution, since the Nation exercised its power through representatives, and it is precisely in the structure of representation that the social significance of the Revolution was specifically reflected, because, in according to the system of suffrage that was established, a large number of citizens was excluded from the electoral activity.[126]

Moreover, the French Constitution established another principle of modern public law, which was particularly developed in France, and which is summarized in the following statements:

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124 Art. 3.

125 Although ROUSSEAU considered the representative regime incompatible with the principle of national sovereignty: "Sovereignty consists in the general will and the general will cannot be represented; deputies of the people are only commissioners; they can decide nothing definitely." *Contract Social*, 3, 15, quoted by J. BRISSAUD, *A History of French Public Law*, London 1915, p. 546.

126 Under the influence of Sieyès, the Constitution established two categories of citizens: active citizens and passive citizens. G. LEPOINTE, *Histoire des institutions du droit public français au XIX Siècle.1789–1914*, Paris 1953, p. 44.

> "There is no authority in France superior to that of the law"[127] and the law was considered "the expression of the general will."

This is an affirmation of the Rule of Law and of the idea that it is not men who command, but laws. Hence, the State bodies could demand obedience only insofar as they are an expression of the law, to the extent, said the Constitution, that the King himself "only reigns by law, and it is only in the name of the law that he can demand obedience."[128]

As aforementioned, the first Constitution of France of 1791, despite of the Revolution, continued to establish a monarchical government: the exercise of the executive power and a share, though very limited, of the legislative power was conferred upon the King. However, he was nothing more than the chief public official; he was considered a delegate of the Nation, subject to the sovereignty of the law. Consequently, the Monarch became for the first time a body of the State, and the ancient institution of divine right became a body of positive law. The King became king of the French people instead of king of France.[129]

Finally, the Constitution also established a system of strict separation of powers, in accordance with what was stated in Article 16 the Declaration of Rights of Man and Citizen, in the sense that:

> "Any society in which the separation of power is not determined has no constitution at all."

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127 "Il n'y a point en France d'autorité supérieure à celle de la loi." M. GARCÍA–PELAYO, *op, cit*., p. 465-466.

128 Art. 4, Chap II, Sec. 1.

129 G. LEPOINTE, *op. cit.*, p. 44.

However, in the French system of separation of powers, a clear predominance of the legislative power was shown. Thus, the king neither convened, suspended, nor dissolved the assembly; he had the power of veto, but only for suspension, and could not take any initiative, although he could invite the legislative body to take something into account.

The assembly, for its part, had no control over the executive, since the king's person was sacred and inviolable; ministers were only subject to criminal responsibility. However, the assembly had important executive attributions such as the appointment of principal officials, the surveillance of departmental administration, the declaration of war, the ratification of treaties, etc.[130]

At the beginning, for example, the separation of powers in France presented the non-interference of one power with another in such a fashion that the judicial power could not guarantee individuals that government would be submitted to legality. Proof of this was the famous Law of Judiciary Organization of 16-24th of August, 1790, which specified:

> "Judiciary functions are and shall always be separate from administrative functions. Any interference by judges in the activities of the administrative bodies, or any summons issued to the administrators by the said judges, for reasons relating to their functions, shall constitute a breach of duty."[131]

Subsequently, the Law of 16 *Fructidor* of the year III (1795) ratified that:

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130 G. LEPOINTE, *op. cit.*, p. 45, 49.

131 J. RIVERO, *Droit Administratif*, Paris 1973, p. 129; J.M. Auby et R. DRAGO, *Traité de contentieux administratif*, Paris 1984, Vol. I, p. 379.

> "The Courts are forbidden, under penalty of law, to take cognizance of administrative acts, whatever their nature."[132]

As a result, the evolution of administrative jurisdiction in France, as a jurisdiction separate from the judicial order for judging the government itself, constituted an extreme expression of separation of powers. If the government or administrators were to be judged, a special jurisdiction (*contentieux administrative*), different and separate from the judicial power, had to be set up, and that was developed through a lengthy process which led, eventually, to the establishment of the *Conseil d'Etat*.

On the other hand, in the concept of Parliament and the law resulting from the French Revolution, any kind of control over the constitutionality of the laws in continental Europe was inconceivable, and this continued to be the case up to the beginning of the last century, when it was established in the Austrian Constitution (1920).[133] That is why, at the beginning of the functioning of the Constitutional Council in France according to the 1958 Constitution, the judicial review system established was a precarious direct *ex post* system of control of the constitutionality of laws (i.e. with respect to enacted laws); and, in other European countries, it was only in the twentieth century post-war periods, in the twenties and from the forties, when systems of jurisdictional control of the constitutionality of laws were established.

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132 J. RIVERO, *op. cit*., p. 129.

133 Hans KELSEN, "Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution," *The Journal of Politics*, vol 4, No 2 (May 1942) pp. 183-200.

In Europe, therefore, since the French Revolution in 1789 and the 1791 Constitution, constitutions during the nineteen century were generally the result of Revolutions, establishing the fundamental scheme of the Rule of Law with fundamental rights and division of powers, and with an additional characteristic, namely that the state was organized from a negative standpoint vis-à-vis its own powers, that means keeping in mind the protection of the citizens against the abuse of state power.

Consequently, the ways and means of control over the state were even more organized than the state itself.[134]

In this process of constitutionalization of the Rule of Law, the principle of constitutional rigidity was also established, in the sense that the constitution was fundamental. It was a fundamental law, which could not be modified by ordinary legislation, requiring special procedures for its amendment. This gave rise to the development of the theory of constituent power. In the French example, this presupposed that the people were an existential political entity. As a result of the Revolution, the people became the subject of constituent power, became aware of their political capacity of action, and provided themselves with a constitution, based on the assumption, clearly stated, of their political unity and capacity of action.

The constitution was then the fundamental law of the state and was not to be easily modified. Thus, the distinction between the constituent power of the people and the legislative power (as constituted power) was developed

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134 See on what is explained in the following pages: Allan R. BREWER-CARÍAS, *Reflexiones sobre las revoluciones sobre la revolución norteamericana (1776), la revolución francesa (1789) y la revolución hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno* (First Ed. 1992, Second Ed. 2008) Third Edition, Ediciones Olejnik, Buenos Aires 2019.

and, consequently, the distinction between constitutional acts (*lois constitutionelles*) and ordinary laws. The Nation always retained the right to change its constitution, but this could only be done through the means that had been prescribed in the constitution itself. Nevertheless, this did not prevent changes in the constitution and because of the revolutionary struggles, four constitutions were adopted in eleven years between 1789 and 1800: that of September 3-14, 1791; June 24, 1793; 5 *Fructidor*, year III (1795); and that of 22 *Frimaire*, year VIII (1800).

Anyway, the significance of the French Revolution lies in the fact that it led to the establishment of a Rule of Law, in the sense that it produced a constitution that limited and controlled the exercise of state power, thereby endowing the modern state with a new political character. In this system, the Nation, as subject of the constituent power, confronted the absolute monarch, eliminated his absolutism, and completely took his place, which led to an increase in the power of the state itself.

Naturally, the American model exerted considerable influence in this respect: the Declaration of Independence of 1776 and the American Constitution of 1787 itself, were also the result of the decision adopted by the people of the United States, although, in the case of the United States, as aforementioned, it was not a matter of transforming a state already in existence, as was the case in France, but rather a question of the constitution of a new political formation, the act of providing a constitution to accompany the political foundation of a new state.

5. *The idea of the Constitution resulting from the Hispanic American Revolution*

After the American and French revolutions aimed at creating a republican federal state in the American case or to transform an absolute monarchical state into a repre-

sentative one in the French case, the constitutionalization process of the Rule of Law was followed during the nineteenth century all over the world, mainly in Latin America and Europe.

In Europe, the French constitution of 1795 particularly inspired the Spanish Monarchical constitution of Cádiz of March 1812, and the Norwegian constitution of 1814,[135] but in Latin American countries, being colonies of Spain and Portugal, the influence of the American and French revolutions and constitutionalism was immediate and definitive. It began in Venezuela, which was the first Latin American country to gain independence from Spain in 1811, being the third country in the world where a "Declaration of Rights of the People" was approved by an elected Congress, and where the first of the Hispanic American constitutions was sanctioned in December 1811, which was the Federal Constitution of the United Provinces of Venezuela of December that year.[136]

Indeed, the Declaration of the Rights of Man and Citizen proclaimed by the French Revolution, although it had been banned in Latin America by the Tribunal of the Inquisition of *Cartagena de Indias* in 1789, began to circulate very quickly in the Spanish colonial provinces, and was translated into Spanish by Antonio Nariño in Santa Fe de Bogotá, in 1792, and afterwards, in the Province of

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135 J.A. HAWGOOD, *Modern Constitutions since 1787*, London 1939, p. 51.

136 Nonetheless, it must be mentioned that in 1804, Haiti declared its Independence, adopting a Constitution that established an Empire. See in general: Allan R. BREWER-CARÍAS, *Los inicios del proceso constituyente hispano y americano. Caracas 1811 - Cádiz 1812* Editorial Bid & co. Editor, Colección Historia, Caracas 2012.

Caracas in 1797, in the latter case, as a result of the conspiracy of *Gual and España* of that year.[137]

In effect, one of the first reactions against the Spanish Monarchy inspired by the French Revolution was the so-called *Conspiracy of San Blas* in Madrid, intended to take place on the 3rd of February 1796. It ended before it began; the conspirators were detained the day before, went on trial and a few of them deported to the Spanish Colonies for life imprisonment. The principal conspirators, including Juan Bautista Picornell, were sent to prison to the Caribbean Spanish ports, arriving at La Guaira, Venezuela, where they managed to get in touch with local conspirators and, in 1797, they developed what has been called the Conspiracy of *Gual and España*, named after the two main local participants: Manuel Gual and José María España.

Even though the conspiracy failed, it remained the most serious attempt at liberation in all Latin America and produced one of the most important documents that inspired the subsequent constitutionalization process in that continent.

The conspirators published in 1797, a booklet entitled "Rights of Man and Citizens" with an "address to the Americans" (*Derechos del Hombre y del Ciudadano con varias máximas Republicanas y un Discurso Preliminar dirigido a los Americanos),*[138] which, in fact, was a transla-

137 See P. GRASES, La Conspiración de Gual y España y el Ideario de la Independencia, Caracas, 1978, pp. 13, 286.

138 See Allan R. BREWER-CARÍAS, "La Declaración de los derechos del hombre y del ciudadano de 1789 y su influencia en las primeras declaraciones de derechos en Hispanoamérica (Con ocasión del bicentenario de la "Declaración de los derechos del pueblo" de 1 de julio de 1811 y de la "Declaración de los derechos del hombre" en la Constitución Federal de los Estados de Venezuela de 21 de diciembre de 1811)," in *Revisión del Legado Jurídico*

tion of the French Declaration of Rights of Man and Citizen contained in the 1795 French Constitution.[139]

This book, probably printed in the island of Guadeloupe, was of capital importance for the constitutionalism of Venezuela, having directly influenced the legal organization of the Republic after the City Council of Caracas, in its session of April 19, 1810, set itself up as the Supreme Board (*Junta Suprema*) of Venezuela to "preserve the Rights of Ferdinand VII," but expelling the colonial authorities, thus starting the establishment of a new government and the legal conformation of a new State.[140]

The City Council of Caracas, in effect, assumed that day the "supreme command" or "supreme authority" of the Province, "by consent of the people," reassuming in itself "the sovereign power." A few months later, on June 11, 1810, and faced with the need to form a "well constituted Central Power" among all the provinces of the former General Captaincy of Venezuela, the Junta summoned "all classes of free men to the first of the citizen's rights, which is to concur with their vote to the delegation of the personal and real rights that originally existed in the common mass," to elect the deputies that were to form "the *Junta General de Diputación de las Provincias de Venezuela*" (General Congress). For this purpose, an Election Regulation was issued, which was undoubtedly the first of all those issued on electoral matters in the Hispanic

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*de la Revolución Francesa en las Américas***,** Facultad de Derecho y Comunicación Social, Universidad Bernardo O'Higgins, Santiago de Chile 2012, pp. 59-118

139 See P. GRASES (ed.), *Derechos del hombre y del ciudadano*, Caracas 1959, p. 105–121.

140 See, in general, T. POLANCO, "Interpretación jurídica de la Independencia" in *El Movimiento Emancipador de Hispanoamérica, Actas y Ponencias,* Caracas, 1961, Tomo IV, pp. 323 ff.

American world (in parallel to a similar Regulation adopted in Cadiz for the election of the Cortes in 1810).[141] Seven of the nine provinces participated in the elections and elected deputies who formed the *Junta General*, which declined its powers in a National Congress in which the representatives were constituted and of which was installed on March 2, 1811. This Congress exhorted all the Provinces of the "Confederation of the Provinces of Venezuela," to have their "Provincial Legislatures" accelerate the drafting of their respective Constitutions.[142]

That Congress was the one that solemnly approved the "*Declaración de los derechos del pueblo"* (Declaration of the Rights of the People) on July 1, 1811,[143] which, after the American and French Declarations, can be considered

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141 See Allan R. BREWER-CARÍAS, "Las primeras manifestaciones del constitucionalismo en las tierras americanas: Las Constituciones Provinciales y Nacionales de Venezuela y la Nueva Granada en 1811-1812 como fórmula de convivencia civilizada," in José Guillermo Vallarta Plata (Coord.), *1812-2012. Constitución de Cádiz. Libertades. Independencia*, Instituto Iberoamericano de Derecho Local y Municipal, Organización Iberoamericana de Cooperación Intermunicipal, Gobierno Municipal, Guadalajara 2012, pp. 297-392

142 See *Libro de Actas del Supremo Congreso de Venezuela 1811-1812,* Biblioteca de la Academia Nacional de la Historia, Caracas, 1959, Tomo II, p. 401.

143 See Allan R. BREWER-CARÍAS, Las Declaraciones de Derechos del Pueblo y del Hombre de 1811 (Bicentenario de la Declaración de "Derechos del Pueblo" de 1º de julio de 1811 y de la "Declaración de Derechos del Hombre" contenida en la Constitución Federal de los Estados de Venezuela de 21 de diciembre de 1811), Academia de Ciencias Políticas y Sociales, Caracas 2011. See the text in: Allan R. BREWER-CARÍAS, Las Constituciones de Venezuela, Madrid, 1985, pp.175 ff; and in. Allan R. BREWER-CARÍAS, Los Derechos Humanos en Venezuela. Casi 200 años de Historia, Caracas, 1990, pp. 71 ff.

the third of the declarations of fundamental rights in the history of modern constitutionalism.[144]

Subsequently, on July 5, 1811, the same Congress proclaimed the Declaration of Independence, the new nation was renamed the American Confederation of Venezuela;[145] and in the following months, under the inspiration of the American Constitution and the French Declaration of the Rights of Man,[146] drafted the first Constitution of all Latin American countries, which was the Federal Constitution of the States of Venezuela of December 21, 1811[147] (sanctioned months before the Monarchical Constitution of Cadiz),[148] which followed not only all the general trends of the constitutionalization process of the Rule of Law existing at the time,[149] but also the fundamental ideas of Hobbes, Bodin, Locke, Montesquieu and Rousseau, all reflected in the articles of the constitution.

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144 See P. GRASES, *op. cit.,* pp. 27 ff.

145 See the text of the 5 July 1811 sessions in: *Libro de Actas… cit.,* pp. 171 a 202. See the text of the Declaration of Independence, written by Juan Germán Roscio, in P. RUGGERI PARRA, *op. cit.,* apéndice, Tomo I, pp. 79 ff. Also in FRANCISCO GONZÁLEZ GUINÁN, *Historia Contemporánea de Venezuela,* Caracas, 1954, Vol I, pp. 26 ff.; and in Allan R. BREWER-CARÍAS, *Las Constituciones de Venezuela, cit*., pp. 171 ff.

146 See José GIL FORTOUL, *op. cit.,* Vol I, pp. 254, 267.

147 See the text of the 1811 Constitution in Allan R. BREWER-CARÍAS, Las Constituciones de Venezuela, cit., pp. 179 ff. See also in Allan R. BREWER-CARÍAS, Documentos Constitucionales de la Independencia/ Constitucional Documents of the Independence 1811**,** Colección Textos Legislativos No. 52, Editorial Jurídica Venezolana, Caracas 2012, 644 pp.

148 See on this, Allan R. BREWER-CARÍAS, *Sobre el constitucionalismo hispanoamericano pre-gaditano 1811-1812***,** Editorial Jurídica Venezolana, Caracas 2013.

149 See the texts in Allan R. BREWER–CARÍAS, *Las Constituciones de Venezuela*, Madrid 1985.

The Venezuelan Constitution first followed the formal structure of the French, containing 228 articles, much more than the few articles in the American Constitution. It was also conceived in the way constitutions were afterwards developed, with both a dogmatic and an organic part. The dogmatic part contained a declaration of "The Rights of man that are recognized and that are to be respected in the state" in 58 articles, much more than the French model. The organic part established the fundamental framework of the state and its bodies, in 140 articles.

Second, the Constitution was adopted by the "people of the States of Venezuela, using our sovereignty", following the general trend of the American and French process in relation to the concept of national sovereignty and representation. Article 144 of the Constitution, in this respect established:

> "144. The sovereignty of a country or supreme power to govern or direct community interests equitably essentially and originally lies in the general mass of its inhabitants and is exercised by means of agents or representatives appointed and established in accordance with the Constitution."

Thus, continued article 145 and 146:

> "145. No individual, no family or portion or group of citizens, no particular corporation, no village, city or county can confer upon itself national sovereignty, which is inalienable and indivisible in essence and origin. Neither may any individual exercise governmental public functions unless it has been obtained by the Constitution."

> "147. Magistrates and officials of Government, invested with any kind of authority whether in the Legislative, Executive or Judicial Departments, consequently, are mere agents and representatives of the

people in their functions and are always responsible to the inhabitants for their public conduct through legal and constitutional means."

Third, the Constitution was conceived as a manifestation of the social contract according to Locke and Rousseau's concepts, to protect the rights of the people upon renouncing the natural condition of man. In this sense, articles 141 and 142 stated:

"141. Once men have set themselves up in a Society, they renounce that unlimited and licentious liberty in which their passions easily led them to indulge, passions characteristic only of the wild state. The establishment of a society presupposes the renouncement of those ill-fated rights, the acquisition of other sweeter and more peaceful rights and the subjection to certain mutual duties.

142. The social pact assures each individual the enjoyment and possession of his goods, without prejudice to the right of others to have theirs."

Articles 151 and 152 also stated:

"151. The aim of society is the common happiness, and governments have been instituted to make man secure, protecting his physical and mental faculties, improving the sphere of his enjoyment and to produce the honest and equitable exercise of his rights.

152. These rights are liberty, equality, property and security."

Fourth, the supremacy of law was formally declared in accordance with Rousseau's concept as the expression of the general will and secured by sanctioning illegal acts as tyrannical. In this respect, articles 149 and 150 stated:

"149. The law is the free expression of the general will of the majority of the citizens, indicated by the body of its representatives legally constituted. The law

> is founded on justice and on the common needs and must protect public and individual liberty against any oppression or violence.
>
> 150. Those acts committed against any person which do not fall within the cases and forms determined by the law, are iniquitous, and when they involve the usurpation of constitutional authority or the liberty of the people, they shall be considered to be tyrannical."

Fifth, the Constitution adopted the principle of separation of powers in accordance with Montesquieu's ideas, establishing in its Preamble the basis of the federal pact by stating:

> "The various functions of the authority entrusted to the Confederation shall never be performed together. The Sovereign Power must be divided into Legislative, Executive and Judicial power, and entrusted to different bodies, independent both reciprocally and in their respective faculties."

Furthermore, article 189 stressed that:

> "The three essential government departments, namely the Legislature, the Executive and the Judiciary must be as separate and mutually independent as is required by the nature of a free government or as is in keeping with the links which bind together the system of the Constitution in indissoluble friendship and unity."

It was a text of 228 articles grouped in nine chapters, whereby the Union of the Provinces that had been part of the General Captaincy of Venezuela, under a federal form of the State, were was established as the Confederation of Venezuela.

The federal form of the State was regulated by establishing the regime of the provinces, limiting their authority, in particular by providing that they could not "exercise any act pertaining to the powers granted to the Congress and the Executive Power of the Confederation" (Art. 119).

"In order for the particular laws of the provinces to never hinder the progress of the Federation," added Article 124, "they shall always be submitted to the judgment of Congress before having the force and value as such in their respective Departments, being able, in the meantime, to be enforced while they are being reviewed by Congress."

The Constitution also regulated aspects related to the relations between the provinces and their citizens (Arts. 125 to 127) and the increase of the Confederation through the eventual incorporation of those Provinces whose representatives had not participated in the Congress (Arts. 128 to 132). Regarding the government and administration of the Provinces, the Constitution of 1811 referred to the provisions of the Provincial Constitutions, setting the following limit:

> "Article 133. The government of the Union assures and guarantees to the provinces the republican form of government that each one of them shall adopt for the administration of their domestic affairs, not approving any Constitution that opposes the liberal and frank principles of representation admitted in this one, nor consenting that at any time another form of government be established throughout the confederation".

These characterized the federal form of the state, which was established following the American model, as a means of uniting several former colonial provinces that were highly decentralized in the Spanish system of colonial government.

The federal scheme adopted in the United States was then the ideal system to be followed in the now independent state, in which the provinces, kept their "sovereignty, liberty and independence" in all matters not assigned by the Federal Pact to the general authority of the Confederation.

But, in fact, adopting the federal form in the organization of the State meant establishing a weakened power in the federal government, it undoubtedly being one of the factors that contributed to the crisis of the First Republic and to the beginning of a ten-year war of liberation, against the invasion of the provinces by the Spanish Army. The crisis was also provoked by the absence of a unipersonal executive, due to the initial executive triumvirate that was created.

Simon Bolivar, criticized the adoption of the federal form of the state in the first Constitution, blaming the lack of political stability and continuity, mainly facing the counter offensive of the Spanish Empire, on the weakened and powerless republic that resulted from it. In 1815, in effect, he said:

> "In the same way that Venezuela has been the American Republic that has made most progress in its political institutions, it has also been the clearest example of the inefficiency of the federal-democratic form for our nascent states.[150]

Four years later, in 1819, on the same matter, he insisted:

> "The more I admire the excellences of the Federal Constitution of Venezuela, the more I am persuaded of the impossibility of its application to our state and

[150] S. BOLÍVAR, "Carta de Jamaica" (1815), in *Escritos Fundamentales*, Caracas 1982, p. 97.

> from my point of view it is a prodigy that such model in the Northern part of America be still in force so prosperously..."[151]

Bolivar qualified the North American federal constitution as the most perfect at the time, but blamed the 1811 Venezuelan legislators for being:

> "Seduced by the dazzling shine of happiness of the American people, thinking that the blessings they enjoy are the exclusive result of their form of government and not of the character and customs of their citizens. And, in effect, the example of the United States, because of its prosperity, was too flattering so as not to be followed."[152]

He finished his argument against the federal form of the state, arguing that at the beginning of the republic, we were not yet prepared for a highly decentralized form of vertical division of power, and for adopting weak central government. He expressed conclusively, in relation to the copying of the North American federal system,

> "I think that it would be better for America to adopt the Koran, than the government of the United States, even if it is the best in the world."[153]

However, in spite of Bolivar's recommendations, federalism, in particular, spread throughout Latin America. Venezuela has always had a federal system of government and it is still a federal state. In the same way, all the other large states in Latin America have a federal form of government, as is the case of Argentina, Brazil and Mexico.

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151 S. BOLÍVAR, "Discurso de Angostura" (1819), in *Escritos Fundamentales*, *cit.*, p. 120.

152 *Idem*.

153 S. BOLÍVAR (letter to D.F. O'LEARY), in *Escritos Fundamentales*, *cit.*, p. 200, 201.

The 1811 Constitution also included a Chapter (VIII) containing the declaration of "Rights of Man to be recognized and respected throughout the State," distributed in four sections: Sovereignty of the people (Arts. 141 to 150), Rights of man in society (Arts. 151 to 191), Duties of man in society (Arts. 192 to 196) and Duties of the social body (Arts. 197 to 199). In this chapter, the articles of the Declaration of the Rights of the People of July 1, 1811, were taken up and enriched, and its drafting was directly influenced by the text on the document on the Rights of the People t of 1797, as well as by the French Declaration and the texts of the Declarations of the former American colonies.[154]

Also, a final Chapter (IX) that included General Provisions, incorporated some norms establishing the regime for the indigenous people (Art. 200) and their equality (Art. 201); the ratification of the abolition of slavery (Art. 202); the equality of the *pardos* (Art. 203); and the extinction of titles and distinctions (Art. 204). It also regulated the oath of office (Sec. 206 to 209); the revocation of the mandate (Sec. 209 and 210); the restrictions on meetings of voters and electoral congregations (Sec. 211 to 214); the prohibition of individuals or groups to assume the representation of the people (Sec. 215); the dissolution of non-authorized meetings of the people (Sec. 216); the public treatment as "citizen" (Art. 226); and the validity of the *Leyes de Indias* while not in opposition to the Civil and Criminal Codes y approved by Congress (Art. 228).

Finally, the supremacy clause of the Constitution contained in Article 227 should be highlighted, as follows:

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154 See Allan R. BREWER-CARÍAS, *Los Derechos Humanos en Venezuela: casi 200 años de* Historia*,* Academia de Ciencias Políticas y Sociales*,* Caracas 1990, pp. 101 ff.

> "*227.* The present Constitution, the laws that may be issued in order to enforce it, and all treaties concluded under the authority of the government of the Union, shall be the supreme law of the State throughout the Confederation, and the authorities and inhabitants of the Provinces shall be bound to obey them religiously without excuse or pretext; but the laws which are issued against the contents thereof shall have no value, except when they have fulfilled the conditions required for a just and legitimate review and sanction."

This supremacy clause and the objective guarantee of the Constitution were ratified in *Chapter VIII* on the Rights of Man, when the last article of the Declaration of Rights states the following:

> "*Article 199*. To prevent any transgression of the high powers entrusted to us, we declare: That each and everything constituted in the foregoing declaration of rights is exempt from and beyond the reach of the ordinary general Power of Government, and that containing or resting upon the indestructible and sacred principles of nature, every law contrary to them shall be absolutely null and void and of no value."

The sources of inspiration for the civilian founding fathers who declared the independence[155] were undoubtedly, as mentioned above, the documents of the French Revolution and the American Revolution. As for the Declaration of the Rights of the People of 1811 and the final Title of the Federal Constitution of 1811 on the Rights of the Peo-

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155 See Allan R. BREWER-CARIAS, Enrique VILORIA VERA and Asdrúbal AGUIAR (Coordinadores), *La Independencia y el Estado constitucional en Venezuela: como obra de civiles (19 de abril de 1811, 5 de julio de 1811, 2 de diciembre de 1811),* Cátedra Mezerhane Ediciones EJV International, Miami 2018, pp. 726.

ple, they were inspired by the text of the *Déclaration des Droits de l'Homme et du Citoyen* that preceded the 1793 and 1795 French Constitutions,[156] which arrived in Venezuela through the aforementioned text published in 1797 as a result of the Conspiracy of *Gual and España*.[157]

Other influences, for example, were also reflected in the text of the Bill of Rights of the Constitution of 1811, coming from the declarations of rights that were incorporated in the Constitutions of the North American States, among them the Declaration of Rights of Virginia of June 12, 1776, and the Constitution or form of Government, agreed to and resolved upon by the Delegates and Representatives of the several Counties and Corporation of Virginia of June 29, 1776.[158]

These texts were translated into Spanish in Philadelphia in the book of Manuel García de Sena*, La Independencia de Costa Firme justificada por Thomas Paine Treinta años ha de 1811*.[159]

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156 See the texts in J. M. ROBERTS and J. HARDMAN, *French Revolution Documents,* Oxford, 1973, 2 vols.

157 See P. GRASES, *La Conspiración de Gual y España*..., *cit.,* p. 147; and Pedro Grases, "Estudio sobre los 'Derechos del Hombre y del Ciudadano'," in the book *Derechos del Hombre y del Ciudadano* (Estudio Preliminar por Pablo Ruggeri Parra y Estudio histórico-crítico por Pedro Grases), Academia Nacional de la Historia, Caracas 1959, pp. 168 ff.

158 See regarding all these influences what is explained in *Part Five* of this book.

159 See in MANUEL GARCÍA DE SENA, *La Independencia de Costa Firme justificada por Thomas Paine treinta años ha*, Edición del Ministerio de Relaciones Exteriores, Caracas 1987, p. 90.

6. *The idea of the Constitution in Europe resulting from the 1812 Cadiz Constitution*

In Europe, as aforementioned, the French Constitution of 1795 was also a direct source of particular inspiration for modern constitutionalism, beginning with the Constitution of the Spanish Monarchy of Cadiz of March 19, 1812, which in turn later had great influence, although it was in force in Spain and its dominions only for two short years, from March 19, 1812 to May 4, 1814, when it was annulled by Ferdinand VII himself, when the absolute monarchy was restored, and political persecution began against all those who had collaborated in its sanction and enforcement.

As for the overseas Hispanic American provinces, during its short years of initial validity, the repercussion of the Constitution of 1812 was very limited. In provinces such as those of Venezuela, which by 1812 had already declared their independence and had even sanctioned a Constitution by means of a Congress of representatives, the validity and influence of the Constitution of Cadiz was completely nil.[160] It was, in fact, only after 1820, when the

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160 See Allan R. BREWER-CARÍAS, "Sobre el inicio del constitucionalismo en la América hispana en 1811, antes de la sanción de la Constitución de Cádiz de 1812," in *Revista Pensamiento Constitucional*, No 17, 2013, Escuela de Posgrado, maestría de Derecho Constitucional, Fondo Editorial Pontificia Universidad Católica del Perú, Lima 2013, pp. 45-78; "La ausencia de influencia de la Constitución de Cádiz en el inicio del constitucionalismo venezolano e hispanoamericano," in *Revista Estado Constitucional*, No. 2, Lima 2012, pp. 53-85; and "El paralelismo entre el constitucionalismo venezolano y el constitucionalismo de Cádiz (o de cómo el de Cádiz no influyó en el venezolano)" in *Libro Homenaje a Tomás Polanco Alcántara*, Estudios de Derecho Público, Universidad Central de Venezuela, Caracas 2005, pp. 101-189. See also Allan R. BREWER-CARÍAS, *Sobre el constitucionalismo*

vast majority of the former Spanish colonies gained their independence,[161] that the Constitution of Cadiz had its greatest influence in Latin America, being even applied provisionally in some cases in the nascent Republics, despite the fact that by 1824 it had already ceased to be in force in Spain, for example, as was the case in Mexico, where the Mayors swore in 1824 "to keep the Spanish Constitution, while the Constitution of the Mexican Nation is being concluded".[162]

Therefore, in reality, it was six years after the annulment of the Constitution of Cadiz, in 1820, when its text would effectively begin to have repercussions as a consequence of a revolution, of military origin, that took place in Spain, and which imposed on Ferdinand VII the oath of the Constitution of Cadiz, which then came into force again, although for another short period of three and a half years, from March 10, 1820 to October 1, 1823.

This imposition, in fact, was a consequence of the military rebellion that broke out on January 1, 1820, in the town of *Cabezas de San Juan* by the expeditionary corps that had been formed and that was to leave for America to

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hispanoamericano pre-gaditano 1811-1812, Editorial Jurídica Venezolana, Caracas 2013.

161 See, for instance, Jorge Mario GARCÍA LAGUARDIA, Carlos MELÉNDEZ CHAVERRI, Marina VOLIO, *La Constitución de Cádiz y su influencia en América (175 años 1812-1987),* San José, 1987; Manuel FERRER MUÑOZ, *La Constitución de Cádiz y su aplicación en la Nueva España,* UNAM México, 1993; Ernesto DE LA TORRE VILLAS and Jorge Mario GARCÍA LAGUARDIA, Desarrollo *histórico del constitucionalismo hispanoamericano,* UNAM, México 1976.

162 See *Diario de sesiones del Congreso* (México), 2 de mayo de 1824, p. 586. Quoted by Demetrio RAMOS, "Las Cortes de Cádiz y América"' in *Revista de Estudios Políticos*, No. 126, Instituto de Estudios Políticos, Madrid 1962, note 422, p. 631

quell the rebellions that by that date had become generalized throughout the Continent. The voice of the revolution was expressed with the pronouncement of Colonel Rafael del Riego, who considered "more important to proclaim the Constitution of 1812 than to preserve the Spanish empire."[163]

The conflict was between, on the one hand, the order to embark for America to fight against an independence process that was developing and that had already defeated the Royal armies, as had happened with General Pablo Morillo's expedition of 1815, commanding the largest military force sent to the Colonies in their entire colonial history, and, on the other hand, the resistance and uprising of the Army with the connivance of secret societies, such as Freemasonry. The resulting option was the latter,[164] the revolution imposing the Constitution of 1812 on the King, who swore it in on March 2, 1820.

In this new period of enforcement, from 1820 onwards, the influence of the Spanish Constitution was manifested in America, in some provisions of the Constitutional texts of the countries in which, by that date, the independence had not yet been proclaimed, and which were the majority[165].

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163 The comment is by Juan Ferrando BADÍA, "Proyección exterior de la Constitución de Cádiz" in M. ARTOLA (ed), *Las Cortes de Cádiz, Ayer, 1-1991*, Marcial Pons, Madrid 1991, p. 207

164 See F. SUÁREZ, *La crisis política del Antiguo Régimen en España (1800-1840)*, Madrid, 1950, p. 38. Quoted by Juan Ferrando BADÍA, *Idem*, p. 177.

165 See for example, Manuel FERRER MUÑOZ, *La Constitución de Cádiz y su aplicación en la Nueva España*, UNAM, México 1993. The exception, as said, was the provinces of Venezuela and Colombia, where months before, in 1819, there had already been adopted the Political Constitution of Venezuela of Angostura, which also governed the former provinces of Cundinamarca; and in it was issued, in 1821, the Constitutional Law of the Union of

As for the influence of the Constitution of Cadiz in Europe, it should be remembered that it was in this constitutional text where, for the first time in the old continent, there were collected the principles of modern constitutionalism bequeathed by the American and French Revolutions, This meant that when it was again put into force between 1820 and 1824, as a result of the coup d'état that forced the King to swear it in, the Constitution of Cadiz acquired an important connotation, particularly because at that time there was no other constitutional model in the Latin world that could serve as a source of inspiration for liberal democratic ideas. It should not be forgotten that by 1812 and later, by 1820, the initial French Constitutions (1791, 1793) had already fallen into historical oblivion with the consequent blurring of their content, among other factors, due to the revolutionary Reign of Terror and its immediate product, the Directory, which had been constituted in accordance with the Constitution of 1795 (Year III); by the coup d'état that Bonaparte had already carried out in 1799, which, among other things, led to the elimination of the same Decree of the Rights of Man and the Citizen of 1789, the fundamental symbol of the Revolution, from the content of the Constitution of 1799 (Year VIII);

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the Peoples of Colombia, in which it was provided that the Congress of Colombia should form the constitution according to "the liberal principles that the wise practice of other nations has enshrined" (art. 7); and as a consequence, the Constitution of Colombia was enacted in Cucuta in 1821, with which the Republic of Colombia was formed, comprising the provinces of Venezuela, Cundinamarca and Ecuador. See ALLAN R. BREWER-CARÍAS, *La Constitución de la República de Colombia del 30 de Agosto de 1821. Producto de la unión de los pueblos de Venezuela y de la Nueva Granada. Sus Antecedentes y Condicionantes,* Academia de Ciencias Políticas y Sociales de Venezuela; Academia Colombiana de Jurisprudencia, Editorial Jurídica Venezolana, Editorial Temis, Caracas, Bogotá, 2021.

by the creation of the Consulate for Life under Napoleon, with the Constitution of 1802 (Year X); by the formation of the Empire and the consecration of Napoleon Bonaparte as Emperor for Life with the Constitution of 1804 (Year XII) and the subsequent elimination of the Republic (1808); and finally, by the restoration of the Monarchy from 1814, with the coronation of Louis XVIII, after the defeat of Napoleon by the European allies, who saw in the French Revolution the source of all the political evils of the time.

In view of the French revolutionary conceptual vacuum that had resulted from all these factors, it can be said that then the Cadiz Constitution of 1812 replaced the French ones as a source of inspiration for the liberal movements, having incorporated in its text, since 1812, the principles of constitutionalism that had begun both in North America and in France. It also served as a source of inspiration for other European countries, particularly after 1820, as happened with the revolutionary movements in Portugal and Italy, in Naples and Piedmont, which saw in the Spanish Revolution the example to follow, also imposing on the Monarchs its product, which was precisely the Constitution of Cadiz.

The Spanish Revolution and the Constitution of Cadiz, which were based on the principle of national sovereignty limiting the powers of the King and the aristocracy, in fact, became a political myth that mobilized the European elites against the Monarchs. Therefore, the political fact that by means of a revolution it was possible to impose on a Monarch a Constitution that limited his powers and prerogatives, was what ultimately provoked the reaction of the European powers against Spain and the convocation of the Holy Alliance to condemn the revolution and seek to reestablish the institutional order in the Peninsula, all of which was precipitated by the repercussions that the Spanish revolution had on the same year 1820, on the begi-

nning of the revolutionary movements in Portugal and Italy, which took the Constitution of Cadiz as a model, replacing the French Constitution of 1791.[166]

The spark was propagated by the work of secret societies, specifically, the Freemasonry, leading to pronouncements in various countries. On the one hand, it was the case of Portugal, where six months after the Spanish events, on August 24, 1820, and, as a consequence of a military revolution initiated in Oporto with the support of the secret society called *Sanderín,* a Government *Junta* was constituted, which twenty days later would join the *Junta* of Lisbon. This resulted in the constitution, with Spanish support, of the "Provisional Board of the Supreme Government of the Kingdom," which called for elections of deputies to the Extraordinary and Constituent General Assembly of the Portuguese nation, precisely according to the model of the Constitution of Cadiz. This resulted in the promulgation of a new Constitution of Portugal, two years later, on September 22, 1822, following the line of the Spanish Constitution, although more democratizing. King John VI swore in that Constitution on October 1 of the same year, after his return from Brazil, where he had taken refuge since 1807 as a result of the Napoleonic invasion.[167]

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166 See Allan R. BREWER-CARÍAS, "La Constitución de Cádiz y los principios del constitucionalismo moderno: Su vigencia en Europa y en América," in Asdrúbal AGUIAR (Coordinador), *La Constitución de Cádiz de 1812, fuente del derecho Europeo y Americano. Relectura de sus principios fundamentales. Actas del IV Simposio Internacional Unión Latina,* Ayuntamiento de Cádiz, Cádiz 2010, pp. 35-55.

167 Before the arrival of the French troops, which since November 1807 had already invaded Spain, to the border with Portugal, Prince John of Braganza, who was *regent* of the kingdom of Portugal due to the illness of his mother, Queen Maria, and his Court, took refuge in Brazil, installing the royal government in Rio de Janeiro in March 1808. Eight years later, in 1816, Prince

European governments, of course, knew about the influence of Spain on the Portuguese revolution, and given the pressures of the Holy Alliance, after the Queen of Portugal refused to swear the Constitution and counterrevolutionary movements prevailed, King John VI, on June 4, 1824, repealed the Constitution of 1822.

By that date, on the other hand, Spain had already been invaded again by the French armies (the so-called "Hundred Thousand Sons of St. Louis"), but this time on behalf of the Holy Alliance, as agreed at the Congress of Verona (1823), an army threatened to reach Portugal. The revolutionary essay failed, and the new Portuguese Constitution would only be in force for two years, even though it would come into force again in 1836.

In Italy, the Spanish revolution and the Constitution of Cadiz would also be the banner adopted by the secret societies, *La Carbonaria* and the *Federados*, both in the

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John assumed the Crown of the United Kingdom of Portugal, Brazil and Algarve (with its capital in Rio de Janeiro), as John VI. In the Peninsula, Portugal was governed by a Regency Junta that was dominated by the commander of the British forces. Once Napoleon was defeated in Europe, John VI returned to Portugal, leaving his son Pedro as regent of Brazil. Although the Cortes (General Assembly) returned the territory of Brazil to its previous status and required the return to the Peninsula of the regent Pedro, the latter, in parallel with the Portuguese Cortes, also convened a Constituent Assembly in Brazil, proclaiming the independence of Brazil in September 1822, where, on October 12 of that same year, he was proclaimed Emperor of Brazil (Pedro I of Braganza and Bourbon). In 1824, the Imperial Political Constitution of Brazil was sanctioned. Two years later, in 1826, the Brazilian Emperor would return to Portugal following the death of his father John VI, to assume the Portuguese kingdom as Pedro IV, although only for a short time. See Felix A. MONTILLA ZAVALÍA, "La experiencia monárquica americana: Brasil y México", in *Debates de Actualidad,* Asociación argentina de derecho constitucional, Año XXIII, No. 199, enero/abril 2008, pp. 52 ff.

south and the north of the Peninsula.[168] In the Kingdom of the two Sicilies, the Neapolitan Carbonari not only had the Riego revolution in Spain as the example to follow, but also considered the Constitution of Cadiz as the most democratic of all European States, which showed a point of balance between the rights of the people and the prerogatives of the Monarchs.

This way, a month before the revolutionary events in Portugal had been unleashed, in July 1820, an alliance of *Los Carbonarios* with the Army and the bourgeoisie forced King Ferdinand I to grant the Constitution of Cadiz, which he did by Edict of July 7 of that year, becoming the Constitution of the Kingdom of the Two Sicilies "except for the modifications that the national representation, constitutionally convened, will deem appropriate to adopt to adapt it to the particular circumstances of the royal dominions."[169]

The reaction of the Holy Alliance, in this case, did not wait either, and, in October of the same year of 1820, at the Congress of Troppeau, the Powers condemned the Neapolitan revolution that threatened the monarchic principle and, in addition, at this Congress, particularly Austria, Russia and Prussia, also condemned the Portuguese revolution, and the one that had inspired them all, which was none other than the Spanish revolution.

The European powers decided to meet again in January 1821 at the Congress of Laybach, this time resolving to annul the Neapolitan constitutional regime, authorizing the invasion of the Kingdom of the Two Sicilies in order to

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168 See Juan Ferrando BADÍA, "Proyección exterior de la Constitución de Cádiz" in M. ARTOLA (ed), *Las Cortes de Cádiz, Ayer, 1-1991*, Marcial Pons, Madrid 1991, p. 241

169 *Idem*, p. 237

restore the monarchical principle, in this case, Austria being in charge of enforcing the resolutions. By April 1821, the Holy Alliance had triumphed in Italy.

However, in those same days, the Constitution of Cadiz would also be the banner that, jointly with the *Carbonari*, the *Piedmontese* revolutionaries would use in the Kingdom of Sardinia to force Prince Charles Albert to grant the Constitution of Cadiz, which happened on March 13, 1821. However, two days later, on March 15, King Victor Emmanuel, who had abdicated because of the revolution, proclaimed the annulment of the actions of the Regency and appealed to the help of the European powers that were still gathered at the Congress of Laybach. The Congress also sent Austrian troops to the King's aid, so that by April 8, the rebellion had been put down and the *Piedmontese* constitutional army had been defeated. The Constitution, in short, had only been in force for less than a month.[170]

Finally, as it was said, the Holy Alliance had met again in the Congress of Verona in October 1822, grouping Austria, Prussia and Russia, the kingdom of the Two Sicilies and of Modena and representatives of France and England, in which, among the fundamental matters to be considered, was not only the situation of Italy, but also that of the Spanish revolution.

Regarding the former, the permanence of the Austrian armies in Italy until 1823 was authorized, and regarding Spain, the imposition of the 1812 Constitution on Ferdinand VII by means of a revolution was condemned, requesting the Spanish government to change its political regime and reinstate Ferdinand VII as absolute Monarch, under threat of war.

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170 *Idem,* p. 242.

This Congress of Verona concluded its sessions on December 4, 1822, with the resolution of the Holy Alliance to give an ultimatum to Spain, charging France to ensure the restitution of the monarchical regime that was claimed; and so it was that, in April 1823, as mentioned, the French army again invaded Spain, this time with the "Hundred Thousand Sons of St. Louis," an action that was of course rejected by the *Cortes*.

Faced with the invasion, the *Cortes*, as had happened ten years earlier, but this time together with the King, withdrew to Andalusia, and then, in June 1823, again to Cadiz. Here they sat until August of that year, so that the Constitution of Cadiz and its *Cortes*, not only were born in this soil of free men, but it was here that they also ceased.

After the defeat of the constitutional army in the battle of *Trocadero*, the King yielded to French demands, and on October 1, 1823, again, for the second time, he annulled the Constitution of Cadiz, restoring the Monarchy. Hence, "the Congresses of Troppau, Laybach and Verona gave official death to the Constitution of 1812 in Spain and in Italy" [171] and, moreover, in Portugal.

In any case, the Cadiz Constitution remained as the first Latin European constitutional text that in the early nineteenth century had collected the principles of modern constitutionalism left by the American and French Revolutions of the eighteenth century, wherefrom derives its singular importance, and the direct influence that it had, both in the new European liberal revolutionary movements, and in the shaping of the Constitutions of many Latin American nations.

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171 As pointed out by Juan Ferrando BADÍA, *Idem*, p. 247.

7. *The Constitution and the citizen's right to its supremacy*

In accordance with all the aforementioned antecedents, the first principle of the Rule of Law is the existence of a Constitution as the supreme rule, as a product of the will of the people, which implies that it also enjoys imperativeness and prevails over any other rule of the legal system.

Therefore, for example, in the most recent Latin American Constitutions, following the remote antecedent of the Federal Constitution of the States of Venezuela of 1811, the principle of constitutional supremacy has been expressly enshrined, as is the case of the Constitution of Colombia, which provides that "The Constitution is the norm of norms" and therefore "in any case of incompatibility between the Constitution and the Law or any other legal norm, the constitutional provisions shall apply" (Art. 4). Similarly, the 1999 Constitution of Venezuela established that "The Constitution is the supreme norm and the foundation of the legal order," to which "all persons and the organs exercising the Public Power" are subject. (Art. 7).[172] In addition, "to comply with and abide by" the Constitution (Art. 131) is one of the constitutional duties of citizens and officials.

But, of course, for a Constitution to be effectively the supreme law of a society, it must be the product of society itself, without impositions. Constitutions imposed by a political group on the rest of the members of society have,

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172 See the proposal of this article made before the National Constituent Asssembly of 1999 in: Allan R. BREWER-CARÍAS, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente),* II, 24 (9 septiembre -17 octubre 1999), (Fundación de Derecho Público-Editorial Jurídica Venezolana, Caracas 1999).

therefore, not only a precarious supremacy, but, in general, a duration limited to the presence in power of the group that imposed it.

In any case, the consequence of the express enshrinement of the principle of constitutional supremacy is, on the one hand, the provision in the constitutional text itself of a whole system for the protection and guarantee of the same against the legislator, which endow it with rigidity, which implies that the Constitution can only be modified or amended by the means expressly set forth in the same constitutional text. Therefore, as stated, for example, in the Venezuelan Constitution of 1999, the Constitution does not lose its validity "if it ceases to be observed by an act of force or if it is repealed by any means other than those provided therein" (art. 333), that is, by those established in Title IX on Constitutional Reform (arts. 340 to 349). According to these procedures and specific institutional channels for the reform of the Constitution (derived constituent power), the same can in no case be carried out by the ordinary legislator through the sole procedure of the formation of laws, nor by means of constitutional interpretations adopted by the Supreme Tribunal, since in these cases, among other factors, the participation of the people as the original constituent power is not guaranteed.

All this implies that in the contemporary world, in relation to the Constitution, we can speak of the existence of a citizen's right to the Constitution and its supremacy.[173]

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[173] See Allan R. BREWER-CARÍAS, "Algo sobre las nuevas tendencias del derecho constitucional: el reconocimiento del derecho a la constitución y del derecho a la democracia," in Sergio J. CUAREZMA TERÁN and Rafael Luciano PICHARDO (Directores), *Nuevas tendencias del derecho constitucional y el derecho procesal constitucional*, Instituto de Estudios e Investigación Jurídica (INEJ), Managua 2011, pp. 73-94.

That is to say, if the Constitution is the product of a social pact formulated by the people, of mandatory observance by the governors and the governed, the people themselves, collectively, and also, all its members individually considered, have an essential right to have that Constitution respected, to have it maintained in conformity with the popular will that expresses it and to have it be supreme. From this derives the fundamental right of every citizen to the supremacy of the Constitution.[174]

The supremacy of the constitution, considered as a higher and fundamental law, was first developed in 1788 by Alexander Hamilton in *The Federalist*. When referring to the role of the courts as interpreters of the law, he stated:

> "A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." [175]

From this statement derives, in addition to the power of judges to control the constitutionality of laws, the essential postulate that the Constitution, as a product of the will of

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[174] See on this matter, Allan R. BREWER-CARÍAS, Mecanismos nacionales de protección de los derechos humanos (Garantías judiciales de los derechos humanos en el derecho constitucional comparado latinoamericano), Instituto Interamericano de Derechos Humanos, San José 2005, pp. 74 ss.

[175] Alexander HAMILTON, *The Federalist* 491- 493 (Ed. by B.F. Wright, Cambridge, Mass. 1961).

the people, must always prevail over the intention of those who govern. This is, precisely, the basis of the citizen's right: that the popular will expressed in the Constitution be respected by those who govern, who in their management cannot purport to make their will prevail over the popular will of the people expressed in the Constitution.

Furthermore, for this reason, Hamilton himself, in developing the principle of the power of judges to declare the nullity of legislative acts contrary to the Constitution, and arguing that this did not mean giving superiority to the Judiciary over the Legislature, pointed out that:

> "It only supposes that *the power of the people is superior to both*; and that where the will of the legislature, declared in its statutes stands in *opposition to that of the people declared in the constitution*, the judges ought to be governed by the latter rather than the former."[176]

Hamilton concluded by noting that:

> "No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; *that the representatives of the people are superior to the peoples themselves."*[177]

What is most interesting to note in these propositions by Hamilton, apart from the power of the U.S. Supreme Court to declare that state and federal laws that are contrary to the Constitution are null and void,[178] which obvi-

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176 *Idem*

177 *Idem*

178 See the comments on the leading cases *Vanhorne's Lessee v. Dorrance*, 1776 and *Masbury v. Madison*, 1803, in Allan R.

ously had a fundamental impact on the development of constitutional justice systems as a materialization of the right to constitutional supremacy; it is the very idea explained above that since the Constitution is a manifestation of the will of the people, the main constitutional right of citizens is the right to the Constitution and its supremacy, that is, to respect for the will of the people as expressed in it.

Nothing would be gained by saying that the Constitution, as a manifestation of the will of the people, is the supreme law that must prevail over that of all the organs of the State and over the actions of individuals, if there were not the right of the people or citizens to said supremacy and, furthermore, to demand respect for that Constitution, which translates into the right to have the effective judicial protection of the Constitution itself.

Now, the fundamental consequence of the express enshrinement of this principle of constitutional supremacy in the Constitutions, such as the aforementioned example of Colombia and Venezuela, has been the provision, in the constitutional text itself, of a whole system designed to protect and guarantee this constitutional supremacy over the laws, based on the judicial review or control of their constitutionality, which is undoubtedly one of the fundamental pillars of contemporary constitutionalism and the Rule of Law.[179] All this has resulted in the express enshrinement of the constitutional right of citizens to the judicial protection of such supremacy, either through the

BREWER-CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

179 Allan R. BREWER-CARÍAS, *Instituciones Políticas y Constitucionales*, *Evolución Histórica del Estado*, Universidad Católica del Táchira-Editorial Jurídica Venezolana, Caracas-San Cristóbal 1996, I, pp. 47 ss.

systems of diffuse control of constitutionality exercised by all judges (Art. 4, Colombia; Art. 334, Venezuela) or through the concentrated control of the constitutionality of laws exercised by the Constitutional Jurisdiction, as is the case of the Colombian Constitutional Court (Art. 241) or the Constitutional Chamber of the Supreme Court of Justice in Venezuela (Art. 336).[180] In addition, the Constitutions provide for habeas corpus, habeas data, or *amparo* actions (actions for the protection of fundamental constitutional rights) (Arts. 30 and 86, Colombia; Art. 27, Venezuela).

Therefore, Modern constitutionalism, in our opinion, is based not only on the principle of the Constitution as the supreme norm, but also on the citizen's right to it and to its supremacy,[181] which, in accordance with the principle of the separation of powers, takes the form of a fundamental right to judicial protection of the supremacy of the Constitution, both with respect to the organic part of the Constitution and to its dogmatic part, for whose preservation a set of guarantees are established. This right also implies, as regards the organic part of the Constitution, the citizen's right to the separation of powers and the right to the territo-

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180 Allan R. BREWER-CARÍAS, *Instituciones Políticas y Constitucionales, Justicia Constitucional,* VII, Universidad Católica del Táchira-Editorial Jurídica Venezolana, Caracas-San Cristóbal 1997, p. 658; and *El Sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia (Temas de Derecho Público Nº 39) y Pontificia Universidad Javeriana (Quaestiones Juridicae Nº 5), Bogotá 1995.

181 See on the citizen's right to the suremacy of the Constitution: Allan R. BREWER-CARÍAS, "Sobre las nuevas tendencias del derecho constitucional: del reconocimiento del derecho a la Constitución y del derecho a la democracia," in *VNIVERSITAS, Revista de Ciencias Jurídicas (Homenaje a Luis Carlos Galán Sarmiento)*, Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas, No. 119, Bogotá 2009, pp. 93-111.

rial distribution of power or to the autonomy of the territorial political institutions; and, regarding the dogmatic part, the right to the effectiveness and enjoyment of constitutional rights through the guarantees established in the Constitution.

That is why, in order to ensure supremacy, the Constitutions establish directly in their own text a series of guarantees, such as the objective guarantee of the Constitution, which considers acts contrary to the Constitution as null and void; or the guarantee of legal reserve for the purpose of establishing limitations to rights, which cannot be established by any authority but by means of a formal law. In addition, there is the guarantee of liability, which of course implies that any act contrary to the Constitution and the constitutional rights provided therein, must entail the responsibility of the person who executed it.

Of course, the fundamental guarantee of the right to the Constitution and its supremacy is, precisely, the possibility for individuals to resort to the judicial bodies to demand the securing of rights, so that these become effective. Therefore, the fundamental guarantee of constitutional rights is the judicial guarantee because, ultimately, the judicial system in any country is established precisely for the protection of the rights of individuals. This is regulated by almost all the Constitutions when they refer to the Judicial Power or the right of access to justice for the protection of rights and guarantees.

Now, this fundamental right to the Constitution and its supremacy, and with them, to the respect of constitutional rights, as mentioned above, takes the form of a right to jurisdictional control of the constitutionality of State acts, either through concentrated or diffuse systems of constitutional justice, and a right to judicial protection of the other fundamental rights of individuals, either through actions or appeals for *amparo* or other judicial means of immediate

protection of the same, such as the injunctions in the Anglo-American world. The consequence of this fundamental right undoubtedly implies attributing to judges the power to ensure constitutional supremacy, which results in restoring fundamental rights violated by illegitimate actions adopted by both State organs and private individuals or by declaring the unconstitutionality or the nullity of acts contrary to the Constitution.

On the other hand, since it is a fundamental right of citizens to ensure constitutional supremacy through the judicial protection of the Constitution, it is clear that only the Constitution could limit this right, i.e., it is incompatible with the idea of the fundamental right to constitutional supremacy that legal limitations to it be established, either in State acts excluded from judicial review of constitutionality, or in constitutional rights whose violation could not be immediately protected.

Constitutional supremacy, therefore, is an absolute notion that does not admit exceptions, so that the constitutional right to its assurance could not admit exceptions either, unless, of course, they are established in the Constitution itself. It follows that, in short, in contemporary constitutional law, constitutional justice or Judicial Review has been structured as an adjective guarantee to the fundamental right of the citizen to the Constitution and to constitutional supremacy.

In some ways, as Sylvia Snowiss noted in her historical analysis of the origins of judicial review in North America, it can be said that it emerged as a substitute for revolution,[182] in the sense that if citizens, as a sovereign people, have the right to constitutional supremacy, any vio-

[182] Silvia SNOWISS, *Judicial Review and the Law of the Constitution,* Yale University Press, 1990, p. 113.

lation of the Constitution could lead to the revocation of the mandate of the representatives or their replacement by others, and a right to resistance or revolt could also be invoked, as defended by John Locke.[183]

Before the emergence of the Rule of Law, therefore, in cases of oppression of rights or of abuse or usurpation, revolution was the way to resolve conflicts between the people and the rulers. However, as a substitute for it there arose precisely the power attributed to the judges to settle constitutional conflicts between the constituted powers or between them and the people.

This is precisely the task of the constitutional judge, and constitutional justice was devised as the main guarantee of the citizen's right to constitutional supremacy.

However, despite the provision of such mechanisms of judicial review, it should be noted that many Constitutions still enshrine the citizen's right to civil disobedience, for example, with respect to regimes, legislation and authorities that contravene the Constitution. An example of this is Article 350 of the 1999 Venezuelan Constitution, which provides that:

> "The people of Venezuela, faithful to their republican tradition, to their struggle for independence, peace and freedom, will disown any regime, legislation or authority that contravenes democratic values, principles and guarantees or undermines human rights."

This article constitutionally enshrines what modern political philosophy has described as civil disobedience,[184]

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183 John LOCKE, *Two Treatises of Government* (Ed. Peter Laslett), Cambridge UK. 1967, pp. 211 – 221.

184 On the matter of civil disobedience and Article 350 of the Constitution of Venezuela, see: María L. ÁLVAREZ CHAMOSA and PAOLA A. A. YRADY, "La desobediencia civil como mecanismo de

which is one of the peaceful forms in which the aforementioned right of resistance is manifested, which had its historical origin in the aforementioned right to insurrection expressed by John Locke. Moreover, it has its remote constitutional antecedent in the French Constitution of 1793 in whose article 35, which was the last of the articles of the Declaration of the Rights of Man and Citizen that preceded it, established that "When the government violates the rights of the people, insurrection is, for the people and for every portion of the people, the most sacred of rights and the most indispensable of duties."

This norm, which was typical of a revolutionary government such as that of the Reign of Terror, was undoubtedly anomalous and soon disappeared from the annals of constitutionalism. However, this has not prevented the appearance in some contemporary versions of Constitutions , which although they do not refer to the right to insurrection, enshrine the right to rebellion against governments of force, as is enshrined, for example, in Article 333 of the Venezuelan Constitution, which establishes the duty of "every citizen, whether or not vested with authority, to collaborate in the reestablishment of the effective validity of the Constitution," if the same should lose "its

participación ciudadana", *Revista de Derecho Constitucional,* Nº 7, Caracas 2003, pp. 7-21; Andrés A. MEZGRAVIS, "¿Qué es la desobediencia civil*?", Revista de Derecho Constitucional,* Nº 7 Caracas 2003, pp. 89-191; and Eloisa AVELLANEDA and Luis SALAMANCA, *"*El artículo 350 de la Constitución: derecho de rebelión, derecho resistencia o derecho a la desobediencia civil", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid 2003, pp. 553-583. See also: Allan R. BREWER-CARÍAS, *El derecho constitucional a la desobediencia civil. Estudios. Aplicación e interpretación del artículo 350 de la Constitución de Venezuela de 1999,* Ediciones Olejnik, Buenos Aires 2019.

validity or cease to be observed by an act of force or because it is repealed by any means other than as provided for therein." This is the only case in which a pacifist Constitution, such as the Venezuelan Constitution of 1999, admits that there may be an act of force to react against a regime that by force has broken the Constitution.[185]

The core issue in this matter, of course, is the determination of when the obligation to obey the law disappears and when it is replaced by the obligation-right to disobey it, and this occurs, in general, when the law is unjust; when it is illegitimate, for example, because it emanates from an organ that has no power to legislate, or when it is null and void, because it violates the Constitution.

From all of the above it is possible to identify the aforementioned citizens' right to the Constitution in the contemporary constitutionalism of the constitutional and democratic Rule of Law State, which, as we have seen, at the same time is divided into the citizens' right to constitutional supremacy, the citizens' right to the effective protection of the Constitution, the citizens' right to the protection of constitutional rights and guarantees, and the citizens' right to civil disobedience and even to rebellion against illegitimate breaches of the Constitution.

It is, in short, the ultimate meaning of the idea of the Constitution as the supreme law, which is the first of the essential and fundamental principles of the Rule of Law.

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185 See Allan R. BREWER-CARÍAS, *La crisis de la democracia en Venezuela*, Ediciones Libros El Nacional, Caracas 2002, pp. 33 ff.

PART TWO

POPULAR SOVEREIGNTY, REPUBLICANISM AND REPRESENTATIVE DEMOCRATIC GOVERNMENT

The second of the principles of the Rule of Law developed in constitutional and political practice in the modern world, also influenced by the foundations of American and French constitutionalism, is that of democracy and republicanism based on the concept of the sovereignty of the people.

With the American Revolution, the traditional principle of monarchical legitimacy of the State was definitively replaced, passing sovereignty from the Monarch to the people. Therefore, with the American Revolution, it can be said that the practice of democratic government began in the modern world. The same principle was followed by the French Revolution, albeit with an initially ephemeral duration in constitutional practice, due to the restoration of the monarchical order after 1815.

1. *Assemblyism in the American Colonies, representativeness, and the sovereignty of the people*

Although the principles of representation, and therefore of democracy can be said to have been the great contribution of the American Revolution, its roots can be traced to the process of English colonization of North America, which, unlike the Spanish colonization of South

America, was not, strictly speaking, a State enterprise and policy assumed centrally by the British Crown.[186]

In North America, colonization took place in a process developed in successive phases through rights granted by means of specific charters given to individuals, beginning with the reign of James I (1603-1625). Based on those Charters, colonies began to be settled in North America, governed by local councils composed of members from among the colonists, albeit appointed from the metropolis.

The development of the principles of representation and local participation in the colonies, therefore, began from the very moment colonization began, and although governors of the colonies were later appointed from England, this did not eliminate the spirit of assembly that took root there. Thus, for example, it was in Virginia, in 1619, that, with authorization of the Virginia Company who was the titleholder of the colonial Charter, the first Assembly of Colonists met for the first time, the House of Burgesses in Virginia. At the time, the Colony was already a prosperous tobacco-planting and tobacco-producing settlement. The subsequent economic failure of the Company, beginning in 1624, transformed the colony into a Crown settlement, but with the colonists retaining their powers of assembly and representation in the House.

Years earlier, beginning in 1620, other colonial settlements were located also on the east coast of North America, with a different scheme than that of the Virginian colonial enterprise, and rather as a consequence of the reli-

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186 See about what is explained in the following pages: Allan R. BREWER-CARÍAS, *Reflexiones sobre las revoluciones sobre la revolución norteamericana (1776), la revolución francesa (1789) y la revolución hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno* (First Ed. 1992, Second Ed. 2008) Third Edition, Ediciones Olejnik, Buenos Aires 2019.

gious and political persecutions that dominated the life in the British Isles. The London Company admitted this scheme of forced emigration, granting concessions to groups of settlers who agreed to run the risk of establishing the settlement, submitting to a seven-year servitude. Thus, for example, 120 "Pilgrims" embarked on the Mayflower in September 1620, arriving three months later at Cape Cod, a long way from Virginia, where the Pilgrims had no concessions or rights of any kind. Therefore, faced with the need to disembark, they set their own rules and signed a Covenant, under which they swore to continue together and obey the rules established for the good of all. Under this covenant, the first self-governing local government in North America was established in Plymouth Colony.

Other Calvinist-inspired Pilgrims obtained a royal charter for The Government and Company of Massachusetts Bay in New England in 1629. The company, founded by the Pilgrims themselves, who were better off than those of the Mayflower, was managed by a Council operating in the colony itself, in Boston, totally independent of London. The Council, to vote on taxes, for example, had to be advised by two delegates from each city in the colony, thus constituting the first assembly that would later be divided into two Houses.

At the same time, other colonies were established, with emigrants or exiles from those already established, in particular from Massachusetts, thus founding, in 1635, an establishment called Providence, in Rhode Island, which later, in 1662, would be the object of a royal charter; and in 1639, the colony of Connecticut was created, also by a group of migrants from Massachusetts, who gave themselves their own "Fundamental Laws of Connecticut" creating a government elected by free men. Other Puritans founded the colony of New Haven on the Connecticut coast, adopting the divine laws to govern themselves.

The Connecticut settlements, in 1662, also obtained from King Charles II a royal charter, which confirmed the existence of a colonial government and assemblies, without Crown control. Therefore, Connecticut and Rhode Island were considered the first independent colonial states.

The colony of Maryland was established in another way and by means of a colonial charter granted to an individual, Georges Calvert, who had served the Crown, but whom Charles I could not employ in England because he was a Catholic. The Charter, of true feudal configuration, appointed the owner, named Lord Baltimore, as head of the church and of the armed forces, being empowered to create manors, a kind of land distribution. Lord Baltimore, in any case, was zealous in keeping the coexistence of the Churches, and in respecting the right of assembly, where he pledged religious tolerance. After the Revolution of 1688, the Church of England monopolized religion in Maryland, and only by converting to Protestantism, was Lord Baltimore able to keep his territorial property, accepting the authority of the Crown in the colony.

A similar colonial scheme occurred in the Carolinas (North and South), so named in honor of Charles II, who granted large territorial property to truly great royalist lords. The latter even asked John Locke, the philosopher in vogue, to draft a constitution creating an aristocracy. In 1729, these colonies passed to the Crown. The territory of New Jersey, also acquired by the same lords who owned the Carolinas, was another colony that passed to the Crown in 1702.

In 1681, William Penn obtained a charter from the King that conferred upon him the ownership of a vast territory between Massachusetts and Maryland, which he called Pennsylvania, where he established a free government in which there participated a society of friends, of extreme Puritan faith, called the Quakers.

As for the colony of New York, initially Dutch (New Amsterdam), it was occupied by England at the time of Charles II (1664), who then gave it to his brother the Duke of York, hence its name.

Finally, another colony located to the south, Georgia, completed the British dominion on the east coast of North America. It was founded in 1732, by means of a charter granted to a group of philanthropists, which in the middle of the 18th century would also pass to the Crown.[187]

In any case, by 1750, all these colonies already possessed broad autonomy, with a deep-rooted assembly spirit and an autonomous local government due, moreover, to the absence of the centralizing mechanisms of the British colonial administration, such as those that Spain was able to establish in South America, for example, with the Council of the Indies at the head. In North America, instead, had its own legislature, composed of two Houses; in some of them (Connecticut and Rhode Island) the Governor was elected, in the others, they were appointed by the Crown or the proprietors. The center of political life in each community, in any case, was the meeting house (Town Hall), where local affairs were resolved in assembly.

It was this spirit of assembly and local government what gave rise to the colonial rebellion that would lead to independence as a reaction against the taxes imposed on the colonies without the participation of the representation of the colonies. It all began with the proposal of Grenville,

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187 See in general, C. M. MC ILWAIN, *Constitutionalism and the Changing World*, Cambridge 1939; A.C. MCLAUGHLIN, *A Constitutional History of the United States*, New York 1936; Robert MIDDLEKAUFF, The Glorious Cause. *The American Revolution, 1763-1789*, Oxford University Press, New York 1982; James FERGUSON, *The American Revolution: A General History, 1763-1790*, The Dorsey Press, Homewood, Illinois 1979.

Chancellor of the Exchequer of George III, to Parliament for the adoption of various taxes on colonial products (*Sugar Act*), and that one-third of the sum necessary to support the small British army in the colonies should be collected in the colonies themselves, by means of a stamp tax.

This led to the adoption of the *Stamp Act* on March 22, 1765, which legislation established stamp taxes on all legal documents, newspapers, publications, academic degrees, almanacs, liquor licenses and playing cards, the enforcement of which provoked enormous and widespread hostility in the Colonies, mainly because they had been established without consulting with the colonists. According to a traditional principle and right of every British subject, in order to be subject to taxes or duties, prior consent was necessary, from the wording of which, even in the Middle Ages, had arisen the principle that "there could be no taxation without representation."

Thus, the colonial reaction was relatively organized and definitely generalized, multiplying inter-colonial conventions aimed at establishing economic boycotts to resist the Crown's taxation pretensions. In this context, the first joint meeting of constitutional significance among the Colonies was the New York Congress of 1765, which met to demonstrate the Colonies' rejection of the Stamp Act, at which the Resolutions of the Stamp Act Congress were adopted on October 19, 1765, in which, among the rights declared, were those affirming that no taxes could be imposed on the people of the colonies without the personal consent of their legitimate representatives.[188]

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[188] R.L. PERRY (ed.), *Sources of our Liberties. Documentary Origin of Individual Liberties in the United States Constitution and Rights*, 1952, p. 270. Also see quotation on page 50 of Part One above.

In this Congress, although a "due subordination to that august body, the Parliament of Great Britain," was declared, its representative character was questioned on the grounds that the taxes established in the Stamp Act had not been approved by the Colonial Assemblies. England annulled the Stamp Act, but imposed a series of customs duties on colonial products.

Even Benjamin Franklin was called to testify about this in the House of Commons, and in 1766, the English Parliament, as a consequence, annulled the Stamp Act, but imposed a series of customs duties on colonial products; initially in relation to glass, lead, colors, paper and tea, creating for this purpose, a body of Customs Commissioners with broad powers of investigation.

The colonial reaction, again, was generalized and categorical, with the colonies refusing to trade with English products, so that by 1769, imports from England had already dropped notably. Pressure from the City on Parliament led, a the proposal of Minister North, to the repeal of the tax laws, but Parliament, to safeguard its prerogative, decided to maintain a very low tax on tea only. In July 1770, the American merchants decided to import English goods again, except tea.

In 1773, the East India Company had a huge stock of tea in London, which it could not export to the Colonies, placing it in a serious economic situation. It obtained an exemption from the customs tax and decided to sell the tea directly in Boston, without going to the merchants, the only way to compete effectively against Dutch tea. The fact outraged the Boston merchants, who had large stocks of tea. The Dartmouth, barely anchored at the Boston dock, was boarded by fake Indians, and the tea went into the sea.

In April, 1774, Parliament voted five acts, described in the colonies as intolerable, in which the port of Boston was closed until reimbursement of the value of tea; the Massachusetts Charter was repealed, prohibiting town meetings, attributing to the King the right to appoint officials; the transfer to England of criminal proceedings in connection with these laws was agreed upon; the accommodation of troops in Massachusetts was resolved upon; and religious freedom was accorded to the Catholics of Canada (Quebec Act).

Faced with these measures of the Metropolis, colonial solidarity was immediate, and all the colonies came to the aid of Boston. On the occasion of the laws voted by Parliament, it became clear that the individual problems of the Colonies, in reality were problems of all of them, and this brought about the need for common action, with the result of Virginia's proposal for an annual Congress to discuss the common interests of America, the first meeting being held in Philadelphia in 1774, declaring the right of the people to participate in their legislative Councils and, not being represented in the British Parliament, the right to be able to vote on taxes that affected them.

All this led two years later to the American Revolution, against the British Parliament, which was sovereign, imposing the principle of the sovereignty of the people, which ultimately implied the establishment of a democratic and representative government. Thus, the Americans at the end of the eighteen century decided, by means of a Revolution, to repudiate the royal authority and replace it with a Republic, republicanism and the conversion of political society into a Republic being the basis of the American Revolution. That is why the Constitution of 1787 was adopted by “the people” (We the people...), who became, in constitutional history, the sovereign.

And even though the Constitution of 1787 was basically conceived only as an organic document regulating the form of government, that is, the separation of powers among the organs of the new State: horizontally, among the Legislative, Executive and Judicial Branches, and vertically, as the United States, in a federal system, for the government of all the branches of government, the democratic form of government was established through representatives elected by the sovereign people, in some cases by direct election and in others by indirect election.

This is precisely what Alexis de Tocqueville discovered and explained to the world at the beginning of the eighteen century in his book *Democracy in America*, in which he said: "Any discussion of the political laws of the United States must always begin with the dogma of the sovereignty of the people."[189]

A principle that de Tocqueville considered to be "over the whole political system of the Anglo-Americans."[190]

He added:

> "If there is one country in the world where one can hope to appreciate the true value of the dogma of the sovereignty of the people, study its application to the business of society, and judge both its dangers and its advantages: that country is America.[191]

To that end he devoted his book, precisely to study democracy in America, recognizing, as has been said, that democracy had already developed in North America some

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189 Alexis DE TOCQUEVILLE, *Democracy in America* (ed. by J.P. MAYER and M. LERNER), The Fontana Library, London 1968, Vol. 1, p. 68.

190 *Ibid*, p. 78.

191 *Ibid*, p. 68.

time before the Independence, which de Tocqueville emphasized by indicating that its exercise, during the colonial regime:

> "It was reduced to hiding in the provincial assemblies and especially in the communes where it was propagated in secret [...] It could not ostensibly show itself in full light within the laws, since the colonies were still constrained to obey."[192]

Thus, once the American Revolution broke out:

> "The dogma of the sovereignty of the people came out from the township and took possession of the government; every class enlisted in its cause; the war was fought, and victory obtained in its name; it became the law of laws.[193]

In accordance with this dogma of the sovereignty of the people, when it prevails in a nation, – he said –, "each individual forms an equal part of that sovereignty and shares equally the government of the state."[194] Thus, he asserted that "America is the land of democracy.[195]

The title of the chapter one of the second part of his book said: "Why it can strictly be said that the people govern in the United States," and in its first paragraph, de Tocqueville said:

> "In America the people appoint both those who make the laws and those who execute them; the people form the jury which punishes breaches of the law. The institutions are democratic not only in principle but also in all their developments; thus, the people *di-*

192 *Ibid*, p. 69.

193 *Ibid*, p. 69.

194 *Ibid*, p. 78-79.

195 *Ibid*, p. 216.

> *rectly* nominate their representatives and generally choose them annually so as to hold them more completely dependent. So, direction really comes from the people, and though the form of government is representative, it is clear that the opinions, prejudices, interests, and even passions of the people can find no lasting obstacles preventing them from being manifest in the daily conduct of society."[196]

However, one of the main aspects to which de Tocqueville referred in relation to democracy was "the main causes tending to maintain a democratic republic in the United States."[197] He said:

> "Three factors seem to contribute more than all others to the maintenance of a democratic republic in the New World.
>
> The first is the federal form adopted by the Americans, which allows the Union to enjoy the power of a greater republic and the security of a small one.
>
> The second are communal institutions that moderate the despotism of the majority and give the people both a taste for freedom and the skill to be free.
>
> The third is the way judicial power is organized. I have shown – he said – how the courts correct the aberrations of democracy and how, though they can never stop the movements of the majority, they do succeed in checking and directing them."[198]

Thus, he established the relation between democracy and decentralization, and he stated that the problems of the "omnipotence of the majority" and even the "tyranny of

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196 *Ibid*, p. 213.

197 Title of Charter IX of 2nd part, *op. cit.*, p. 342.

198 *Idem*, p. 354.

the majority"[199] was tempered by the almost non-existence of administrative centralization in North America,[200] and by the influence of the American legal profession.[201]

Democracy as a form of government, always attained or maintained, is the second general trend in modern and contemporary constitutionalism, inspired by the American constitutional process. All the constitutions in the world established it as a basic component of their political systems, and it is the sign of our times, even though its maintenance has not always been secured.

2. *The French National Assembly, the idea of the Nation and the sovereignty of the people vis-à-vis the Monarch*

All these principles of popular sovereignty, democracy and representation were also the essential political elements that emanated from the French Revolution, and which arose from political antecedents and events that followed in the political institutions of the absolute monarchy itself.[202]

One of these was the *États Généraux*, which were assemblies in which the Monarch brought together the three orders or estates (hence the word *états*) of society, that is, the clergy, the nobility and the third estate. They were, therefore, the organized expression of the stratified

199 *Idem*, p. 304, 309.

200 *Idem*, p. 323.

201 *Idem*, p. 324.

202 See about what is explained in the following pages in Allan R. BREWER-CARÍAS, *Reflexiones sobre las revoluciones sobre la revolución norteamericana (1776), la revolución francesa (1789) y la revolución hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno* (First Ed. 1992, Second Ed. 2008) Third Edition, Ediciones Olejnik, Buenos Aires 2019.

society of the *Ancien Régime*, so that in such assemblies, the three orders voted separately. This rule undoubtedly contributed to their own weakening.

These assemblies began to exist, of course, for political – although circumstantial – reasons, at the beginning of the fourteenth century, at the initiative of King Philip the Fair (1285-1314), who, upon having been admonished by Pope Boniface VIII through the bull *Ausculta Fili* (December 5, 1301) for using his royal prerogative to confer benefits and appoint bishops to sees, summoned the representatives of the three estates or orders of the Kingdom and society to seek their support to confront the Pope. The *États Généraux* met on April 10, 1302, in a great assembly convened at Notre Dame, which approved the King's conduct. The Monarch's objective had been achieved, and in that assembly he sought to find a means to impose his will on the Pope, based on the idea that the Nation and its Sovereign were in perfect agreement.

However, the approval of the King's conduct by the *États Généraux* actually gave rise to the beginning of a tumultuous history of these assemblies in the course of the following years, which would change the initial intention of supporting the Monarch that gave rise to their birth, to become thereafter the most powerful political instrument against the Monarchy. This assembly, made up of representatives of the three perfectly differentiated estates of society (nobility, clergy, and the rest (*tiers état*) of the population), in reality, would progressively tend to become a political force with ambitions of power, beyond what the King had delegated to them, for, from being advisors to the King, when he submitted certain matters to them for consultation in order to hear the opinion of the Nation, they went on, by his delegation and consent, to acquire the power to examine and vote subsidies and new taxes, becoming, four centuries later, the fundamental driving force of the Revolution.

The convocation of the *États Généraux* was made by the King and, from the middle of the sixteenth century onwards, the custom was imposed that the deputies or representatives to these assemblies, when they were ins-talled, had to deliver to the King a written document with the claims or complaints of their respective locality, called *cahier de doléances,* which contained the set of petitions that were formulated to the King at the moment of ins-talling the session of the Assembly. In this way, through these *cahiers*, the King was made aware of the reality and material situation of the country, and the demands of the places where the deputies came from were presented to him.

However, once the Monarchy and the absolute power of the King were consolidated, from 1614 onwards, these assemblies stopped meeting for a period of 175 years, until 1788, when they met precisely to provoke the Revolution. Although they were not abolished or changed, during that period the Kings no longer convened them, as a sign of absolutism. Therefore, the convocation of such an assembly by Louis XVI (1754-1793), in 1788, one year before the Revolution, meant the resurrection of a disappeared and forgotten institution, and it was that convocation, precisely, the most dangerous lethal weapon against the Monarchy, within which, the Third Estate, converted into an Assembly, made the Revolution.

In fact, it can be said that the political revolution of France began with that convocation, since, in short, the Monarchy itself put an end to absolute government when the King accepted to share government and power with a body of elected deputies who would assume the Legislative Power that, up to that moment, was exercised by the Monarch himself. Therefore, on July 5, 1788, when the *États Généraux* were convened and the date of the *États Généraux* was fixed, the King pronounced the death sentence of the *Ancien Régime*, of the Absolute Monarchy, and of his own life.

However, once the King had accepted and agreed to the convocation of the *États Généraux*, the political agitation turned to another essential aspect, which was the form of the convocation and the way in which the Assembly was to function. As it was composed of three orders, until 1614, each of the three orders had one vote. Therefore, the matters received three votes and each order voted separately, whereby the privileged classes, the nobility and the clergy, always dominated and imposed themselves, because they had two votes against the *Tiers État*. Therefore, the political discussion, from September 1788, was about the form of the vote in the sense of whether or not it should be separate, and the form how the orders should meet, in terms of the number of their representatives. Even the *Parlement* (court), which was the main instrument of the aristocracy, issued a declaration on September 21, 1788, indicating the chosen form: each order would have equal representation and separate vote. In doing so, the aristocracy had undoubtedly triumphed, but it had also begun the real revolution.

The *Parlements*, in fact, were another institution of the Monarchy that played a fundamental role in the Revolution, becoming, even before the *États Généraux*, the most dangerous threat to the power of the King. In the *Ancien Régime*, the King was the source of all justice, but he could delegate it, as happened with the Intendants, who performed judicial functions, with the King's Privy Council, which also exercised judicial functions, and with the twelve provincial judicial institutions, called the *Parlements*, scattered throughout the territory of the kingdom and which described themselves as guardians of the "fundamental laws of the kingdom." This undoubtedly happened with the tolerance of the Monarch, in accordance with the ideas of Montesquieu (1689-1755) (who had been President of the *Parlement* de Bordeaux) on the separation of powers and their counterweight. These institutions,

twelve in all, configured as High Courts to administer justice ultimately in the name of the King, played a fundamental political role in the revolutionary process, and particularly, the *Parlement* of Paris, with the exercise of its rights of registration and rejection of royal edicts. The *Parlements*, like the *États Généraux*, had also acquired a certain power vis-à-vis the King, for circumstantial political reasons, precisely and coincidentally, when the *États Généraux* ceased to be summoned. In 1614, as it was said, the *États Généraux* were summoned for the last time, and it was precisely in 1610, that the *Parlements* began to acquire sources of power, also for circumstantial reasons, on the occasion of the assassination of Henry IV (1533-1610).

Now back to 1788, when the King convened the *États Généraux*, the fact was that no one knew, after 175 years of inactivity of these Assemblies, how it was that they functioned, in the sense of determining the form of election of representatives and the form of voting. Only the King could say it, and he did not. This imprecision even led to the curious fact, before the declaration of the *Parlement* of Paris, of the acceptance by the Monarch of the proposal of Minister Brienne to convene an "academic contest" inviting "all the learned and other educated persons of the Kingdom, and in particular, those who composed the Academy of *Belles Lettres*, to address to his Lordship, the Minister of Grace and Justice, all kinds of reports and memoirs on this question."[203]

About this call, Alexis de Tocqueville sarcastically remarked that, "It was no more and no less than treating

[203] See A. DE TOCQUEVILLE, *L'Ancien Régime et la Révolution,* 1856; *The Old Regime and the Revolution*, Translated by Jon Elster, Cambridge University Press, 2011; *El Antiguo Régimen y la Revolución*, Alianza Editorial, Madrid 1982, p. 86.

the country's Constitution as an academic question and putting it out to competition."[204] And, so it was. In the most literary country in Europe, of course, such a request, at a time of political effervescence, provoked a flood of writings and papers, so that everyone deliberated, everyone claimed and thought of their interests and tried to find in the ruins of the old *États Généraux*, the most appropriate way to guarantee them. This movement of ideas originated the class struggle and led to the total subversion of society. Of course, the old *États Généraux* were often forgotten and the discussion turned to other goals and, in particular, to identify the Legislative Power, the separation of powers, new forms of government, and individual liberties. The flood of writings provoked a total subversion of ideas and, in this process, the writings of Montesquieu and Rousseau were fundamental.

As mentioned, the *Parlement* itself also expressed its way of thinking regarding the form of meeting of the *États Généraux*, in the sense that they should meet as in 1614, each order having one vote and separate votes, so that the privileged classes would always maintain control of the Assembly.

With this, the *Parlemen*t definitively lost its claim to be the spokesperson for liberties. Minister De Brienne had resigned, and Minister Necker was once again in charge of the *Intervention Générale des Finances*. Faced with the *Parlement*'s declaration, there were multiple pamphlet reactions, marked by the reaction of the Tiers état and, as de Tocqueville pointed out, King Louis XVI replied to the *Parlement*:

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[204] *Idem.,* p. 86.

> "I have nothing to reply to my *Parlement* on your entreaties. It is with the Nation assembled with whom I will conclude the appropriate arrangements to consolidate forever the legal order and the property of the State." [205]

The King thus reacted against the judicial body, thinking that the assembly would support him, that is to say, that he would resolve the conflict by consulting with the Nation, which was represented, precisely, in the *États Généraux*. With this, the King, materially, consummated the Revolution, by renouncing the Absolute Government and accepting to share it with the *États Généraux* that would meet in May 1789. As said, by doing so, the King signed his condemnation and that of the *Ancien Régime*.

As for the *Parlements*, de Tocqueville summed up their fate expressing:

> "Once absolute power had been definitively vanquished, and when the Nation no longer needed a champion to defend its rights, the *Parlement* suddenly returned to being what it once was: a deformed and discredited old institution, a legacy of the Middle Ages; and at once it resumed its former place in public hatreds. To destroy it, it was enough for the King to let it triumph."[206]

The estates or orders had been together in the process described above, but with the King defeated and the *États Généraux* convened, the struggle for dominion over them between the classes began, and with this, the true figure of the Revolution began to emerge.[207]

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205 *Idem*., p. 81.

206 *Idem.,* p. 83.

207 See about what is explained in the following pages in Allan R. BREWER-CARÍAS, *Reflexiones sobre las revoluciones sobre la re-*

Thus, the discussion that centered on the *États Généraux* was about who should dominate this Assembly. The *États Généraux*, as was said, had not met in France for the preceding 175 years (since 1614), so that, as institutions, they were but a vague memory. Thus, as opposed to the traditional scheme defended by the *Parlement* and the aristocracy, that each order had one vote and the three orders voted separately, whereby the privileged classes had two votes out of one, the essential point of the general political propaganda that was defended by the bourgeoisie, posited that there should be a doubling of the members of the *Tiers État* in relation to the other two estates, and that the vote should be by head of deputy and not by order.

This was the central motive of the public debate of the Patriotic Party and of all the written literature: the Tiers État should have, then, twice as many deputies as the other estates, that is, equal to those of the nobility and the clergy added together, and the vote should be by head count and not by order separately, with the possibility of having an equal vote between nobility and clergy and the *Tiers État*, and the first two would cease to dominate the Assembly.

As stated above, the fundamental political question was then set in determining who would dominate the *États Généraux*, so that the struggle between the estates was unleashed, multiplying the writings against the privileges, the violence against the aristocracy, and the denial of the rights of the nobility. Natural equality, which had been a theme spread by the nobility itself in its leisure time, would become the most terrible weapon directed against it, prevailing the idea that the government should represent

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the general will, and the numerical majority should dictate the Law. Therefore, the political discussion revolved around the representation of the *Tiers État*, in the sense of whether or not it should be more numerous than the other two estates (nobility and clergy).

On December 5, 1788, the Royal Council decided that the *Tiers État* should have a number equal to the sum of the other two estates, thus doubling them. The Royal Council, however, did not pronounce itself on the form of the vote, whether it was by head count or by order and separately. It was clear that even if the number of deputies of the *Tiers État* was doubled, if the vote remained by order, separately, the aristocracy would still triumph, having two votes over one from the non-privileged classes. This was undoubtedly paramount.

Hence, the pre-revolutionary political process was marked by an aristocratic revolution that then turned against itself: the aristocracy, to defend its privileges against the King, provoked through the *Parlements* the convocation of the *États Généraux*, and thus, the diminution of the absolute power of the Monarchy. To this end, it even allied with the bourgeoisie. However, by subsequently defending the traditional integration of the *États Généraux*, which favored its interests and ensured its privileges, it caused the rupture of its alliance with the *Tiers État*. Therefore, the triumph of the *Tiers État* in the *États Généraux* meant the end of the aristocracy, which was, ultimately, the first victim of the Revolution that it itself had begun since 1787.

However, even without resolving the problem of the vote, in January 1789, the Regulation of Elections of the deputies was published, establishing a system of indirect election, of two tiers in the countryside and three tiers in the cities. The elections were held in more than 40,000 constituencies or electoral assemblies throughout the

country, a process that awakened France politically, producing a complete mobilization of the population and arousing popular emotions. In all the local assemblies, the traditional booklets of demands and grievances (*cahiers des doléances*) were formulated. In this way, all the deputies, from all over the country, arrived at Versailles in April 1789, loaded with petitions and requests from the nobility, the clergy and the people, marked by the reactions against absolutism that sought to limit the powers of the King; by the desire for a national representation to vote on tax laws and, in general, to make the laws; and by the general desire for equality. All the political effervescence, no doubt, was embodied in these booklets of demands and grievances which, in the manner of the traditional *États Généraux*, the deputies were to deliver to the King on the day of their installation.

As foreseen, on May 5, 1789, the *États Généraux* were officially inaugurated by the King, and the initial discussion was about how they were to be installed, as this had not been resolved in the royal summons: whether in one assembly of the three orders together, or in three separate assemblies.

The urban and professional bourgeoisie had monopolized the majority of seats among the deputies of the *Tiers État*, and therefore dominated the discussions and votes in the assemblies, which was reinforced by the division prevailing in the other two estates. In the same month of May 1789, the *Tiers État* insisted on holding joint sessions to consider the validity of the deputies' mandates, refusing separate verification. The nobility adopted a diametrically opposed position, considering separate voting as a principle of the monarchical constitution. The clergy, divided, while not accepting to hold joint sessions with the *Tiers État*, refrained from declaring themselves as a separate Chamber.

A month later, on June 6, 1789, the *Tiers État* revealed itself, installed itself, and incited and summoned the other two orders to a joint session, warning them that if they did not attend, it would act alone, even if the number of votes per head count were equal. In this process, the clergy played an important role, although it was one of the privileged classes of the estate society, it did not have a uniform composition: there was a high clergy, which was part of the nobility, and there was a low clergy, closer to the popular classes and the bourgeoisie. Thus, when the *Tiers État* called for a general assembly, first three, then seven and finally sixteen deputies from the clergy joined the *Tiers État*, a process in which Abbé Emmanuel Sieyès undoubtedly played a fundamental role.

This last element caused the assembly to be installed, this being a triumph of the *Tiers État*, assuming the title of Assembly. Sieyès, deputy for the clergy, even proposed that the title should be "Assembly of known and verified representatives of the French Nation." In any case, not a month and a-half had gone by since the installation of the *États Généraux*, when on June 17, 1789, the *Tiers État*, with some deputies from the other orders, adopted the "Declaration of Constitution of the Assembly."

The deputies of the *Tiers État*, dominated by the bourgeoisie, therefore, set themselves up as a National Assembly and attributed to themselves the power to legislate and, therefore, to consent or not to consent to taxes. This was undoubtedly the first revolutionary act of the *Tiers État*, and the beginning, in 1789, of the French Revolution. Therefore, first, the *Parlements* and then, the *États Généraux,* are the ones who provoked the Revolution.

In June 1789, therefore, France saw the emergence of an Assembly in which the all-powerful and uncontainable majority that claimed national representation threatened and diminished the royal power, already disarmed. That is

why de Tocqueville observed that in this situation "the *Tiers état,* dominating the single Assembly, could not help but make, not a reform, but a revolution,"[208] and that is what it did. Hence, the very statement derived from the title of Sieyès' famous work: *Qu'est-ce que le tiers état?* The *Tiers État* constitutes the whole Nation, denying that the other estates had any value.[209]

The Assembly issued decrees, including on the form of its own dissolution, taking power away from the King over it. These, however, were abrogated by the King, ordering the *États Généraux* to be constituted separately, intimidating the *Tiers État* by force. It was here when the popular element made its first appearance in the Revolution.

Indeed, hunger, the increase in the price of bread due to the scarcity of cereals, particularly that year due to climatic reasons; in short, poverty was the fuel for the agitation and rebellion of the people, stimulated by the deputies of the *Tiers État* to achieve their political survival vis-à-vis the King. Thus, the Assembly, with popular support, prevented its own dissolution and imposed itself on the King. The Parisian mob even went in protest to Versailles, and even reached the King's chambers in the Palace. This caused the King to order the other two estates (nobility and clergy) to join the Assembly, so that from June 27, 1789, by royal decision, the political-constitutional structure of France and the Absolute Monarchy was radically changed.

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208 See A. DE TOCQUEVILLE, *L'Ancien Régime et la Révolution,* 1856; *The Old Regime and the Revolution*, Translated by Jon Elster, Cambridge University Press, 2011; *El Antiguo Régimen y la Revolución*, Alianza Editorial, Madrid 1982, p. 92.

209 See Emmanuel SIEYES, *Qu-est-ce que le tiers état,* (published in January 1789), ed. R. Zappeti, Genoa 1970.

In any case, the process of political and popular rebellion had been so rapid and violent that the King had called in the Army to subdue the Assembly that disobeyed his orders. The National Assembly, on July 9, 1789, had constituted itself into a National Constituent Assembly in defiance of royal power once again. The presence and repressive action of the Army in Paris produced popular exacerbation; and the people, under the political harangue, sought arms to defend themselves. They obtained them on July 14 in the assault on the military barracks of the Invalides, where the mob armed itself (4 cannons and 34,000 rifles) and in this process of searching for weapons, that same day there took place the storming of the Bastille, the State prison, and symbol of royal arbitrariness. There, however, besides the fact that there were only seven detainees, there were no weapons.

The revolt, in any case, saved the National Assembly, which, recognized by the King and definitively installed after the storming of the Bastille, began to change the face of the French Constitution in August 1789. The subversive spirit spread throughout the Provinces in which the peasants and the people in arms rose up against the former lords. The National Assembly had to pay immediate attention to the problem of fiscal privilege, which led, on August 5, to the noble and clerical deputies renouncing their feudal rights and their fiscal immunities.

The Assembly had received, on July 11, a first text of a "Declaration of the Rights of Man and Citizen," presented by Lafayette.[210] The provincial rebellions having been suppressed, this Declaration was sanctioned on August 26-27, 1789, and with it, the Assembly adopted the articles of

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210 Yves GUCHET, *Histoire constitutionelle française (1789-1958),* Éditions européenes Erasme, 1990, p 47.

a Constitution – 19 articles preceding the Declaration – thus producing the first constitutional manifestation of the Assembly.

In these articles of the Constitution, the principles of organization of the State were set forth: it was proclaimed that the powers emanated essentially from the Nation (art. 1); that the French Government was monarchical, but that there was no higher authority than that of the Law, through which the King reigned, and by virtue of which he could demand obedience (art. 2); it was proclaimed that the Legislative Power resided in the National Assembly (art. 2) composed of freely and legally elected representatives of the Nation (art. 9), in a single Chamber (art. 5), and of a permanent nature (art. 4); it was provided that the Executive Power would reside exclusively in the hands of the King (art. 16), but that he could not make any Law (art. 17); and it was established that the Judicial Power could not be exercised in any case, neither by the King nor by the Legislative Body, so that justice would only be administered in the name of the King by the courts established by Law, according to the principles of the Constitution and according to the forms determined by Law (art. 19).[211]

As for the text of the Declaration of the Rights of Man and Citizen of 1789, it was adopted by "The representatives of the French people, constituted in National Assembly," and in it, as opposed to the sovereignty of the Monarch, it proclaimed "the principle of all sovereignty

[211] See the text and about what is explained in the following pages in Allan R. BREWER-CARÍAS, *Reflexiones sobre las revoluciones sobre la revolución norteamericana (1776), la revolución francesa (1789) y la revolución hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno (First Ed. 1992)*, Second Ed. Bogotá, 2008; Third Ed. Buenos Aires 2019.

resides essentially in the Nation" so that "no body, no individual (including the king) can exercise an authority which does not expressly emanate from it" (art. 3).

The Declaration, of course, was rejected by the King, originating a new popular revolt that provoked the transfer of the Assembly from Versailles to Paris, and forced the royal sanction of the Declaration, on October 2. The Assembly ordered the King to return to Paris on October 5-6, and on November 2, the Assembly confiscated the assets of the Church and the clergy, which were declared national goods.

The Assembly, in a few months, made the juridical Revolution, changed all the instruments that governed the Monarchy, and, from the end of 1789, a new State began to take shape, creating on December 22, the Departments as uniform territorial demarcation of the new State. Likewise, earlier, by Decree of December 14, 1789, it had organized the municipalities and institutionalized the "municipal power".

The process after 1789 is well-known history: the Revolution originated the wars of the European Monarchies against France, which found itself threatened on all its borders. The Revolution, therefore, in addition to consolidating itself internally, had to protect itself externally. In June 1791, the King negotiated with foreign powers and tried to flee; but he was arrested and forced to accept the Constitution of September 13, 1791, which was the first modern European Constitution, configuring a monarchical State with an Assembly of elected representatives marked by the principle of the separation of powers. According to it, the King retained the Executive Power, the Legislative Power was assumed by the Assembly, and the Judicial Power by the Courts. The *Parlements,* of course, had been eliminated by the Revolution, wherefore the institutions that provoked it (the *États Généraux* and the *Parlement*) disappeared immediately.

Louis XVI, by virtue of the new Constitution ceased to be "King of France" and became "King of the French." As constitutional monarch, he endeavored to curb the Revolution by applying the suspensive veto to legislation, but what he succeeded in doing was to increase political and popular discontent against him. He was taken prisoner by the insurrectionary Commune of Paris on August 10, 1792, imprisoned in the prison of the Temple, accused of treason, tried by the newly elected Convention on September 2, 1792, condemned to death, and executed on January 21, 1793.

In any case, after the imprisonment of the King, the Republic was proclaimed on September 22, 1792, and the first Republican Constitution came into force on June 24, 1793, once ratified by referendum (Constitution of the Year I), whose text was also preceded by the Declaration of Rights. In those months, moreover, political and revolutionary terror took hold of France and chaos became generalized, especially because of the foreign coalition formed against the Revolution (March 1793).

In 1795 (August 22), a new Constitution was sanctionned, (Constitution of the year III), also preceded by a Declaration of Rights, concluding the Convention on October 26, 1795.

The Directory was installed on November 2 of the same year. Bonaparte, who in October 1795 unveiled a revolt of the royalists (13 *Vendémiaire*), was appointed Chief of the army in Italy. Triumphant in 1795, the Directory appointed him Commander of the expedition in Egypt (1798), returning to France in October 1799, where the moderates entrusted him with the task of eliminating the Directory. By means of a coup d'état, on November 9-10, 1799 (*Brumaire*, year VIII), he imposed on the country an authoritarian Constitution and the Consulate began.

This ended the French Revolution, whose process had lasted only 10 years.

In 1802, Bonaparte, after centrally reorganizing the justice, the administration (with the creation of the Prefects) and the economy, made himself appointed Consul for Life (1802) and then Emperor of the French (1804), "by the grace of God and the national will." Crowned as Napoleon I, he established a hereditary monarchy with Empire nobility, and continued the reorganization and centralization of revolutionary France, even adopting the Civil Code.

The war, however, monopolized a good part of his government. After the retreat from Russia (1812), defeated at Leipzig (1813) and France invaded by the European powers, he abdicated in 1814, being confined to the island of Elba. From there, he escaped from English surveillance, returned to France in March 1815 (the Hundred Days), and after being defeated at Waterloo (June 18), on June 22, 1815, he abdicated for the second time, surrendering to the English, who exiled him to the island of St. Helena, where he died in 1821. From 1815, the Monarchy was reinstated in France, with Louis XVIII (1755-1824).

Republicanism in France had lasted 12 years (1792-1804). After a brief reinstallation (II Republic) between 1848 and 1852, it was only from 1870 that it was reconstituted, with the III Republic (1870-1940), the IV Republic (1944-1958) and the V Republic (1958 to date).

The Imperial and then Monarchist Constitutions, from 1804 onwards, had postponed the Republic. On the other hand, the Declaration of Rights, from 1804 onwards, could only be considered as a historical text without precise legal consequences, although its principles inspired subsequent regimes. It was not until 1973, that the Constitutional Council expressly considered the Declaration of the Rights of Man and of the Citizen of 1789 as part of the constitu-

tional text, and it was not until 1973 that the Declaration of the Rights of Man and of the Citizen of 1789 was expressly considered by the Constitutional Council to be part of the Constitution.[212]

In any case, the French Revolution and French constitutionalism, as well as the American Revolution, left the legacy for the Rule of Law, the principle of the sovereignty of the people, republicanism, and representative democracy, in contrast to the absolutist regime, where the sovereign was the Monarch, who exercised all powers and even granted the Constitution of the State. With the Revolution, as has been said, the King was stripped of his sovereignty, which was transferred to the people, there having arisen the notion of Nation, as personification of the people, to replace the King in the exercise thereof.

To use Berthelémy's words:

> "There was a sovereign person who was the King. Another sovereign person had to be found to oppose him. The men of the Revolution have found that sovereign person in a moral person: the Nation. They have taken the Crown away from the King and have placed it on the head of the Nation."[213]

Hence, the principle of sovereignty attributed to the people or the Nation and not to the King or the rulers, which emerged from the text of the Declaration of the

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212 L. FAVOREU, "Le principe de constitutionalité. Essai de définition d'après la jurisprudence du Conseil constitutionnel", in *Recueil d'études en 1'honneur de Charles Eisenmann*, Paris 1977, p. 33 ; J. RIVERO, "Rapport de Synthèse" in L. FAVOREU (ed.), *Cours constitutionnelles européennes et droits fundamentaux,* Aix-en-Provence 1982, p. 520.

213 See BERTHELEMY-DUEZ, *Traité elémentaire de droit constitutionnel*, Paris 1933, p. 74, quoted by M. GARCIA–PELAYO, *op. cit.*, p. 461.

Rights of Man and of the Citizen: "The principle of all sovereignty resides essentially in the Nation. No body, no individual may exercise any authority which does not expressly emanate from it" (art. 3). The Declaration of Rights, which also preceded the Constitution of 1793, also stated that "Sovereignty resides in the people. It is one and indivisible, imprescriptible and inalienable" (art. 25), and the Declaration that preceded the Constitution of 1795, stated, "Sovereignty resides essentially in the universality of the citizens. No individual, no partial gathering of citizens can attribute sovereignty to itself."

It should also be noted that despite its monarchical character, the French Constitution of 1791 was representative, from the moment in which the Nation exercised its power through representatives; so that, precisely because of the system that was established for participation, the Revolution had a special social significance linked to the bourgeoisie, since according to the suffrage system that was established, a large number of citizens were excluded from electoral activity.

In any case, after the Monarchy and the execution of Louis XVI, as mentioned above, the Constitution of 1793 established the Republic in place of the Monarchy, as "unique and indivisible" (art. 1). Consequently, the sovereign people, constituted by "the universality of French citizens," appointed its representatives to whom it delegated the exercise of public powers (art. 7 to 10). These ideas of representativeness, however, were imposed in France from the very moment of the Revolution, in 1789, even though the form of government initially remained monarchical. Thus, in the Constitution of 1791, it was established that:

> "The Nation, from which all powers emanate, can exercise them only by delegation. The French Constitution is representative: the representatives are the legislative body and the King" (art. 2, title III).

Therefore, even the King became, with the Revolution, the representative of the Nation, until he was decapitated, and with that, the Monarchy turned into a Republic was completely representative.

3. *The idea of popular representation at the beginning of Hispanic American constitutionalism*

The idea of popular representation and the exercise of sovereignty by the people, in accordance with the principles derived from the American and French revolutions, also marked the beginning of the constituent process in Spain and Latin America at the beginning of the nineteenth century.

In both cases, the constituent processes that began in 1810 had precise objectives: in Spain, it was a question of achieving the political reconstitution of a pre-existing Monarchical State that since 1808 was in crisis due to the Napoleonic invasion of the Peninsula and the subsequent war that was fought for independence; and in Latin America, specifically in Venezuela, after the ousting of the Colonial authorities and the assumption of the local power by a local Junta, it was the case of the constitution new states founded by what had been former Spanish colonies in America that had declared independence.

Also in both cases, the constituent process had, as its initial common denominator, the adoption of the principle of popular sovereignty and the need to reconstitute or constitute the governments of the States based on the representation of their inhabitants. That is, at each end of the Spanish Empire, two constituent processes started based on the principles of placing the sovereignty in the people, and on democratic representation for the purpose of electing a political body called to redefine, or define, a new political regime as a result of the existing political crisis. To this end, in both cases, the first politi-

cal act that was adopted to culminate those constituent processes was the issuance, in 1810, of two normative acts, instructions or regulations, with the purpose of summoning the people for the election of the deputies to the *Cortes* in Spain, and of the deputies to a Congress or General Assembly in Venezuela, establishing the system and procedure for the indirect election of deputies.

This was done in the Peninsula, by the Supreme Governing *Junta* of Spain and the Indies on January 1, 1810, issuing the "Instruction that must be observed for the election of Deputies to Cortes";[214] and in Venezuela, six months later, the Supreme Conservative Junta of the Rights of Fernando VII, on June 11, 1810, issued the "Regulation for election and meeting of deputies who shall compose the Body for the Preservation of the Rights of Mr. D. Fernando VII in the Provinces of Venezuela." [215]

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[214] See in *Textos Oficiales de la Primera República de Venezuela*, tomo II, Edición Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas, 1982, pp. 61 a 84. See Allan R. BREWER-CARÍAS, "La primera manifestación de representatividad democrática y las primeras leyes electorales en España e Hispanoamérica en 1810 (La elección de diputados a las cortes de Cádiz conforme a la Instrucción de la Junta Central Gubernativa del Reino de enero de 1810, y la elección de diputados al Congreso General de Venezuela conforme al Reglamento de la Junta Suprema de Venezuela de junio de 1810," in José Guillermo VALLARTA PLATA ED), *Libro Homenaje a la Constitución española de Cádiz de 1812*, Instituto Iberoamericano de Derecho Local Municipal, Guadalajara, 2012,

[215] See the texts in: *Textos Oficiales de la Primera República de Venezuela*, tomo II, Edición Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas, 1982, pp. 61 a 84. See also in ALLAN R. BREWER-CARÍAS, *Las Constituciones de Venezuela*, Academia de Ciencias Políticas y Sociales, Tomo I, Caracas 2008

In the case of Spain, by convening the elections for representatives to the *Cortes*, the Supreme Junta had to change the traditional structure of the *Cortes*, which up to then were the old state institutions in which only the nobles and clergy had the right to participate. The purpose was, in its stead, to call the Spanish people to form a national representation of *Diputados*, to be elected through an indirect electoral system in each Province of the realm, which was later extended to the Colonial Provinces by the Council of Regency by declaring on February 14, 1810, that the American colonies had ceased to be colonies and that they "were an integral and essential part of the Spanish monarchy." By September 1810, the Cortes were installed, assuming the Legislative Power and assigning the Executive Power to the Council of Regency.

The final product of the Spanish Cortes was the sanctioning, in March of 1812, of the Monarchical Constitution of Cadiz, in which the basic principles of constitutionalism and rule of law were incorporated.[216]

In the case of Venezuela, on June 11, 1810, barely two months after the *Junta Suprema para la Conservación de los derechos de Fernando VII* had been installed in Caracas (April 19, 1810), the Board, by virtue of its non-representative nature in relation to the other Provinces of the General Captaincy of Venezuela, proceeded to issue a "Regulation for the election and meeting of deputies who are to compose the Body for the Preservation of the Rights of Ferdinand VII in the Provinces of Venezuela" calling for the exercise of the "most important right of the people which was to concur with their vote in the delegation of the personal and real rights which originally existed in the

[216] See on this Constitution, its meaning and importance, what has been said *supra* in *Part One* of this book.

common mass," on *Diputados* from all the provinces. After being elected in March 1811, the elected body of *Diputados* began to act as the General Congress of the Provinces of Venezuela, made up by deputies appointed pursuant to an indirect elections system.

The election of the deputies to the General Congress was made by "all the free neighbors of Venezuela" through a two-tier indirect electoral system, according to which the parish electors, who were in turn elected by the neighbors of each parish, were to elect a number of deputies at the rate of one for every 20,000 souls.

In accordance with rules established, elections were held at the end of 1810 in seven of the nine provinces of the former General Captaincy of Venezuela,[217] 44 deputies having been elected for the Provinces of Caracas (24), Barinas (9), Cumana (4), Barcelona (3), Merida (2), Trujillo (1) and Margarita (1).[218] These were the deputies that made up the General Congress that the following year, on July 1, 1811, would adopt the Declaration of the Rights of the People; on July 5, 1811, would formally declare the Independence of Venezuela; and on November 21, 1811, would sanction the Federal Constitution of the United Provinces of Venezuela.[219]

In these instruments, all the principles of popular sovereignty and representativeness were collected, so that, for example, in the Declaration of Rights of the People of

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217 The following Provinces participated: Caracas, Barinas, Cumaná, Barcelona, Merida, Trujillo and Margarita. See José GIL FORTOUL, *Historia Constitucional de Venezuela*, Tomo primero, Berlín 1908, p. 223.

218 See C. PARRA PÉREZ, *Historia de la Primera República de Venezuela*, Academia de la Historia, Tomo I, Caracas 1959, p. 477.

219 See on this Constitution, its meaning and importance, what has been said *supra* in *Part One* of this book.

1811, the first two articles of the Section "Sovereignty of the People" stated:

> "Art 1. Sovereignty resides in the people; and the exercise thereof in the citizens with the right to vote, by means of their legally constituted proxies.
>
> Art 2. Sovereignty, by its nature and essence, is indispensable, inalienable, and indivisible".

The Constitution of 1811 also defined popular sovereignty along the same lines:

> "Art. 143. A society of men united under the same laws, customs and governments forms a sovereignty.
>
> Art. 144. The sovereignty of a country, or the supreme power to regulate or equitably direct the interests of the community, resides therefore essentially and originally in the general mass of its inhabitants and is exercised through their proxies or representatives, appointed and established in accordance with the Constitution."

According to these norms, therefore, in the former colonial provinces of Spain that formed Venezuela, the sovereignty of the Spanish Monarch had ceased. In fact, since April 19, 1810, sovereignty had begun to be exercised by the people, who gave themselves a Constitution through their elected representatives. Therefore, the Constitution of 1811 began by stating:

> "We, the people of the United States of Venezuela, using our sovereignty and desiring to establish among ourselves the best administration of justice, to procure the general good, to insure domestic tranquility, to provide in common for our external defense, to sustain our liberty and political independence, to preserve pure and unharmed the sacred religion of our ancestors, to ensure in perpetuity to our posterity the enjoyment of these goods, and being mutually united in

> the most unalterable union and sincere friendship, preserve pure and unharmed the sacred religion of our elders, perpetually assure to our posterity the enjoyment of these goods, and being mutually bound by the most unalterable union and sincere friendship, have resolved to solemnly confederate to form and establish the following Constitution, by which these states are to be governed and administered.... "

The idea of the sovereign people, therefore, which not only came from the French Revolution, but also, before that, from the American Revolution, took root in Venezuelan constitutionalism since 1811, against the idea of monarchic sovereignty that still prevailed in Spain at that time.

And from this derived the idea of republican representativeness, which, of course, was also included in the Venezuelan Constitution of 1811, in which it was established that sovereignty was exercised only "through proxies or their representatives, appointed and established in accordance with the Constitution" (Art. 144). Accordingly, the Constitution of 1811, added:

> "Art. 146. No individual, no family, no portion or gathering of citizens, no particular corporation, no town, city or party, can attribute to itself the sovereignty of society, which is indispensable, inalienable and indivisible in its essence and origin, nor can any person exercise any public function of government if it has not obtained it by the constitution."

In short, the system of government being clearly republican and representative, in accordance with the most exact French expression of the Declaration of 1789 (Art. 6), the Constitution of 1811 established that:

> "Art. 149. The Law is the free expression of the general will of the majority of citizens, indicated by the organ of their legally constituted representatives."

These representatives in Congress formed the House of Representatives and the Senate, for the election of which the Constitution established a detailed form of election (Art. 14 to 51), in an indirect system, through parish congregations (Arts. 26, 28). The Constitution, following the general trend, restricted suffrage by establishing economic requirements for participating in elections.[220] The political control of the nascent State was then reserved for the Creole aristocracy and the nascent brown bourgeoisie.

As for the "Executive Power," it was provided that it would reside in the federal city "deposited in three individuals popularly elected" (Art. 72) by the Electoral Congregations (Art. 76) by open lists (Art. 77).

It should be noted, moreover, that republicanism and assemblyism was a constant throughout the constitutional evolution of the nascent Republic, so, for example, after the fall of the first Republic, and before its reconstitution in 1819, during the military campaigns for the liberation of Venezuela, Simon Bolivar was always determined to legitimize the power by the people gathered together or through elections.[221]

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220 *Cfr.*, R. DÍAZ SÁNCHEZ, "Evolución Social de Venezuela (hasta 1960)," in M. PICÓN SALAS et al., *Venezuela Independiente 1810-1960*, Caracas, 1962, p. 197.

221 See Allan R. BREWER-CARÍAS, "Ideas centrales sobre la organización del Estado en la obra del Libertador y sus proyecciones contemporáneas," in *Boletín de la Academia de Ciencias Políticas y Sociales,* Caracas 1984, Nº 95-96, pp. 137 ss.

4. *Democracy as a political regime and the citizens' right to democracy*

As a result of the consolidation, during the last two hundred years, of all the principles of republicanism and democratic representation, based on the principle that sovereignty resides in the people, it is clear that the second principle of the rule of law is that of representative democracy, which is expressed in the contemporary world in all Constitutions, as is the case, for example, of Venezuela's 1999 Constitution, whose Article 5 states the following:

> "Sovereignty resides in a non-transferable way in the people, who exercise it directly in the manner provided in this Constitution and the Law, and indirectly, through suffrage, by the organs that exercise the Public Power."

The expression that sovereignty resides "untransferably" in the people, MEANS that sovereignty only and always resides in the people and no one can assume it, not even a Constituent Assembly, which, of course, could never be "sovereign" as, for example, the National Constituent Assembly of 1999 was so often and improperly qualified in Venezuela.[222] The 1999 Constitution even states, when regulating the institution of the National Constituent Assembly, that "the people of Venezuela is the depositary of the original constituent power" (art. 347) which, therefore, can never be transferred to any Assembly.

In any case, it was the constitutional enshrinement of the principle of popular sovereignty and its non-transferable nature that led in the modern world to the

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222 See the critical comments on this in Allan R. BREWER-CARÍAS, *Poder Constituyente Originario y Asamblea Nacional Constituyente,* Academia de Ciencias Políticas y Sociales, Caracas 1999*,* pp. 67 ss.

development of the principle of representative democracy, in the sense that the people, who are the holders of sovereignty, normally exercise it through representatives.[223]

Popular sovereignty and representative democracy,[224] therefore, are consubstantial and indissoluble principles, which is why it is impossible to enshrine the principle of popular sovereignty, in a democratic regime, without the principle of representative democracy.[225]

Representativeness, in itself, is the essence of democracy, and the vices of democracy require perfecting it, but not eliminating it. For example, in some cases, the great problem derived from the political system of party democracy is that democratic representativeness has not really appertained to the people, but to the political parties. Consequently, the resulting crisis that in many cases has affected democratic representativeness cannot lead to its elimination, but rather to its improvement.

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223 See, in general, Ricardo COMBELLAS, *Derecho Constitucional: una introducción al estudio de la Constitución de la República Bolivariana de Venezuela,* Mc Graw Hill, Caracas 2001, pp. 33 ss.; and Humberto NOGUEIRA ALCALÁ, "Tópicos sobre la clasificación de los tipos de Gobierno constitucionales democráticos", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid 2003, pp. 325-368.

224 See, on sovergnity and representative democracy, Pedro L. BRACHO GRAND and Miriam ALVAREZ DE BOZO, "Democracia representativa en la Constitución Nacional de 1999", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón,* Volumen I, Tribunal Supremo de Justicia, Caracas 2001, pp. 235-254; Allan R. BREWER-CARÍAS, *Reflexiones sobre el constitucionalismo en América, op. cit.*, pp. 17 ss., 55 ss.

225 See Allan R. BREWER-CARÍAS, *Debate Constituyente,* Tomo I, *op. cit.*, pp. 184 ss.

All this to expand the radius of representativeness, and to allow the people, their places and communities to find direct representation in the representative Assemblies.

In any event, in the example of Article 5 of the Venezuelan Constitution, sovereignty, which resides in the people, is exercised "indirectly, through suffrage, by the bodies that exercise the Public Power," with Article 62 also regulating the right of citizens to participate freely in public affairs "through their elected representatives".

It follows, therefore, that democratic representativeness must always have its source in popular elections (art. 70), and that these are intended to elect the holders of the organs that exercise the Public Power, which, of course, are those established by the Constitution according to the principles of distribution and separation of Public Power (art. 136).

Certainly, representative democracy must be perfected by making citizen participation in political processes possible, which is achieved not only through political decentralization for the purpose of bringing power closer to the citizen, but also through the establishment of various instruments to make the right to participation a reality.

It follows from the above that in the contemporary world, as the essence of the rule of law, in addition to the right to the Constitution and its supremacy, it is also possible to identify the citizens' right to democracy,[226] that is to

[226] See Allan R. BREWER-CARÍAS, "Sobre el derecho a la democracia y el control del poder", Foreword to the book by ASDRÚBAL AGUIAR, *El derecho a la democracia. La democracia en el derecho y la jurisprudencia interamericanos. La libertad de expresión, piedra angular de la democracia*, Editorial Jurídica Venezolana, Caracas 2008, 19 ss.; "Sobre las nuevas tendencias del derecho constitucional: del reconocimiento del derecho a la Constitución y del derecho a la democracia", in *VNIVERSITAS, Revista de Ciencias Jurídicas (Homenaje a Luis Carlos Galán*

say, that in the Constitutional State the people and the citizens govern through their representatives, subject to control.

The consequence of this approach, of course, is that political rights have begun to cease to be reduced to those that were generally enumerated expressly and in isolation in the Constitutions, as has been the case of the rights to vote, to hold public office, to associate in political parties, and more recently, to direct political participation.

This right to democracy requires the functioning of a political regime in which the essential elements of democracy are guaranteed, which are, as listed, for example, in the Inter-American Democratic Charter of the Organization of American States in 2001, in addition to the respect for all human rights and fundamental freedoms, the following: 1) access to power and its exercise subject to the rule of law; 2) the holding of periodic, free, fair elections based on universal and secret suffrage, as an expression of the sovereignty of the people; 3) the pluralistic regime of political parties and organizations; and 4) the separation and independence of the branches of government (Art. 3).

In any democracy, therefore, it can be said that the citizens have the right to be guaranteed all these essential elements, which in many Constitutions have even been configured as some of the aforementioned individualized political rights, as in the case of the right to exercise pub-

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Sarmiento), Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas, N° 119, Bogotá 2009, pp. 93-111; "Algo sobre las nuevas tendencias del derecho constitucional: el reconocimiento del derecho a la constitución y del derecho a la democracia," in Sergio J. CUAREZMA TERÁN and Rafael Luciano PICHARDO (Directores), *Nuevas tendencias del derecho constitucional y el derecho procesal constitucional*, Instituto de Estudios e Investigación Jurídica (INEJ), Managua 2011, pp. 73-94.

lic functions, the right to vote, or the right of association in political parties. However, considered as a whole, and with particular emphasis on the right to the separation of powers, they can be configured, globally, as integrating a "right to democracy" that is intended to guarantee the effective control of the exercise of power by those in power, and through them, by the State.

This right to democracy, of course, can only be configured in a State governed by the rule of law, and is not conceivable in States with authoritarian regimes where the aforementioned essential elements cannot be guaranteed precisely due to the absence of controls over the exercise of power, even though they may be States in which, in fraud to the Constitution and to democracy itself, governments may have originated from elections.

Democracy, therefore, is inextricably linked to the control of power, derived from the separation of the branches of government that is established in all the Constitutions formulated after the American and French revolutions becoming another of the fundamental pillars of modern constitutionalism.

Thus, democracy itself, as a political regime, is based on the right of citizens to control power in order to ensure that those elected to govern and exercise state power in representation of the people do not abuse it. For this reason, since the Declaration of the Rights of Man and Citizen of 1789, it was rightly established that "any society in which the separation of powers is not determined, lacks a Constitution" (Art. 16).

Therefore, more than two hundred years later, but with its origin in those postulates, in the internal constitutional order of democratic states based on the rule of law it is possible to identify a right to democracy made up of the aforementioned essential elements that are complemented by its fundamental components, also listed in the Inter-

American Democratic Charter itself, which are the following: 1) transparency of governmental activities; 2) probity and accountability of governments in public management; 3) respect for social rights; 4) respect for freedom of expression and press; 5) constitutional subordination of all State institutions to the legally constituted civil authority and 6) respect for the rule of law of all entities and sectors of society (Art. 4).

Like some of the essential elements of democracy, many of these fundamental components have also been established in the Constitutions as individualized citizens' rights, as is the case, for example, of the set of social rights and freedom of expression of thought. However, also considered as a whole, together with the essential elements, these fundamental components of democracy are what makes it possible to reaffirm the existence of the citizens' right to democracy as a fundamental right in itself, which implies, above all, the possibility for citizens to control the exercise of power. That is precisely why, in the contemporary world, democracy is not only defined as the government of the people through elected representatives where access to power is guaranteed in accordance with the rule of law, but also and above all, as a government subject to controls, and not only by the Power itself according to the principle of the separation of the powers of the State, specifically, by the Judiciary and the Constitutional Judge, but by the people themselves, that is, by the citizens, individually and collectively considered, and it is precisely to this that citizens are entitled when we speak of the right to democracy.

Among the components of the right to democracy, therefore, is not only the right to political representation, which implies that those in power are elected through the exercise of the right to vote, but also that access to power in any case is made in accordance with the Constitution and the laws, that is, with the principles of the rule of law.

These rights, in a State governed by the rule of law, must be guaranteed by the Constitutional Judge, who is called upon to ensure not only that the exercise of power by the rulers is carried out in accordance with the text of the Constitution and the laws, but also, that access to power is carried out in accordance with the provisions established therein.

Particularly, in the democratic system established in the Constitution, the Constitutional Judge is the one who must be in charge of controlling that the access to power is made only through democratic methods, so he can have competence, for example, to control the constitutionality, not only of the election, but also of the appointment of rulers, as well as the behavior of political parties, being able to proscribe, for example, those parties with non-democratic purposes whose aims are precisely to destroy democracy.

Therefore, when faced with constitutional violations that mean a rupture of the constitutional thread in the access and exercise of power, for example, when the President of the Republic is deposed by means of a coup d'état or a coup against the Constitution, or when a popularly elected office is assumed without the democratic legitimacy derived from suffrage, the Constitutional Judge must assume the challenge of restoring the violated constitutional order.

The guarantee of the right to democracy, therefore, means that the Constitutional Judge is who must ultimately ensure that access to power is carried out by democratic methods, in accordance with the provisions of the constitutions on representation and suffrage.

PART THREE

THE SEPARATION AND LIMITATION OF POWER AS A GUARANTEE OF LIBERTY

From the principle of democracy derives the third feature of the state which, according to law, is the existence of a system of division or separation of powers. This means that Parliament or the legislative power draws up the legal rules, and the administrative and judicial bodies are responsible for enforcing them. This system of separation of powers, or rationalization of power, is also established as a guarantee to citizens of their respective rights, considering as legislators, in the strictly formal sense, only those elected bodies aimed at representing the people. Consequently, the executive body, despite the normative faculties with which it is endowed, cannot be considered as legislator, in the sense of drawing up rules that, for example, might limit individual rights and guarantees.

Consequently, only those bodies elected by the people and to represent them are considered as Legislators in a formal and strict sense. For this reason, executive bodies can never be considered as legislators, in the sense of being able to enact norms that may, for example, limit constitutional rights and guarantees, create taxes or criminalize (legal reserve).

Furthermore, this system of separation of powers contains a fundamental component, namely the autonomy and independence of judges, which also serves to guarantee individual rights.

Consequently, neither a person holding legislative office, nor the executive can be considered as judges.

However, under the *État de droit* regime, the separation of powers is not absolute and rigid, since there are numerous interrelations between the various state bodies, which must exercise mutual control and limitation, through the so-called system of weight and counterweight, or checks and balances, which, in fact, balances the system of state power.

This system is characterized by several factors, one of which is the supremacy of the legislative power as creator of the law vis–à–vis the executive and the judiciary, who are responsible for enforcing that law. However, this primacy of the legislator is not necessarily tantamount to sovereignty and to avoid absolutism on the part of the legislator, or what has been called "elected dictatorship",[227] the legislative power is necessarily subjected to the constitution. Thus, since the Legislator is limited by the constitution, a system must be set up to control the constitutionality of its acts, either by ordinary courts or by special courts, to guarantee the constitutionality of the laws.

But, in this system of separation of powers, as we have already pointed out, the independence of the judiciary vis-à-vis the legislator and the executive is a fundamental element of the Rule of Law , to such an extent that one can say that the genuine state according to the law is the one in

[227] See HAILSHAIN, *Elective Dictatorship*, 1976, quoted by P. ALLOTT, "The Courts and Parliament: Who whom? *Cambridge Law Journal"*, Vol. 38, 1, 1979, p. 115. HOGG also has said that Parliament had become "virtually an elective dictatorship. The party system makes the supremacy of a government like, the present, automatic and almost unquestioned." Quoted by M. ZANDERS, *A Bill of Rights*? London 1980, p. 5.

which judges are autonomous and independent,[228] and, naturally, the one in which procedural guarantees exist in order to avoid abuse of authority on the part of the judges.[229]

Now, this principle of the separation of powers is at the very origin of the Rule of Law, as conceived by the theoreticians of absolutism, particularly Locke, Montesquieu and Rousseau, before the XVIII Revolutions.

1. *Theoretical Backgrounds*

In effect, John Locke, in his *Two Treatises of Government* (1690), became the first ideologist of the reaction against absolutism when he advocated the limitation of the monarch's political power. He based his proposal on the consideration of man's natural condition and the social contract of society, which gave birth to the state.

In Locke's opinion, the reason why men enter into a social contract is to preserve their lives, liberties and possessions, the three basic assets that he regards, in general, as "property." Moreover, it is this "property" that gives men political status. In Locke's own words:

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228 See Allan R. BREWER-CARÍAS, "El principio de la separación de poderes como elemento esencial de la democracia y de la libertad, y su demolición en Venezuela mediante la sujeción política del Tribunal Supremo de Justicia," in *Revista Iberoamericana de Derecho Administrativo, Homenaje a Luciano Parejo Alfonso,* Año 12, Nº 12, Asociación e Instituto Iberoamericano de Derecho Administrativo Prof. Jesús González Pérez, San José, Costa Rica 2012, pp. 31-43.

229 See Allan R. BREWER-CARÍAS, "Foreword" to the book of: Gustavo TARRE BRICEÑO, *Solo el poder detiene al poder, La teoría de la separación de los poderes y su aplicación en Venezuela*, Colección Estudios Jurídicos Nº 102, Editorial Jurídica Venezolana, Caracas 2014, pp. 13-49.

> "For liberty is to be free from restraint and violence from others, which cannot be where there is no law; and is not, as we are told, "a liberty for every man to do what he wishes"..... But a liberty to dispose, and order, as he wishes his person, actions, possessions, and his whole property under the allowance of those laws under which he is..."[230]

Naturally, this social contract as conceived by Locke changed man's natural condition and could not give rise to the formation of a government under which men would be placed in a situation worse than the one in which they had previously been. Consequently, an absolute government could not even be considered legitimate, as a civil government was. If the state emerged as a protector of "natural rights" which did not disappear with the social contract, their actual disappearance due to the action of an absolute state would justify resistance to the abuse of power.[231]

Now, within the measures designed to rationalize and limit power, Locke developed his classical distribution of state functions, some of which he regarded as powers. In paragraph 131 of his book *Two Treatises of Government*, Locke said the following:

> "And so, whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such

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230 See J. LOCKE, *Two Treatises of Government* (ed. Peter Laslett), Cambridge 1967, paragraph 57, p. 324.

231 *Idem*, p. 211.

> laws, or abroad to prevent or redress foreign injuries and secure the community from Inroads and Invasions."[232]

Therefore, Locke distinguished four state functions, that of legislating, of judging, of employing forces internally in the execution of the laws and of employing those forces abroad, in defense of the community. He gave the name of *legislative power* to the first function, that of making the laws "to which the other powers are and must be subordinated,"[233] as he said. He named the third function the *executive power*, which involved "the execution of the municipal laws of the society within the latter and above its parts"[234] or components. He named the fourth function the federative power, which includes "the power of war and peace, leagues and alliances, transactions with all persons or communities outside the state."[235]

Of all the functions he assigned to any sovereign state, the only one that he did not regard as a "power" was the *function of judging*, regarding which Peter Laslett, in his introduction to Locke's book, stated that "it was not a separate power, but a general attribution of the state."[236]

In this effort to rationalize state functions, the novelty of Locke's thesis lies in the distinction between the faculty of legislating and that of employing the forces in the execution of the laws.

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232 *Idem*, p. 371.

233 *Idem* paragraphs 134, 149, 150, p. 384, 385. Peter LASLETT comments, in "Introduction", p. 117.

234 *Idem*, p. 117.

235 *Idem*, p. 383. In relation to the name given by LOCKE to this power he said: "if any one pleases. So the thing be understood, we are indifferent as to the name." *Idem*, p. 383.

236 P. LASLETT, "Introduction", *loc. cit*., p. 118.

In this context, it was not necessary to individualize the power of judging, which, particularly in England, was a traditional state function.

In any case, it is important to note that Locke confined himself to rationalizing and systematizing the functions of the sovereign state but did not actually formulate a theory on the division of powers, much less their separation. What is more, no thesis can be inferred from Locke's work to the effect that the power of the state had to be placed in different hands to preserve liberty or guarantee individual rights, whilst allowing the parts to coincide.[237] He did however admit that if the powers were placed in different hands, a balance could be achieved, as he stated in his book "balancing the Power of Government, by placing several parts of it in different hands.[238]

Perhaps then, Locke's fundamental contribution to the principle of the division of power lay in his criteria, according to which the executive and federative power must necessarily be in the same hands.[239] In addition, his criteria of the *supremacy of the legislative power* over the others, to the extent that both the executive function and that of judging had to be performed in execution of, and in accordance with the laws adopted and duly published.[240]

For Locke, this supremacy of the legislative power was precisely the consequence of the supremacy of Parliament over the monarch, resulting from the 1689 Revolution

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237 *Idem*, p. 117-118.

238 *Idem*, p. 107, 350.

239 *Idem*, p. 118.

240 M.J.C. VILE, *Constitutionalism and the Separation of Powers*, Oxford 1967, p. 36. (LOCKE: "There can be one supreme power, which is the legislative, to which all the rest are and must be subordinated", "for what can give laws to another, must need be superior to it", Chap. XIII, p. 149-150).

which, *supremacy,* as we have mentioned, is the most characteristic feature of English public law, compared to continental systems.

This theory of the division of power, that had such a great influence on modern constitutionalism, mainly because of its conversion from the "division of power" to the "separation of power" both in the French Revolution and in the American and Latin-American Revolutions, had its fundamental formulation in Montesquieu's equally well known work.

According to Montesquieu, political liberty only existed in those states in which the power of the state, together with all corresponding functions, was not in the hands of the same person or the same body of magistrates.[241] That is why, in his famous work *De 1'Esprit des Lois*, he insisted that "it is an eternal experience that any man who is given power tends to abuse it; he does so until he encounters limits... In order to avoid the abuse of power, steps must be taken for power to limit power."[242]

From his comparative study of the various states existing at the time (1748), Montesquieu reached the conclusion that England was the only state whose direct aim was political liberty. That is why, in the well-known Chapter VI of Volume XI of his book, he undertook to study the "constitution of England", and from that study, he formulated his theory of the division of power into three categories:

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241 A PASSERIN D'ENTRÈVES, The Notion of the State. An introduction to Political Theory, Oxford 1967, p. 120.

242 MONTESQUIEU, *De l'Esprit des Lois* (ed. G. Truc), Paris 1949, Vol. I, Book XI, Chap. IV, p. 162–163.

> "Legislative power, power to execute things which depend on international law, and power to execute things which depend on civil law in the first case, the prince or magistrate makes laws for a period of time or forever. In the second case, he makes peace or war, sends, or receives ambassadors, establishes security, takes measures against invasion. In the third case, he punishes crimes, or settles disputes between individuals.
>
> The latter we shall call the power to judge, and the other simply the executive power of the state."[243]

Following Locke's example, Montesquieu defined various state functions or faculties, rather than division of power: the function of making laws, that of judging and that of executing laws, the latter encompassing what Locke called executive and federative power.

However, the novelty of Montesquieu's division of power, and what distinguishes it from Locke's approach, is, on the one hand, his proposal that to guarantee liberty, the three functions must not be in the same hands. On the other hand, that in the division of power, they were to *be* on an equal footing, otherwise power could not curb power. In the same Chapter VI of Volume XI of De 1'Esprit des Lois, Montesquieu expressed the following opinion:

> "When legislative power and executive power are in the hands of the same person or the same magistrates' body, there is no liberty... Neither is there any liberty if the power to judge is not separate from the legislative and executive powers... All would be lost if the same man, or the same body of princes, or noblemen or people exercised these three powers: that of

[243] *Idem*, Vol. I, pp. 163-164.

> making the laws, that of executing public resolutions and that of judging the wishes or disputes of individuals."[244]

As a result of all this, Montesquieu stated:

> "Those princes who wanted to become despots always began by taking possession of all the magistracies."[245]

Underlying this conception, there was also the concept of liberty, seen from the same standpoint as Locke. Montesquieu even said, in terms very similar to those used by Locke:

> "It is true that in democracies the people seem to do what they want; but political liberty does not consist of doing what one wants. In a state, that is to say, in a society in which laws exist, liberty can only consist of being able to do what one should want to do, and not being obliged to do what one should not want to do."[246]

However, in contrast to what existed according to the English constitution which he *was then* analyzing, Montesquieu's concept involved no proposal whatsoever that any public authority should have priority over another. It is true that by defining the legislative authority as the "general will of the state" and the executive authority as

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244 *Idem*, Vol. I, p. 164. In the same Chap. VI, Book XI MONTESQUIEU added that "Were (the judiciary power) joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would, be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." *Cf.* Ch. H. MCILWAIN, *The High Court of Parliament and its Supremacy*, Yale 1910, pp. 322-323.

245 *Idem*, Vol. I, p. 165.

246 *Idem*, Vol. I, Book XI, Chap. III, p. 162.

the "execution of that general will,"[247] it could be inferred that the latter, as far as the execution itself was concerned, was to submit to the will of the former, but not, of course, in the sense of political subordination.

On the contrary, he conceived the three authorities as being so equal that they could act as a mutual restraint, as the only possible form of co-operation for the maintenance of political liberty. That is why Montesquieu concluded with his famous proposal:

> "These three powers should constitute a rest, or inaction. But since, as all things, they must necessarily move, they will be forced to move in concert."[248]

It is clear, in any case, that Montesquieu's concept, like Locke's theory, was devised for Absolutism. Both were theoreticians of absolutism. That is why their concepts of the division of the sovereign's power were a legal doctrine rather than a political postulate. In other words, the theory does not answer the question about who is to exercise sovereignty, but how power should be organized to achieve certain objectives.[249]

Furthermore, in addition to Locke's and Montesquieu's contributions to the definition of the limitation of power, in the political theory, which led to continental reaction against the Absolute state, and the appearance of the *État de droit* or Rule of Law**,** Rousseau's concept of law occupies a place of paramount importance. This concept subsequently led to the postulate of the submission of the state to the Law, which is of its own making. It gave rise to the principle of legality and consolidation of the *État de droit* itself.

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247 *Idem*, Vol. I, p. 166.

248 *Idem*, Vol. I, p. 172.

249 A. PASSERIN D'ENTREVES, *op. cit.*, p. 121.

In effect, as Rousseau himself said, the social pact or contract is the solution to the problem of finding a form of association:

> "Which defends and protects, with the whole common force, the person and goods of each member of the association, and in which each person, united with all, nevertheless obeys only himself and remains as free as before."[250]

Thus, he said, "the transition is made from the natural to the civil state."[251] However, as Rousseau himself pointed out,

> "Through the social pact we have given birth to the political body; we must now endow it with movement and a will, through legislation."[252]

Thus, – and this was the novelty of his proposal – it is the law, as a manifestation of the sovereign state resulting from the social pact, which sets the state in motion and provides it with the necessary will, since it is a question of "acts resulting from the general will and dealing with a general issue." Hence, Rousseau not only built up the theory of the law as an "act of the general will", to which the conduct of the state itself and that of private individuals must be subjected, but he also established the principle of the generality of the law, which was to subsequently lead to the reaction against privileges, which is another basic element of the *État de droit.*[253]

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250 J.J. ROUSSEAU, *Du Contrat Social* (ed. Ronald Grimsley), Oxford 1972, Book I, Chap. IV, p. 114.

251 *Idem*, Book I, Chap. VIII, p. 119.

252 *Idem,* Book II, Chap V, p. 134

253 *Idem*, Book II, Chap, V, p. 136.

However, Rousseau limited state functions to two: the making of laws and their execution, to which he applied the same terminology as Montesquieu: legislative power and executive power.[254] Nevertheless, it is not a question here of a doctrine of separation of powers, but, along the same lines as Locke and Montesquieu, of a doctrine on the division of one single power, that of the sovereign, resulting from the social pact or from the integration of the general will.[255]

Neither was Rousseau in favor of placing the two functions of power – the expression of the general will by means of laws and the execution of those laws – in the same hands. Therefore, adopting the same approach as Montesquieu, he also recommended that different bodies exercise them, although, unlike Montesquieu, he insisted on the need for the subordination of the body executing the law to the body making it.

This**,** in Locke's approach and in the English system, was to ensure the subsequent supremacy of the legislation and the law, developed later in Europe. Furthermore, the supremacy of the law was to be the cornerstone of public law within the framework of the Rule of Law in Europe, allowing the development of the principle of legality, particularly with regard to government.

In this respect, Rousseau agreed with Montesquieu. Rousseau in fact stated, "Therefore, we understand a Republic to be any state which is governed by laws."[256] Montesquieu, for his part, defined the "state" as "a Society in which laws exist."[257]

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254 *Idem*, Book III, Chap, I, p. 153.

255 R. GRIMSLEY, "Introduction", in ROUSSEAU, *op. cit*, p. 35.

256 *Idem*, Book III, Chap. VI.

257 MONTESQUIEU, *op. cit*., Book XI, Chap. III, p. 162.

Which is also a declaration of the fact that the existence of laws was a fundamental requisite for the existence of the state.

2. *The effects of the American and French Revolutions*

It can generally be said that the writings of Locke, Montesquieu and Rousseau made up the entire theoretical and political arsenal for the reaction against the absolute state and its replacement by the state according to law, based on the separation of powers, as a guarantee of liberty. That reaction was to occur in Continental Europe, with the French Revolution (1789), and in North America, with the Independence (1776), based on the exaltation of individualism and liberty.

In effect, all the political theories previously mentioned were based on the analysis of man's natural situation and the achievement of the social pact or contract that established a sovereign as a mechanism for the protection of liberty. This was the basis for the subsequent exaltation of individualism and the political enshrinement of rights, not only of the citizens of a particular state, but also those of man, with the consequent construction of political and economic liberalism.

It was also deemed necessary for the power of the state, as a product of the social pact, to be divided and rationalized in order to prevent its abuse by the sovereign. For this reason, the Universal Declaration of the Rights of Man and Citizen of 1789 was precise in proclaiming that "*in any society in which freedoms are not duly guaranteed and the separation of powers is not determined, there is no Constitution*." To that end, state functions were systemized and power was divided, thereby paving the way for the adoption of a different and more radical formula: that of the "separation of powers", as a *guarantee* of liberty.

As Madison pointed out at the beginning of American constitutionalism:

> "The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of Tyranny."[258]

That is why the principle of the separation of powers was one of the essential elements of the American constitution. For example, the Constitution of Massachusetts (1780) contained categorical expressions:

> "In the government of this Commonwealth, the legislative department shall not exercise the executive and judicial powers, or either one of them: The executive shall never exercise the legislative and judicial powers, or either one of them:
>
> The judicial shall never exercise the legislative and executive powers, or either one of them: to the end it may be a government of laws not of men."[259]

Moreover, the sovereign's power was considered to be updated by the production of laws, which were believed to be not only indispensable for the existence of the state

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[258] See J. MADISON, *The Federalist* (ed. B.F. Wright), Cambridge, Mass 1961, Nº 47, p. 336.

[259] Art. XXX. *Massachusetts General Law Annotated*, St. Paul, Minn. Vol. 1-A, p. 582. In 1776, the constitution of Virginia also had a declaration on separation of powers, considered as "The most precise statement of the doctrine which had at that time appeared." M.J.C. VILE, *Constitutionalism and the Separation of Powers*, *cit*., p. 118. Article III of that constitution stated: "The Legislative, Executive and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others; nor shall any person exercise the powers of more than one of them at the same time, except that the Justice of the County Courts shall be eligible to either House of Assembly."

itself, but also a guarantee of civil and political liberty. And the legislative function occupied a superior position to that of the other executive functions.

Consequently, in this concept arising out of the French Revolution, all acts, both of the Sovereign and of private individuals, were subjected to the law, understood to be an act of the general will. This gave rise to the principle of legality.

The Rule of Law and liberalism are, therefore, based on the concepts of liberty, separation of powers, supremacy of the law and the principle of legality. As a result, the essence of the Rule of Law from the beginning, in contrast to the absolute state, lies in the principle of the submission of the state and its administration to legality, which is to say, the necessary regulation of the state by the law, which must set limits on power.

However, such submission was not always guaranteed in European countries and in all those, which adopted the *État de droit* model. At the beginning, for example, the separation of powers in France presented the non-interference of one power with another in such a fashion that the judicial power could not guarantee individuals that government would be submitted to legality. Proof of this was the famous Law of Judiciary Organization of 16-24th of August 1790, which specified:

> "Judiciary functions are and shall always be separate from administrative functions. Any interference by judges in the activities of the administrative bodies, or any summons issued to the administrators by the said judges, for reasons relating to their functions, shall constitute a breach of duty."[260]

[260] J. RIVERO, *Droit Administratif*, Paris 1973, p. 129; J.M. AUBY et R. DRAGO, *Traité de contentieux administratif*, Paris 1984, Vol. I, p. 379.

Subsequently, the Law of 16 *Fructidor* of the year III (1795) ratified that:

> "The Courts are forbidden, under penalty of law, to take cognizance of administrative acts, whatever their nature."[261]

As a result, the evolution of administrative jurisdiction in France, as a jurisdiction separate from the judicial order for judging the government itself, constituted an extreme form of separation of powers. If the government or administrators were to be judged, a special jurisdiction, different and separate from the judicial power, had to be set up, and that developed through a lengthy process that eventually led to the establishment of the *Conseil d'Etat*.

On the other hand, in the concept of Parliament and the law resulting from the French Revolution, any kind of control over the constitutionality of the laws in continental Europe was inconceivable, and this continued to be the case up to the beginning of the present century. As we will see, there is still no system of direct control over the constitutionality of the laws in France, and it was only in the post-war periods, the twenties, and later in the forties, that a system of this kind was developed in other European countries, although it is still inconceivable in the British legal system.

As for the evolution of the principle of separation of powers in North America, in the U.S. Constitution of 1787, and previously in the various Constitutions of the former colonies, the principle was first formally expressed by advocating the limitation of political power. Thus, the first of those constitutions, that of Virginia in 1776, stated (Art. III):

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261 J. RIVERO, *op. cit*., p. 129.

> "The Legislative, Executive and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time..."

As stated, the American Constitution of 1787 does not have a rule similar to this one in its articles, but its main objective was precisely to organize the form of government within the principle of separation of powers, in accordance with a system of checks and balances. Accordingly, all legislative powers are vested in Congress; the Executive power is vested in the President; and the Judicial power of the United States is vested in the Supreme Court.[262]

The rigidity of the separation of powers is also evident in the fact that the executive Cabinet is completely independent from Congress, with which it maintains no formal communication.[263]

Therefore, in particular, the U.S. Cons-titution regulated the powers of the Executive in what was a new form of government, presidentialism, as opposed to parliamentarism, and a particular configuration of the Judiciary, never before known in constitutional practice.

Alexis de Tocqueville referred, in his book, *Democracy in America* to these two aspects of the principle.

Regarding the executive power, he immediately pointed out that in the United States, "maintenance of the republican form of government required that the representative of the executive power should be subject to the na-

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262 Arts. 1,1; 2,1; and 3,1.

263 M. GARCÍA-PELAYO, *Derecho Constitucional Comparado*, Madrid 1957, p. 350.

tional will"; thus, "the president is an elective magistrate... the one and only representative of the executive power of the nation."[264]

But, he noted, "in exercising that power he is not completely independent."[265]

That was one of the consequences of the check and balance system of separation of powers adopted in the United States, but without making the executive dependent on parliament, as in parliamentary systems of government. That is why when comparing the European parliamentary system with the presidential system of the United States, de Tocqueville referred to the important part played by the executive power in America in contrast with the situation of a constitutional king in Europe.

A constitutional king, he observed, "cannot govern when opinion in the legislative chambers is not in accord with his."[266] In the presidential system, he said, conversely, the sincere aid of Congress to the president "is no doubt useful, but it is not necessary in order that the government should function."[267]

The separation of powers and the presidential system of government eventually followed in all Latin American republics after the Independence or after the monarchical experience that a few countries had.

In any case, throughout the nineteenth and twentieth centuries, the evolution of the principle of the separation of powers and the primacy of the legislator has shown a

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264 See Alexis DE TOCQUEVILLE, *Democracy in America* (ed. by J.P. MAYER and M. LERNER), The Fontana Library, London 1968, Vol. 1, p. 148.

265 *Idem*, p. 149.

266 *Ibid*, p. 155.

267 *Ibid*, p. 156.

growing trend, both towards the submission of the state and all its bodies to the law and to legality, and towards the establishment of judicial controls to that end, either by means of special tribunals separate from the judicial power, or by the use of the courts of the judiciary itself. This submission and control contributed, *inter alia*, to the very birth of administrative law in Europe and even in England, as an autonomous branch of the legal sciences as at the end of the XIX century.

The struggle for the submission of government to legality is an irreversible victory of the Rule of Law and has been implanted throughout the world nowadays.

The characteristics of the separation of powers naturally vary from one country to another and its original justification as a guarantee of liberty has been forgotten. In many cases, it has been used for purposes never originally envisaged. In England, for example, the separation of powers was maintained, but for the purposes of the supremacy of Parliament over the various state bodies, that is to say, to subject the courts and tribunals to Parliament, and even to allow the courts the possibility of controlling the administrative authorities.

The same doctrine also prevailed in the United States of North America, but for the purpose of clearly separating the executive and legislative functions, and enabling the Supreme Court to even declare acts of Congress invalid, whereas in France, the principle was used to make the legislative power supreme, but taking the separation to the extreme of preventing ordinary courts from controlling the

legality of administrative acts, and eliminating any possibility of controlling the constitutionality of the legislator's acts.[268]

The North American constitution can indeed be considered a classical example of the division of powers, although it contains no precept especially designed for that division. The principle is, however, patent in several rules stipulating, for example, that all legislative powers are entrusted to Congress; that executive power is granted to the president; and that the judicial power of the United States is in the hands of the Supreme Court.[269] The rigidity of the division of powers is also evidenced by the fact that the Cabinet is absolutely independent from Congress, with which it has no formal communication.[270]

However, the principle has undergone several changes, due to the constitution itself, to judicial interpretation, and to constitutional practice. In the first place, there is, together with the principle of the separation of powers, a system of checks and balances whereby the Executive has some participation in the legislative power by veto and the annual address to Congress, and in judicial power through the prerogative to pardon. Regarding the executive's right to appoint officers and ratify treaties, this requires the consent of the legislator, who also performs judicial functions in cases of impeachment, and is responsible, within the limits of the constitution, for the organization of the judicial power.

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268 See I. JENNINGS, *The Law and the Constitution*, London 1972, p. 25-28.

269 Arts. 1,1; 2,1 and 3,1.

270 M. GARCÍA-PELAYO, *Derecho Constitucional Comparado*, Madrid 1957, p. 350.

Finally, the courts are authorized to establish their rules of procedure, which is undoubtedly a legislative function, and they developed the power to control even the actions of Congress itself.[271]

3. *The Sovereignty of Parliament*

However, in the concept of the separation of powers as a system of distributing power in such way that power curbs power, the English system was at variance.

Despite Montesquieu and all the literature produced in the eighteenth century with reference to England, as a living example of the separation of powers, the fact is that such separation has never been a reality and the situation at that time was, and has always been, that of the *heureux mélange* – the successful mixture – to which Voltaire referred.[272]

Nevertheless, British constitutional history shows a series of groups and institutions contending the domination and participation in state power. This has brought about the phenomenon of a balance of powers, which has constantly given rise to a system of restriction and counter–restriction, although, in the United Kingdom, one power has always prevailed over the others. In general, the predominant power has been that of Parliament, but in fact, the predominant power has been that of the government, due to its control over the House of Commons and to the practice of delegated legislation.

In this sense, Philip Allott, in an article published a few years ago in the Cambridge Law Journal, stated:

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271 *Idem*, p. 350 and 351. In general, A and S. TUNC, *Le système constitutionnel des États-Unis d'Amérique*, 2 vols. Paris 1954.

272 Quoted by M. GARCÍA-PELAYO, *op. cit.*, p. 283. *Cf.* G. MARSHALL, *Constitutional Theory*, Oxford 1971, p. 97.

> "The Executive has acquired an overall position of dominance, extending its authority in all three of the functional branches of Government – legislative, executive and judicial –. Above all, it has acquired a practical control over the House of Commons in Parliament, from which it has virtually excluded the House of Lords as a countervailing power."[273]

This fact has been pointed out by almost all the constitutional lawyers of the United Kingdom[274] and that is why Wade and Phillips in their book on constitutional and Administrative Law pointed out that "In absence of a written constitution, there is no formal separation of power in the United Kingdom."[275] And particularly between the legislative and the executive power; that the practical needs of the parliamentary government have obliged Parliament to trust governmental policy and accept the cabinet's wishes as far as the legislative program is concerned, but retaining the right to amend, criticize, question and, ultimately, to

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273 P. ALLOTT, *loc. cit*., p. 115.

274 For example, T.R.S. ALLAN has pointed out that "the political consequence of the legal arrangement (that perceives the constitution as a legal order subject to, and dominated by, an unrestrained and all-powerful sovereign: the Parliament) is the overwhelming authority of a government with a majority of seats in the House of Commons," and that "It is this concentration of power which is seen as a threat to fundamental rights and liberties; constitutional restraints are therefore needed to protect such rights from irresponsible legislative encroachment; the need is to counteract the "helplessness of the law in face of the legislative sovereignty of Parliament" (Sir Leslie Scarman), in "Legislative Supremacy and the rule of Law: Democracy and constitutionalism", the *Cambridge Law Journal*, Vol. 44, (1), 1985, pp. 111-112.

275 E.C.S. WADE and G. GODFREY PHILLIPS, *Constitutional and Administrative Law*, (9th ed. by A.W. BRADLEY), London 1985, p. 53.

annul, and also that practical needs have demanded considerable delegation of the power of rule regulation to the executive.[276]

4. *Separation of powers in the Hispanic American Revolution*

The principle of the separation of powers, in contrast to the English tradition, marked the constitutional process in Spain and Hispanic America from its beginning in the constitutional changes that took place in 1810, in Spain with the covenant of the Cortes and in the Provinces of Venezuela with the revolution of independence.

This was evidenced since the installation of the *Cortes* in Cadiz in September 1810, when deciding that it was to assume only the Legislative Power, assigning the Executive Power to the Council of Regency. Subsequently, the Monarchical Constitution of Spain sanctioned in March 1812, of course also followed the principle of separation of powers by providing that the power to make laws is in the *Cortes* with the King (art. 15); the power to execute the laws is in the King (art. 16), and the power to apply the laws in civil and criminal causes is in the courts established by law (art. 17).[277]

It was also evidenced in the same motivation that the Supreme *Junta* of Caracas, constituted on April 19, 1810, had when calling, in June of that year, the elections of the Deputies to the General Congress of Deputies of the Provinces in order to "establish a very clear and pronounced separation between the executive branch and the dispositive power or provisional source of the law."

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276 *Idem*, p. 49, 564.

277 See Maria Luisa BALAGUER CALLEJÓN, "La división de poderes en la Constitución de Cádiz," in *Revista de derecho político,* Universidad Nacional a Distancia, No. 83, 2012, pp. 19 ff.

Thus, upon the installation of the elected Congress that replaced the Supreme Board assuming the Legislative Power, it adopted the principle of the separation of powers to organize the new government, appointing, on March 5, 1811, three citizens to exercise the National Executive Power, taking turns in the presidency for weekly periods, and also constituting a High Court of Justice for the exercise of the Judicial Power.

The Federal Constitution of December 21, 1811, of course, also had among its fundamental pillars the organization of the State according to the principle of the separation of powers, for which in its very "Preliminary" it stated that:

> "The exercise of this authority entrusted to the Confederation can never be united in its various functions. The Supreme Power must be divided into Legislative, Executive and Judicial, and entrusted to different Bodies independent of each other and in their respective faculties."

In addition, article 189 insisted that:

> "The three essential Departments of the Government, namely, the Legislative, the Executive and the Judicial, must be kept as separate and independent of each other as the nature of a free government requires, and this is appropriate to the chain of connection which binds the whole fabric of the Constitution in an indissoluble mode of Friendship and Union."

The principle of the separation of powers, marked in the initial Constitution by a certain weakness due to the collegiate configuration of the Executive Power, precisely to avoid the formation of a strong power, could have con-

tributed to the fall of the First Republic,[278] but without doubt conditioned the constitutional evolution of Hispanic America, always searching for a balance between the branches of government.

The principle, of course, was in turn based on the principle of constitutional supremacy, even formally incorporated in the Federal Constitution of Venezuela of 1811, with its objective guarantee by proclaiming the nullity and invalidity of state acts contrary to the Constitution. From this principle derived, progressively, the system of judicial review of the constitutionality of these systems of distribution of power, which even led to the formal establishment of a system of concentrated judicial review of the laws, since 1858.[279]

5. *The distribution of power within the State as guarantee of liberty*

The idea of the state according to law with or without parliamentary sovereignty is based on the concept of the limitation and distribution of power, which may be observed in three aspects.

In the first place, it can be observed in a distribution of power between the state itself, on the one hand, and individuals or citizens on the other, in the sense that a sphere of liberty is established for individuals and citizens, even as a fact existing prior to the state.

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278 *Cfr.* C. PARRA PÉREZ, *Historia de la Primera República de Venezuela,* Caracas, 1959, Tomo II, pp. 7 and 3 ff.; Augusto MIJARES, "La Evolución Política de Venezuela" (1810-1960)", in M. PICÓN SALAS et al., *Venezuela Independiente, cit.,* Caracas 1962, p. 31.

279 Allan R. BREWER-CARÍAS, *El control jurisdiccional de la constitucionalidad de las leyes,* Caracas 1978.

This implies limitations to state powers, in the sense that the faculty of the state to invade the sphere of fundamental rights is, in principle, limited.

This is true, in a certain way even in the United Kingdom with Parliamentary supremacy, the absence of an entrenched Bill of Rights and the unthinkable judicial review of legislation. As Winterton pointed out:

> "For centuries, and certainly at the time of the 1688 Revolution, the concept of practically "inalienable" personal liberties has been a very strong feature of the British constitution: it is implicit in the British concept of the Rule of Law and has led to the doctrine of natural justice in administrative law, as well as the rules for interpreting statutes so as not to threaten individual liberty."[280]

The second aspect of the distribution of power under the Rule of Law relates to its organization by means of a principle of distribution of power between constituent and constituted power. The constituent power belongs and corresponds to the sovereign people and is reflected in a constitution, wherefore a constituent act can only be taken by the latter in accordance with the provisions of the constitution itself. Thus, the bodies of the constituted power cannot invade the activities which correspond to the constituent power established in the constitution, and that is why all invasions of those activities invalidate the acts so taken.

Third and last, this principle of the distribution of power under the Rule of Law also refers to the organization of state power itself in the sphere of constituted power, by means of a system of division of power consisting of a series of attributions to the different state bodies.

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[280] G. WINTERTON, *loc. cit*., p. 599.

This principle of organization or distribution of power has two connotations: in the first place, the classical horizontal division or separation of powers, that distinguishes the various branches of public power in a nation, between the legislative, the executive (government and administration) and the judicial bodies. The aim of this division and distinction is to establish reciprocal restrictions and controls between the various state powers, and they are normally established in the constitution.

In addition to this, there is a second, vertical connotation that seeks a distribution of state power among its different territorial levels, resulting, for example, in the Federal state or politically decentralized forms of state. In these, the different territorial levels (national, federate states or regions and municipalities) exercise part of the public power, also within a system of distribution of jurisdictions established by the constitution.

These three forms of distribution and limitation of state powers bring in constitutional matters, and necessarily lead, when adopted by a state, to a system of judicial review to control the illegitimate invasions or interferences of one of such powers in the sphere reserved to the other. That exists, more or less, in the constitutional system of the Western World today, because these countries have written rigid constitutions with a formal declaration of fundamental rights and have either a federal organization or other systems of political decentralization.

In the constitutional system of the United Kingdom there is, on the contrary, no entrenched Bill of Rights, though the judicial protection of fundamental rights cannot imply the invalidation of acts of Parliament. No distinction is made between constituent and constituted powers due to the absence of a written constitution and the principle of sovereignty and supremacy of Parliament, though there is no control over the constitutionality of Parliamentary acts. Finally, the constitutional system is unitarian, with

no power distributed in territorial units that could restrain the powers of Parliament, though there is no control of constitutionality of the vertical distribution of power.

In the case of the Constitutional Revolution in Hispanic America, however, the important thing to note is that, from its beginnings, it was based on the principle of the limitation of power as a guarantee of freedom, expressed both in the horizontal distribution of power among the various organs of the State (Legislative, Executive and Judicial), and in the vertical distribution of power among the various territorial levels (Provinces or States and Municipalities).

Therefore, in Venezuela, for example, in the last of the aforementioned aspects of distribution of power, its distribution in the territory divided into Provinces was framed since 1811 within the federal form of the State, having been a constant in the constitutionalism, later consolidated since 1864. And although this form of political decentralization was only followed in a few other Latin American countries (Argentina, Brazil, Mexico), municipalism took root in all countries, starting with the provincial Constitution of Caracas of January 1812, in Venezuela,[281] and was even configured as a "municipal power," as enshrined in the Venezuelan Constitution of 1858.

6. *Democracy and the citizens' right to separation of powers*

However, in the contemporary world, the principle of separation of powers, one of the essential pillars of the Rule of Law, can also be considered one of the essential elements of democracy.

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281 See Allan R. BREWER-CARÍAS, *La Constitución de la Provincia de Caracas de 31 de enero de 1812*., Academia de Ciencias Políticas y Sociales, Colección Estudios No. 100, Caracas 2011.

This, in fact, is not only reduced to elections and electoral contests, but is a political system of interrelation and global alliance between the governed, who elect, and the elected rulers, which must be prepared to guarantee, on the one hand, first, that the representatives are elected by the people, and that they can govern by representing them; second, that the citizen, in addition, can have effective political participation not limited to the periodic election alone; third, above all, a system in which the human being, his dignity, rights and freedoms are paramount; fourth, that the exercise of power be subject to effective control, so that rulers and public officials are controlled, accountable and can be held responsible; and fifth, as a condition for all these guarantees, that the organization of the State be truly structured according to a system of separation of powers, with the essential guarantee of their independence and autonomy, particularly of the judiciary.[282]

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[282] See Allan R. BREWER-CARÍAS, "Los problemas del control del poder y el autoritarismo en Venezuela", in Peter HÄBERLE and Diego GARCÍA BELAÚNDE (coordinadores), *El control del poder. Homenaje a Diego Valadés,* Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, tomo I, México, 2011, pp. 159-188; "Sobre los elementos de la democracia como régimen político: representación y control del poder", in *Revista Jurídica Digital IUREced*, Edición 01, Trimestre 1, 2010-2011, in http://www.mega upload.com/?d=ZN9Y2W1R; "Democracia: sus elementos y componentes esenciales y el control del poder", in *Grandes temas para un observatorio electoral ciudadano,* tomo I*„ Democracia: retos y fundamentos*, *(compiladora Nuria González Martín),* Instituto Electoral del Distrito Federal, México 2007, pp. 171-220; "Los problemas de la gobernabilidad democrática en Venezuela: el autoritarismo constitucional y la concentración y centralización del poder", in Diego VALADÉS (coord.), *Gobernabilidad y constitucionalismo en América Latina*, Universidad Nacional Autónoma de México, México, 2005, pp. 73-96.

The Inter-American Democratic Charter of 2001, which, as mentioned, is perhaps one of the most important international instruments of the contemporary world, is absolutely precise in this regard in listing among the essential elements of democracy, precisely "the separation and independence of the branches of government" (art. 3). This means that all the other essential elements and components of democracy listed in the same Charter (Arts. 3, 4), depend on it, because, ultimately, only by controlling power can there be free and fair elections, as well as effective representation; only by controlling power can there be political pluralism; only by controlling power can there be effective democratic participation in the management of public affairs; only by controlling power can there be administrative transparency in the exercise of government, as well as accountability on the part of those in power; only by controlling power can there be a government subject to the Constitution and the laws, that is, the rule of law and the guarantee of the principle of legality; only by controlling power can there be effective access to justice so that it can function with effective autonomy and independence; and finally, only by controlling power can there be a real and effective guarantee of respect for human rights.

It follows, therefore, that only when there is a system of effective control of power can there be democracy, and only in this system can citizens find their rights duly balanced with the Public Powers.

7. *Separation of powers and systems of government*

From the implementation of the principle of separation of powers in modern constitutionalism with the development of the rule of law, forms of government emerged, mainly the presidential system and the parliamentary system, as a product of the type of relations established between the government and Parliament, that is, between the

bodies exercising the Executive and the Legislative powers,[283] having rooted the parliamentary system mainly in Europe, and the presidential system mainly in the Americas.

The difference between them derives fundamentally from the source of democratic legitimacy of the holders of the organs of government, that is, who has the power to institute or elect them and eventually to dismiss, remove or revoke them; and furthermore, it derives from the respective functions of such organs, in relation to the government.

In parliamentary systems, in fact, the government emanates from or derives from Parliament and depends on its confidence. That is to say, the body that ultimately governs is the parliament, through officials who are generally members thereof (Head of Government, Prime Minister, Ministers) who have its backing, and whose appointment to lead the government does not entail the loss of parliamentary investiture. In parliamentary systems, therefore, a distinction is made between the Head of State and the Head of Government, the latter being dependent on Parliament; to the point that it can be said that the differentiation between them in modern constitutionalism arose with parliamentary systems.[284]

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283 It is evident, as Diego VALADÉS has said referring to Latin American presidentialism, that for an adequate understanding of contemporary systems of government "it is essential to delve into the roots of power in the States that emerged to freedom at the beginning of the nineteen century." Diego VALADÉS, "El presidencialismo latinoamericano en el siglo XIX", in *Revista parlamentaria de habla hispana*, Nº 2, 1986, p. 49

284 See Diego VALADÉS, *El gobierno de gabinete,* Instituto de investigaciones Jurídicas, UNAM, México 2003, p. 5

Therefore, in parliamentary systems, the Parliament, in general, is the only body elected by popular vote, so that the government emanates from it and is accountable to it for its actions. In these cases, the Head of Government does not have its own direct democratic legitimacy, but that which emanates from Parliament, and the Head of State, on the other hand, may be a Monarch or an elected President, but they do not govern.

That is to say, although in some cases of parliamentary systems there may be an elected President, he only acts as Head of State; of course, with some exceptions in the semi presidential systems like the French one regulated in the 1958 Constitution. Therefore, as long as the President does not have the functions of government, that is, as long as he does not lead the government with powers of initiative and political guidance, despite the presidential election, the system will remain parliamentary, in which case, the government will remain dependent on Parliament and the parliamentary majority.

Ultimately, in parliamentary systems, the government emanates from the parliament that holds the popular representation, so that the head of government is not directly elected by the people. The parliament, therefore, is the preeminent organ on which the legitimacy of the government depends.

Presidential systems of government, on the other hand, exist when the Head of Government (who is also, at the same time, Head of State) is elected directly and periodically by the citizens by universal suffrage. Therefore, the mere election of a President by universal suffrage is not sufficient to qualify the system of government as presidential, and it is required that he be a Head of Government. In short, what is essential is the democratic legitimacy of the Head of Government, which in the case of presidential systems does not derive from Parliament, a body that, moreover, cannot delegitimize him.

These forms of government, however, have been modified and molded according to the realities of each country, so that it can be said that at present there are no pure presidential or parliamentary systems.

Many historical parliamentarisms have become presidentialized, as happened in France with the so-called "semi-presidential" system of the 1958 Constitution. In this case, as aforementioned, there is a directly elected President of the Republic as well as the *Assamblée Nationale*, with the government having a double dependence on the *Assamblée* and the elected President; and furthermore, the importance and role of the Head of State is greater in terms of the possibility of influencing the government. Therefore, although the system is called a semi-presidential system, it falls within the presidential systems. Therefore, in these cases, if the President does not enjoy the support of the parliamentary majority, he has to "cohabit" with a prime minister and cabinet of another political tendency.

In contrast, in the case of presidential systems in Latin America, given their political effects due to the traditional predominance of the Heads of State and government,[285] elements of parliamentarism have been successively incorporated in the different countries, forming attenuated presidential systems or with parliamentary subjection.[286]

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285 See, in general, Manuel BARQUÍN et al, *El predominio del poder ejecutivo en Latinoamérica*, UNAM, México 1977; and Juan J. LINZ, "Los peligros del presidencialismo" in Juan LINZ et al, *Reformas al presidencialismo en América Latina: ¿Presidencialismo vs. Parlamentarismo?,* Comisión Andina de Juristas/Editorial Jurídica Venezolana, Caracas 1993.

286 See Dieter NHOLEN, "Sistemas de gobierno. Perspectivas conceptuales y comparativas" in Juan LINZ et al, *Reformas al presidencialismo en América Latina: ¿Presidencialismo vs. Parlamentarismo?,* Comisión Andina de Juristas/Editorial Jurídica Venezolana, Caracas 1993, pp. 78 ff.

Thus, changes in systems have occurred more in presidential systems than in parliamentary ones, the former being the most criticized by European democratic theory. A summary of this criticism, for example, is reflected in the comments of Michelangelo Bovero in relation to the constitutional reform project that a few years ago was proposed in Italy in relation to the transition from a parliamentary system to a presidential system, refuting it with the following three drastic formulas:

a. Presidentialism is the *oldest* institutional form of modern democracy, which is precisely why it is a rudimentary form of democracy.
b. The presidential form of government is the *least democratic* of those that modern democracy can assume, because in it a monocratic power, to a greater or lesser extent discretionary, tends to prevail over the collegial power of the pluralistic Assemblies (the parliament), which are entrusted with the political representation of the citizens.
c. The only truly *democratic* reform of presidentialism can only be its *abolition* (drastic or gradual, as circumstances may allow or require).[287]

The central theme of the discussion and criticism of the systems of government, and the choice between one or the other system, has been conditioned by the issue of its democratic legitimacy, whether of a multitude of representatives or of a single representative. Undoubtedly, in the presidential system, the power of government is entrusted to a single body, which is democratically elected,

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287 See Michelangelo BOVERO, "Sobre el presidencialismo y otras malas ideas. Reflexiones a partir de la experiencia italiana," in Miguel CARBONELL et al (Coordinadores), *Estrategias y propuestas para la reforma del Estado*, UNAM, México 2001, pp. 18-19.

for a certain fixed period (which in some cases can be very long), with no possibility of change until the next presidential election. In this case, undoubtedly, it is sometimes difficult to combine the role of Head of State, which should belong to all the citizens, with that of Head of a government, which may belong to a party or to the parliamentary majority.

Therefore, the government in the hands of a single elected body can give rise to a crisis of democratic legitimacy, which in the presidential system can only be solved through exceptional political mechanisms, such as the recall referendum or impeachment, which, at the same time, are too slow, complex and traumatic. On the other hand, the direct relationship of the President with the electorate can give rise to a leader-people relationship that can turn the regime into a plebiscitary and populist one.

Therefore, another aspect that influences the functioning of the presidential system is the method of presidential election: absolute majority -two rounds- or relative majority. Two-round systems, which are sometimes advocated to ensure greater democratic representativeness and legitimacy, in contrast, can give rise to insurmountable conflicts and tensions between the legislative and executive bodies. For this reason, it has sometimes been considered that the double round, instead of resolving conflicts, may exacerbate the authoritarian pretensions of the elected President, who may believe that he has a real majority.[288] In presidential systems, a factor of effective governance derives from the political majority that the President may have in the parliament, either because of the absolute majority that his party may have or because of the agreements between parties to ensure such governance.

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[288] Diego VALADÉS, El gobierno de gabinete, *op. cit*., p. 12.

In presidential systems, on the other hand, the relationship between the President of the Republic and the Parliament in the exercise of their own functions has given rise to a series of constitutional interferences for the purpose of mitigating the separation of powers, converting it into cooperation or collaboration. For example, the President may veto legislation emanating from the Parliament; and the Parliament must approve the decrees of state of exception emanating from the Executive. The draft Budget Law can only be a presidential initiative and the Parliament is limited in its powers to modify the draft of such law.

On the other hand, although in the presidential system the government does not depend on Parliament, the legislative controls that have been incorporated into the Constitutions have progressively led Parliament to co-participate in the functions of government, as it is constitutionally empowered, for example, to authorize or approve some executive decisions.[289]

In another sense, the normative function of the State has ceased to be an exclusively parliamentary task, admitting not only the development of the regulatory power of the President of the Republic, but also the power to issue decrees with the rank and value of law, even by delegation of the parliament.

On the other hand, in presidential systems, the President appoints his Ministers, who are his organs, and together they make up the Council of Ministers. The Ministers must countersign the acts of the President, thus miti-

289 Néstor Pedro SAGÜÉS, "Formas de gobierno: aproximaciones a una teoría del control parlamentario sobre el Poder Ejecutivo, in Juan LINZ et al., *Reformas al presidencialismo en América Latina: ¿Presidencialismo vs. Parlamentarismo?,* Comisión Andina de Juristas Editorial Jurídica Venezolana, Caracas 1993, pp. 93ff.

gating the unipersonal nature of the Executive. As for the deputies, if they are appointed Ministers, they lose their investiture; and the office of Minister is incompatible with any other office, so that in order for them to be elected deputies, they must separate from their offices beforehand. The Ministers, responsible before the President, are also responsible before the Parliament, where they are obliged to appear to be questioned, and may be subject to votes of censure to achieve their removal.

In short, in presidential systems, the government emanates directly from the will of the people and not from Parliament, which also holds popular representation; therefore, the head of government does not derive from Parliament. However, the normative power of the State is shared between the two bodies. The President of the Republic, therefore, may become the preeminent organ, which may result in the relegation of the Parliament to being an organ of registration of executive decisions, with the sole possibility of being an organ of balance of power through the exercise of powers of control.

PART FOUR

THE SUBMISSON OF THE STATE TO THE RULE OF LAW: THE PRINCIPLE OF LEGALITY

The fourth main feature of the concept of the Rule of Law or *État de droit* is the submission of the state to the law, which implies that all the actions of the public bodies of the state and its authorities and officials must be carried out subject to the law and within the limits set by the law. Hence, the state is always bound to act according to what is established in the law.

This principle of legality is, perhaps, one of the main features of the contemporary legal system, ultimately meaning that state bodies should be subject to the law, although the assertions do not always have the same meaning and scope in every system.

For instance, Sir Ivor Jennings said that the rule of law or government according to law, means "that all power came from the law and that no man, be he King or Minister or private person, is above the law."[290]

However, we may ask what about the sovereign? and, in the case of the British constitution, what about Parliament? Jennings referred to "the Government according to law", and we could ask: does he include Parliament in that expression? Can we say that the whole principle of the

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290 I. JENNINGS, *Magna Carta*, London 1965, p. 9.

state according to the law or submitted to the law, that is to say, that all power of state bodies come from the law, is also applicable to the British constitutional system? Alternatively, is it true that, in general terms, the rule of law in the British legal system is rather a principle related to government, in the sense that the executive must be enforced by the courts, and not a principle related to Parliament?

1. *The law and the Sovereign: constituent and constituted powers*

We can start our approach to the analysis of this principle of the submission of the state to the law, as one of the main features of modern constitutionalism, by following the statement made by H.L.A. Hart in his book, *The Concept of Law*, when he said:

> "Whenever there is law, there is a sovereign incapable of legal limitation."[291]

Consequently, in all modern legal systems, we can distinguish two powers: that of the constituent, that is to say, the sovereign body, and that of the constituted, formed by all the state organs.

This is, as we have seen, one of the main consequences of the principle of limitation of state power: the division in a given society between the constituent and the constituted power, bearing in mind that the constituent power is in the hands of the sovereign, who exercises it with no legal limitation whatsoever, and that all the constituted powers are, on the contrary, limited above all by the rules laid down by the sovereign or constituent body.

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[291] H.L.A. HART, *The Concept of Law*, Oxford 1961, p. 70. On p. 65 asserts: "in every society where there is law there is a Sovereign" ... "everywhere the existence of law implies the existence of such a. sovereign."

That is why this sovereign, said Hart, "makes law for his subjects and makes it from a position outside any law." Therefore, "there are, and can be, no legal limits on his law–creating powers." He concluded by saying that "the legally unlimited power of the sovereign is his definition."[292]

In similar terms, C.M. McIlwain, speaking on the sovereign said: "it is the highest body legally able to make rules for the subject, and itself free of the law."[293]

If we therefore accept this theory and the principle that in all legal order there is a sovereign not submitted to the law or legal limitations, how can we talk about the Rule of Law, the *État de droit* or the state submitted to the law?

This question leads us again to the problem of sovereignty and the sovereign and, in particular, to the task of identifying within the bodies and organs of the state, which one is the sovereign and therefore, not subjected to the law.

In a democracy, as Austin stated, -and this is in the essence of the Rule of Law-, it is not the elected representatives who constitute or form part of the sovereign body but the electors. Hence, in England, Austin said, "speaking accurately, the members of the House of Commons are merely trustees for the body by which they are elected and appointed: and consequently, the sovereignty always resides in the king's peers and the electoral body of the Commons."

Similarly, he held the opinion that in the United States, sovereignty of each state of the Federal Union, "resides in the state's government as forming one aggregate body,

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292 *Idem*, p. 64-5.

293 C.M. MCILWAIN, *Constitutionalism and the Changing World*, Cambridge 1939, p. 31.

meaning by a state's government not its ordinary legislature but the body of citizens that appoints its ordinary legislature."[294]

With regard to this distinction in a democracy, between the sovereign itself, the people, and the organs of the state, the Germans have made a useful distinction between what they choose to call the sovereign and the sovereign organ. (*Trager der Staatgewalt* or *Staatorgan*).[295] The sovereign, that is to say the electoral body, has no legal limitations as a constituent power, but the sovereign organs not only have limitations imposed on them by the constituent power in the constitution, but are also subject to various types of control, even the political one, by the same people who set them up throughout, for instance, by referendum.

In this perspective, we must again consider the concept of parliamentary sovereignty.[296] In this respect, Hart points out the following alternative:

> "There could only be legal limits on legislative power if the legislator were under the orders of another legislator whom he habitually obeyed; and, in that case, he would no longer be sovereign.
>
> If he is sovereign, he does not obey any other legislator and hence there can be no legal limits on his legislative power."[297]

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294 J. AUSTIN, *The Province of Jurisprudence Determined* (ed. H.L.A. HART), London 1954 Lec. VI, p. 230, 231, 251, quoted by H.L.A. HART, *op. cit*., p. 72.

295 C.M. MCILWAIN, *op. cit*., p. 31.

296 See on what has been said, in *Part One* of this book.

297 H.L.A. HART, *op. cit*., p. 65.

That is, precisely, the main question. Is the legislative organ legally bound to observe constitutional restriction imposed by a constituent power, that is to say, by the people as sovereign? In that case, the legislative body would then not be the sovereign, but only the sovereign organ; conversely, is the legislative body in a state, free of the Law and therefore with no constitutional or legal limits to its power because it is the only body that established the law of a country, without legal restriction? In this case, it would be the sovereign itself.

We must generally accept that, in the modern world, almost all legal systems establish legal limitations on the exercise of legislative organ power, normally incorporated in a written and rigid constitution, and do not identify the sovereign with that legally limited legislator or Parliament, but rather with the people as an electoral body.

"Even in England," Hart said, "Austin himself did not identify the sovereign with the legislature." As Hart argued:

> "This was his view although the queen in Parliament is, according to normally accepted doctrine, free from legal limitations on its legislative power, and so is often cited as a paradigm of what is meant by "a sovereign legislature" in contrast with Congress or other legislatures limited by a 'rigid' constitution."[298]

But, in spite of this general principle of the sovereignty of Parliament in the British constitution under the Rule of Law state perspective as a state subjected or submitted to law, even in the United Kingdom as a democracy, we must admit that the sovereign is in fact not really Parliament, but the people of this country, as an electoral body. And that the real difference between the British constitu-

[298] *Ibid*, p. 72.

tion and the other constitutional systems in the world, is that of the degree of delegation of sovereign power given by the people to the legislative organ, in other words, "the manner in which the sovereign electorate chooses to exercise its sovereign power."[299]

Hart pointed out the distinction in the following passages from his book:

> "In England ... the only direct exercise made by the electorate of their share in the sovereignty consists in their election of representatives to sit in Parliament and the delegation to them of their sovereign power. This delegation is, in a sense, absolute since, though a trust is reposed in them not to abuse the powers thus delegated to them, this trust in such cases is a matter only for moral sanctions, and the courts are not concerned with it, as they are with legal limitations on legislative power."[300]

By contrast, Hart added:

> "In the United States, as in every democracy where the ordinary legislative is legally limited, the electoral body has not confined its exercise of sovereign power to the election of delegates but has subjected them to legal restrictions. Here the electorate may be considered an "extraordinary and ulterior legislature" superior to the ordinary legislative, which is legally "bound" to observe the constitutional restrictions, and, in cases of conflict, the courts will declare the acts of the ordinary legislature invalid. Here then, in the electorate, is the sovereign free from all legal limitations which the theory requires."[301]

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299 *Ibid*, p. 72.

300 *Ibid*, p. 73.

301 *Ibid*, p. 73.

Then we can conclude by saying that this principle of the Rule of Law (*État de droit)* or of the state according to the law, implies that the sovereign body which has no legal limitations, can only be the people as electorate, and therefore that all state organs or bodies are subject to the law.[302] And law here means not only what is called in the continental systems "formal law", that is to say, a statute or act of Parliament, but also all the rules that constitute the legal order, in its hierarchical framework with the constitution as the supreme norm or *grundnorm*.

Therefore, in the constitutional systems with written constitutions, when we referred to the state according to or subject to the law, in the word law are included all the sources of the legal order: the constitution itself and all the other norms deriving therefrom.

On the contrary, the sense of the term "law" in the expression "rule of law" in constitutional systems with non–written constitutions, basically means, "rule of law as enacted by Parliament,"[303] which, in principle, with its sovereignty delegated by the sovereign, has no legal limits on its activity.

In spite of this, as has been said, some kind of limitation upon parliamentary power to enact legislation has been developed in the United Kingdom by means of judicial interpretation, based on presumptions. So, as Prof. J. D. B. Mitchell said:

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302 J.D.B. MITCHELL, *Constitutional Law*, Edinburgh 1968, p. 62.

303 G. WINTERTON, "The British Grundnorm: Parliamentary Supremacy re-examined", *The Law Quarterly Review*, 92, 1976, p. 596.

> "A statute is presumed, in the absence of clear words to the contrary, not to take away property without compensation, not to exclude the jurisdiction of the court, not to be retrospective, not to impose taxation."[304]

It has also been considered that precisely through such presumptions, effective protection can be given to fundamental rights and liberties, and therefore, arguments arose in the sense that with these presumptions of interpretation it was uncertain that the enactment of a formal Bill of Rights as part of English law would achieve better protection of traditional liberties. On the contrary, T.R.S. Allan said,

> "A common law presumption which commands the loyalty of the judges is as powerful an instrument for interpreting legislation so as to safeguard individual liberties as an enacted Bill of Rights."[305]

However, in most other countries, the sovereign people or electorate unluckily do not always have the confidence that the English people have always had in their own legislative organ or in presumptions of interpretation. On the contrary, experience abroad has shown that it has been precisely because of the actions of Parliaments, dominated by circumstantial majorities, that the worst attacks against human rights have been committed. On the other hand, in other countries the sovereign unfortunately does not fear fictions or presumptions, duly applied, as a means of judicial protection of human rights.

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304 J.D.B. MITCHELL, *op. cit.*, p. 66.

305 T.R.S. ALLAN, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism", *The Cambridge Law Journal*, 44, (1), 1985, p. 135.

That is why the majority of other countries today[306] feel the need to establish a written and rigid constitution, with an entrenched declaration of fundamental rights and liberties, precise provisions for the limitation and distribution of state powers, mainly of the legislator and of the executive, and giving judges substantial power of control over the submission of all state organs to the constitution and to the law. From there comes the concept of the Rule of Law.

2. *The supremacy of the law in the French conception of the law*

One of the fundamental principles of the French Revolution, as a reaction against absolutism, derived from the representative democratic principle, was that of the supremacy of the legislator (National Assembly), as it was composed of the elected representatives of the Nation.[307] In this way, the Third Estate, having controlled the National Assembly in 1789, became the all-powerful representative of the Nation. Hence the formula that the "law is the expression of the general will" following the Rousseauian postulate, so that, as the National Assembly affirmed in the Constitution of 1791:

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306 With the exemption of the United Kingdom, New Zealand and Israel, all other countries of the world have written constitutions. *Cf.* O. HOOD PHILLIPS, *Reform of the Constitution*, London 1970, p. 4; F.M. AUBURN, "Trends in Comparative Constitutional Law", *The Modern Law Review* 35 (2), 1972, p. 129.

307 See regarding what is said in the following pages in Allan R. BREWER-CARÍAS, *Reflexiones sobre la Revolución americana (1776) y la revolución francesa (1789) y sus aportes al constitucionalismo moderno*, Editorial Jurídica Venezolana, Caracas 1992, pp. 196 ff.

> "There is no authority in France superior to that of the law. The King reigns only by it, and it is in the name of the Law that he can demand obedience" (Art. 1, Chap. II, Title III)."

The law, then, as an "expression of the general will" as indicated in the Declaration of the Rights of Man and Citizen (Art. 6),[308] acquired a higher rank in French constitutionalism as a consequence of the primacy of the Legislative Power itself.

Nevertheless, from the substantive point of view, the principle of the supremacy of the law was based on the principle of its generality, which at the same time was a guarantee of equality, one of the basic postulates of the Revolution. The laws of liberty, which were intended to make possible the free development of the members of the social group, were the instruction of the Assembly against the privileges that were abolished.

In any case, because the law was the expression of the general will, the right of all citizens to "concur personally or through their representatives" in the formation of the law was enshrined (Art. IV), establishing the following principles in the articles of the Constitution that followed the Declaration:

> "No act of the Legislative Bodies can be considered as law, if it has not been made by the freely elected representatives of the Nation and if it has not been sanctioned by the Monarch." (Art. 9).

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308 See the text in Allan R. BREWER-CARÍAS, *Los Derechos Humanos en Venezuela: casi 200 años de historia*, Caracas, 1990, p. 24; and in W. LAQUEUR and B. RUBIN, *The Human Rights Reader*, 1979, p. 119, *Cfr*. G. DE RUGGEIRO, *The History of the European Liberalism*, Boston 1967, p. 67.

> "The Executive Branch may not make any law, even a necessary one, but may proclaim, in accordance with the laws, to order or challenge its observance." (Art. 16).
>
> "The Judicial power shall be administered by courts established by law, according to the principles of the Constitution and according to the rules determined by law." (Art. 19).

For its part, the Law of August 16-24, 1790, added that:

> "The Courts may not directly or indirectly take any part in the exercise of the legislative power, nor suspend or impede the execution of the decrees of the Legislative Body, sanctioned by the King, under penalty of prevarication." (Art. 10, Title II).

At the base of the conception of the law as the expression of the general will was the idea that emerged from the Revolution that not only was there no higher authority than the law, but that it was through the law that one could govern and demand obedience.

Thus, in contrast to the absolute power of the monarch in the *Ancien Régime*, the principle of legality and the rule of law emerged, in the sense that one can only govern by virtue of and subject to the laws.

3. *The Law and the Legal Order*

As we said at the beginning, in this expression, *État de droit* or state according to the law, or simply the Rule of Law," mainly in legal systems with written constitutions, the world "law" must be understood not only in the sense of acts of Parliaments, Congress or legislative bodies, that is to say, Statutes in English terminology, but in the broader sense of legal order, comprising all the norms that regulate a given society according to its political constitution.

In the same broader sense, the expression "principle of legality" used in continental law must be understood as equivalent to the rule of law.

Therefore, "legality," in contemporary constitutional law is not only the submission to "formal law" as an act passed by the legislator, as it used to be in the past centuries in relation to administrative actions and as a consequence of the principle of the supremacy of the law but means today the submission to law as the "legal order," including, the Constitution and other deriving sources of law.

Furthermore, in the contemporary world, the rule of law or the principle of legality not only refers to the submission of the executive to law controlled by the courts, but also the submission of all the state organs, including Parliament, to the laws that regulate their functions. In this sense, the principle of legality or the rule of law applicable to Parliament or to the legislative body, in systems with written a constitution, are the rules contained in that constitution.

However, as we said, from the historical point of view, the principle of legality in continental Europe was understood in the restricted sense.

It was considered that, if the state was to be subject to the law, "law" in this expression was understood in its formal sense to mean an act issued by the legislator, considered to be the body representing the people, and the expression of the general will.

In this sense, the law, as an act of the legislative body, was what Locke used to define the liberty of man under the law: He said:

> "The liberty of man in society is to be under no other legislative power but that established, by consent, in the commonwealth; nor under the domiminion of any will or restraint or any law, but what that legislative shall enact according to the trust put in it."[309]

Also, law, as the expression of the general will, in Rousseau's terminology was that enacted by the legislator.[310]

In this sense, article 6 of the French Declaration of the Rights of Man and Citizen of 1789 states the following:

> "The Law is the expression of the general will; all citizens have the right to participate personally, or through their representatives, in its formation."[311]

Undoubtedly, in France during the nineteenth and twentieth century, this restricted sense was generally what the term "law" referred to in the principle of legality.

For instance, Raymond Carré de Malberg, one of the most important and classical constitutional writers of the beginning of the last century, wrote the following about the formal criteria for the definition of law:

> "The parliamentary act of legislation resembles the work of an organ enjoying, in regard to the formulation of the laws, an exclusive special power, and in this sense it constitutes an act of the state power."

Moreover, he added,

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309 J. LOCKE, *Two Treatises of Government* (ed. Peter Laslett), Cambridge 1967, Chapter 4.

310 J.J. ROUSSEAU, *Du Contrat Social* (ed. Ronald Grimsley), Oxford 1972, Book II, Chap V, p. 136–; Book III, Chap IV, p. 163.

311 See in W. LAQUEUR and B. RUBIN, *The Human Rights Reader*, 1979, p. 119. *Cf.* G. DE RUGGEIRO, *The History of the European Liberalism*, Boston 1967, p. 67.

> "In the assembly of the deputies representing the Nation, the citizens themselves, all the citizens, in their capacity as constituent members of the nation are represented and thus participate in making laws."[312]

In this tradition, the law, as an expression of the general will enacted by Parliament, was the fundamental guarantee of liberty. Furthermore, the laws proposed for the limitation of power at the time of the beginning of the *État de droit* and after the French Revolution were not, as far as their contents were concerned, the statutes or laws usually approved by today's Parliaments, but "laws of liberties,"[313] that is to say, laws designed to enable the members of the social body to evolve freely mainly because of the fact that the state had, as its main function, to enable the exercise of liberties by the citizens.

That was the essence of liberalism in its political perspective, and in this regard, the Declaration of the Rights of Man and Citizen stated:

> "Art. 2. The aim of every political association is the preservation of the natural and inalienable rights of Man; these rights are liberty, property, security and the resistance to oppression.
>
> Art. 4. Liberty consists of the power to do whatever is non injurious to others; thus, the enjoyment of natural rights of every man has for its limit only those that

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312 See CARRÉ DE MALBERG, *La loi, expression de la volonté générale*, 1931, quoted by M. LETOURNEUR and R. DRAGO, "The Rule of Law as Understood in France", *American Journal of Comparative Law*, 7, 1958, p. 148.

313 E. GARCÍA DE ENTERRÍA, Revolución francesa y administración contemporánea, Madrid 1972, p. 16.

assure other members of society the enjoyment of those same rights; such limits may be determined by the law."[314]

This restricted meaning of the term law, as a formal law, in the definition of the principle of legality has been followed in contemporary times by French administrative writers[315] even though some followed the broader sense of the law, as "legal order", in the definition of the principle of legality[316] or of what Hauriou once called the *bloc legal* or *bloc de la légalité.*[317.]

In any event, the reason for this narrow sense of the law regarding the principle of legality in France, even in modern times and in spite of the written constitutions adopted by that country since 1791, is that it was normally formulated in relation with the control of the executive or the administration, due to the traditional concept of the supremacy of the law in France, and also to the traditional absence of any protection given to the people against legislative actions contrary to the Constitution,[318] with the

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314 Arts. 2 and 4. See in W. LAQUEUR and B. RUBIN, *op. cit*., pp. 118-119.

315 Ch. EISENMANN, "Le droit administratif et le principe de legalité", *Etudes et documents*, Conseil d'Etat, Nº 11, Paris 1957, p. 25-40; N. LETOURNEUR and R. DRAGO, *loc. cit*., p. 149.

316 A. DE LAUBADÈRE, *Traité elémentaire de droit administratif*, Paris, Nº 369; G. VEDEL, *La summission de l'administration à la loi* (extrait de la *Revue Al Ouanoun Wal Igtisad*, 22e année, Le Caire) no. 26, 31, 47, 58, 94, 165, 166, quoted by Ch. EISENMANN, *lot. cit.,* pp. 26-27.

317 Ch. EISENMANN, *loc. cit.,* p. 26.

318 A. TUNC, "Government under Law: a Civilian View" in Arthur E. SUTHERLAND (ed.), *Government under Law*, Cambridge, Mass 1956, p. 43.

exception of the development after the establishment of the control of the constitutionality of laws by the Constitutional Council in 1958.

In effect, with the development of judicial review to allow control of the constitutionality of laws in France, thanks to the functioning of the Constitutional Council and its interpretative decisions, and with the spreading of the American and Austrian models of judicial review of the constitutionality of legislative acts in legal systems with written constitutions, the difference between the constitution, as constituent rule, and the law, meaning act of Congress or of the legislative power, subordinate to the former, has been widely accepted, and with it, the expansion of the principle of legality or rule of law.

In this perspective, the acts of the legislative body are *per se* derivative norms of the Constitution and therefore subordinate to it. Consequently, the rule of law or the principle of legality in the contemporary *État de droit* or Rule of Law also comprises the "rule of the Constitution" or the "principle of constitutionality," and therefore those acts issued in direct execution of the Constitution are submitted to it and can be controlled, hence the judicial control of the constitutionality of laws.

Now, we must pick up two things from what we have said:

First, that the principle of legality or rule of law in our context is referred to the state, namely to all state organs and powers, and not only to one, mainly the executive or administrative power. As a result, in a state with a written constitution, the legislative body is also bound by the principle of legality or the rule of law, in the sense that its activities are legally limited by the Constitution and, therefore, it can be judicially controlled in most countries, as is the administration.

Second, we must also stress that in the expression principle of legality or rule of law, the term "law" must be understood in the broader sense of legal order and not in the formal sense of act of Parliament or statute, thus comprising the Constitution itself, the formal laws, and all the norms established in a legal system deriving from the constitution.

This approach leads us to the need to identify the basic trends of a legal system to determine which norms are applicable to each organ of the state, in other words, to establish the confines of the legality to which the various organs of the state are subject.

In this sense, we must say above all that in all legal systems,[319] in general, there exists and must exist a distinction between the rules that form the Constitution itself, as a higher positive law, and on the other hand, the provisions or rules of law that may be made by an authority delegated by the Constitution. In other words, a distinction must be established between constituent law and ordinary legislation.

As McIlwain pointed out when referring to Bodin's thoughts on the matter:

> "There is and there must be, in every free state, a marked difference between those laws which a government makes and may therefore change, and the one which makes the Government itself. The Government... is "free of the law" (said Bodin)... but by this he meant free only of the ordinary laws which the government itself has made or may make. He does not

319 G. MACCORMACK, "Law and Legal System", *The Modern Law Review*, 42 (3), 1979, p. 285–290: "Legal system" understood as a collection of rules of law that have in common their interrelation in a particular order, mainly hierarchical.

include among these laws, the fundamental principle of the constitution under which the government itself comes into being, which defines, and sets bounds to the supreme organ in the government so created...

The... supreme authority established and defined by a fundamental law is bound absolutely by that law, though it is free of all other laws."[320]

This distinction between constitutional rules of law and ordinary legislation, we stress, is of a fundamental nature in modern constitutionalism, mainly, of course, in written constitutional systems. If, as we have said, the principle of legality is that of the conformity or of the submission of all state acts to the law, in other words, the principle according to which all the activities of a state must conform to the Law, it is then undoubtedly necessary to determine which is the rule of law to which each act of the state must conform. For this purpose, the rules of law that comprise a legal system are usually organized, deliberately or spontaneously, in a hierarchical manner, so that there are norms of a higher level that prevail over norms of a lower level.

4. *The Hierarchical or Graduated Legal System and the scope of the Principle of Legality*

Hans Kelsen's theory of a legal system as a hierarchy of norms is, without doubt, a useful method for identifying the hierarchical relation between the rules of law that make up a legal system. In this sense, each norm belonging to the system usually has its derivation in another norm, the chain of derivation ending in a *Grundnorm* or Constitution, which is the ultimate reason for the existence of all the norms of the whole system.

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320 Ch. H. MCLLWAIN, *Constitutionalism and the Changing World*, Cambridge 1939, p. 73.

When using the verb "derivation," Kelsen referred to the mode of creation of norms, in the sense that a norm is always created according to a power established by another norm.[321]

Kelsen said:

> "A plurality of norms or of rules of law constitute a unity, a system or an order when their validity depends on, in the final analysis, a unique rule or norm. This fundamental norm is the common source of validity of all the rules or norms that belong to the same order and form its unity.
>
> A rule of law thus belongs to a given order only when the possibility exists of making its validity depend on the fundamental norm that is on the foundation of this order."[322]

This theory of the graduated systemization of the legal order in a hierarchical way, with the constitution at the apex, was developed by Adolf Merkl, from the same so–called "school of Vienna" to which Hans Kelsen also belonged, mainly on the grounds of administrative law.[323] We refer to it, because it gives us a good method of logical order for constructing a legal system containing the various normative levels involved in a legal order of any state at a

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321 H. KELSEN, *General Theory of Law and State*, trans. Wedberg, rep. 1901, p. 110 et seq., quoted by G. MacCormack, *loc. cit.*, p. 286.

322 H. KELSEN, *Pure Theory of Law*, Chap. IX; *Teoría pura del derecho*, Buenos Aires 1981, p. 135.

323 It was Adolf MERKL, from the same 'School of Vienna', who developed the legal system as a hierarchy of norms in the grounds of administrative law. See A. MERKL, *Teoría general del derecho administrativo*, Madrid 1935, p. 7–2. See also H. KELSEN, "La garantie juridictionnelle de la constitution (La Justice constitutionnelle)", *Revue du droit public et de la science politique en France et a l'ètranger,* Paris 1928, pp. 197–257.

particular point in time. It also provides us with a logical explanation for the formal validity of each of those normative levels.

It also gives us the formal confines of the "legality" of each act of the state organs, related to the leveled position of each norm that is created in that legal system.

In effect, the positive law of any state, at a given point in time, consists not only of the laws as formal acts of Parliament, but also of other normative bodies, such as delegate legislation, regulations, customs, the general principles of law and a whole series of other rules, including case law, certain specific and individualized ones such as contracts, court judgments and various types of administrative acts and provisions. All these precepts that make up the legal order in force at a given time not only have different origins but also different ranks, and it is not a question of considering them as co–coordinated rules in juxtaposition.[324] On the contrary, every legal order has a hierarchical structure, with its rules distributed in various strata, more or less one above the other. However, within this hierarchy, there must necessarily be a formal connection between the rules, because they are linked organically, despite their different origins and characteristics.

Consequently, the legal order cannot be interpreted as a mere inorganic and disorderly aggregate of components, or simply as a chance juxtaposition of rules. On the contrary, to fully understand the legal order of a state, all such components must be arranged in hierarchical order, so that they form a legal system, with various types of norms unified and related. That is to say, they must follow a systematic order, with relations of co-ordination and dependence between the different parts.

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[324] H. KELSEN, *Teoría pura... cit*., p. 147.

Now, as we have said, the principle that establishes the relationship between all those legal rules of such varied origin, rank and scope, shaping them into a system, is the existence of a common basis of validity in the form of a fundamental or superior rule. Hence, a set of rules of law constitutes a relatively independent legal system when the justification or validity thereof derives from a single rule, on which they are all formally based. And this single rule is referred to, in relation to all the others, as the fundamental rule or the constitution.[325]

This method for the construction of the legal order in force by means of a graduated system of rules is based on the fact that the creation of a legal rule is always founded on another legal rule. One can, therefore, speak of a superior rule and of an inferior one. For example, the establishment of ordinary laws or acts of Parliament is regulated by the Constitution; the decision as to who is to enact delegate legislation and how it should be enacted is regulated by certain formal laws. The judicial decisions and their procedural rules are subject to previous legal rules established in formal law and delegate legislation. Likewise, the rules for the validity of administrative acts are established in ordinary laws, delegate legislation and other general regulations, and so on.

Thus, the principle of the internal connection of a legal system consists of basing the validity of certain rules on the validity of others.

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325 See on this matter, Allan R. BREWER-CARÍAS, "Sobre el principio de la formación del derecho por grados en Venezuela, en la distinción entre el acto de gobierno y el acto administrativo," in Antonio ALJURE SALAME, Rocío ARAÚJO OÑATE, William ZAMBRAN CETINO (Editores), *Sociedad, Estado y Derecho. Homenaje a Álvaro Tafur Galvis*, Universidad del Rosario Editorial, Tomo II, Bogotá 2014, pp. 77-105.

According to this method, it can be said that each category of rules is based on others of higher rank, and at the same time, serves as the basis for others of lower rank.

Consequently, the whole legal order in force constitutes a system, which is graduated in hierarchical structures, and in which each link depends on others while supporting others.

According to this method, the validity of all the rules of a given legal order, ultimately, stems from the Constitution, the latter being understood to mean the rule that regulates the whole structure of the legal system, which is at the apex of the legal order and on which, finally, the latter is based.

This method referring to the forms of submission of state organs and activities to the rule of law is not only applicable to legal orders with written constitutions, but also applies to those systems with unwritten constitutions. In the former, the application of the theory of the graduated or hierarchical system of rules is evidently clear, precisely because there exists a formal constitutional document established as a supreme constituent rule. Whereas, in other legal systems without written constitutions, the process of systemization of the legal order is much more complicated, and that is why the legal system here consists of an amalgam of heterogeneous rules, established in statutes and common law,[326] which are applied by courts as rules of law, also including ancient laws enacted centuries ago, conventions, delegate legislation and so on.

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326 "The law is today an amalgam of common law and statute law of such an interdependent kind that it is often difficult to say whether a particular result is determined by the statute or by ordinary case Law." P.S. ATIYAH, "Common Law and Statute Law", *The Modern Law Review*, 48, (1), 1985, p. 5.

In either case, the formal systemization of a legal order is nevertheless indispensable to the determination of the scope of application of the law to state bodies because, in both cases, situations very often arise in which two provisions, antagonistic in their content, apparently claim to be in force. In such cases, it will always be necessary to find out which of the two is in force, determine which ranks higher or lower in the event of conflicts between two or more rules of law, which appears to be in force, and which state body is competent to decide on which one is in force and which one is not.

In short, to solve the issue of the formal validity of the precepts applied to state bodies, it is necessary to formally systematize the whole set of rules of law in a unified structure, from the logical point of view. That is precisely the reason why the method of the graduated system of rules of law provides an appropriate tool.

With this method, in the overall analysis of the legal order, it is possible to distinguish between those acts of state whose execution is immediately related to the constitution, that is to say, which are issued directly on the basis of constitutional powers, and those, whose execution is not directly related to the constitution, and which are actually issued on the basis of powers that establish rules of law inferior to the constitution.

Among the acts immediately related to the constitution are, primarily, the "formal laws", that is to say, acts of Parliament issued in accordance with the provisions of the constitution, as well as formal acts of a legislative nature, drawn up by the politically decentralized territorial entities. For example, in a Federal state, there are the laws issued by the legislative bodies of the member states of the Federation; or the formal acts, also of a legislative nature, of the local and municipal authorities, when the latter have political autonomy.

In all such cases, the laws as formal acts of the legislative bodies constitute a direct exercise by them of a competence contained in the constitution of the state itself. Therefore, they are produced on the basis of a competence established in the constitution and exercised in direct execution of the constitution.

That is why we have said that, in relation to acts of Parliaments, for instance, the rule of law that establishes limitations on its activities is the "rule of the constitution", in the sense that in a written constitutional system, the legislative body finds its confines of legality in the norms of the constitution. The principle of legality in relation to the legislative body, therefore, implies submission to the constitution, and judicial control over its acts can only be of a constitutional nature.

Legal systems with written constitutions, not only have the formal laws acts of direct execution of the constitution, but there are also other acts of Parliament that are issued on the basis of attributions provided for directly in the constitution, and which are not defined as "formal laws" because they are not instruments regulating the conduct and activities of individuals, as is the case of normative parliamentary acts that regulate the organization and procedures of the legislature internally. They are what is called *interna corporis*, that is to say, acts that regulate the functioning of the Houses.

Parliament can also pass other acts, which are not "formal laws" nor acts with internal effects, and which are issued on the basis of the direct execution of constitutional attributions. In many written constitutions, in fact, and because of the checks and balances system of the separation of powers, a multitude of legislative interventions in executive activities has been established in a way that certain executive acts require, as a condition for their validity, the authorization or approval of Congress or of the Legis-

lative Assembly. That happens, for instance, in the appointment of some high-ranking state officials in the domestic administration or in the diplomatic corps, in the contracting of foreign loans or in the approval of various budget modifications. In many countries, the executive requires the approval, or the authorization of Congress, before taking any such actions.

All these acts of Parliament, even though they are not formal laws, enjoy the same formal hierarchy as the formal Law, in the sense that they are only subordinated to the constitution, which regulates them. They are, therefore, subject to the principle of legality, but in the sense of subjection to the constitution and can be judicially reviewed to enforce the constitutional rule with which they must be in accordance.

In these constitutional systems of written constitutions, this fundamental document also attributes in some cases direct powers to the head of state to exercise certain activities that are not subject to regulation by the ordinary legislator. In such cases, there is the question of powers attributed by the constitution to the head of state, or of government, who exercises them, precisely, based on those constitutional attributions, which can neither be regulated nor limited by the legislator through acts of Parliament.

Here it is a question of acts that normally concern the "government" in the political sense, and which are reserved for the head of state or of government. It is what is termed in European continental law "acts of government" or "political acts", more or less equivalent to the North American notion of "political questions", which, being acts of direct execution of the constitution, are not submitted to regulation by formal law and are exercised by the head of state, based on the direct provisions of the constitution.

Consequently, these acts of government also rank equal to formal laws, and are only subject to what is established by the constitution, which determines its confines of legality.

By reason of the traditional absence of judicial control of the constitutionality of state acts, and because of the limited power conferred upon the administrative judicial courts or tribunals in France and in other continental European countries, the doctrine of the *actes de gouvernement* or "acts of government" was an exception to the principle of legality that was developed during the first half of last century in the sense that they were not subject to judicial control by the administrative judicial courts.

In France, the decisions of the *Conseil d'État* declaring its incompetence to control such acts, led to the development of that doctrine, establishing a distinction between administrative action, which should be subject to judicial control, and governmental action, which was not subject to such control.

This governmental action was gradually reduced to two fields: the acts of the head of state or of government in relation to the legislative body, for instance the power of the executive to submit bills to the legislature, and acts concerned with international relations, for example, the process of making or denouncing a treaty.[327]

On the contrary, in a legal system with judicial review of the constitutionality of state acts, these "acts of government", if it is true that they would escape judicial review by the administrative judicial court because they are not subject to "formal law" and they are not administrative acts, they would nevertheless be subject to judicial review or control of the constitutionality.

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327 A. TUNC, "Government under Law: a Civilian View", *loc. cit*., pp. 46-47.

Here, again, those acts of the head of state or of government are undoubtedly subject to the principle of legality, but here legality also means constitutionality (submission to the rule of the constitution). Therefore, if there were no system of judicial review of constitutionality, ordinary courts for administrative judicial control acts would declare their incompetence to control these on the grounds of unconstitutionality, and not because they would have been an exception to the rule of law. Here again, in relation to each state act, the question is to define the confines of what legality means to them, so as to establish its validity conditions.

In addition to the so called "acts of government" within the acts of the head of state or of government in direct execution of the constitution, we can also add the so–called "decree laws," which rank equal to the "formal law" and which are produced in those cases in which the constitution attributes certain legislative powers to the executive power, that is to say, to the head of state. In such cases, including delegating legislation, it is a matter of acts with the force of "formal law," as far as their rank and content are concerned, not issued by the ordinary legislator or by Parliament, but by the head of state or of government.

By virtue of their legislative content, these are normative acts of government that are also issued in direct execution of the constitution, on the basis of the power established directly by the constitution, allowing, in some occasions, to be delegated by Parliament in accordance with the provisions of the constitution. In such cases, the decree–laws have the same rank as ordinary formal Laws, although, by virtue of their content, an ordinary formal law enacted by Parliament could replace them.

In all these cases, acts issued by constitutional bodies are acts in direct execution of the constitution and are, therefore, submitted only to the Constitution. The principle of legality of the *État de droit*, that is, the necessary submission of state bodies to the law, as far as these constitutional bodies and acts issued in execution of the constitution are concerned, is tantamount to the submission to the constitution. As we have already said, in these cases, "legality" is equivalent to "constitutionality" for Parliament and for the head of state or government, in other words, submission to the constitution, or action in conformity with the rules established by the constitution and within constitutional limits.

Nevertheless, in the formal systematization of the legal order, within this graduated system of production of rules and their execution, apart from all those acts issued in direct execution of the constitution, the rest of the state bodies, particularly in the administrative and judicial field, exercises its powers not in direct execution of constitutional rules, but rather in direct execution of the "legislation," that is to say, of the formal laws or acts of parliament and even acts of government or decree–laws issued in turn by the appropriate constitutional bodies in direct execution of the constitution.

Thus, all administrative activities are ultimately acts issued in immediate execution of the "legislation," and mediate execution of the constitution, that is to say in direct execution of the "legislation" and indirect execution of the constitution.

Consequently, the extent of the administration's submission to legality in the *État de droit* is greater than that of the submission to the rule of law of the supreme state bodies. Congress or Parliament is submitted to the constitution and when the head of state or of government issues an act of government, he is only restricted by the constitu-

tion, whereas the administrative bodies and authorities are involved in a much more extensive area of legality, since they are submitted to the "legislation" and execute it. That is why in this field the principle of legality has taken on the meaning it normally has in relation to administrative action in the contemporary state.

This approach to the graduated system of legal order for the analysis of legal systems, as we have said, has enormous implications in the area of judicial control of the activities and actions of the state.

In effect, it would be no use formulating the principle of legality in the *État de droit,* in the sense of submission of the state to the rule of law, if some mechanisms were not set up whereby individuals could control the effective submission of state bodies to the law, by court action.

This obviously leads us to the two major aspects of judicial review in the modern world, which are conditioned by the degree of execution of the acts of state vis-à-vis the constitution.

In effect, in those systems in which a written constitution exists, the maximum demonstration of the principle of legality is reflected in the establishment of two major systems of judicial review or control over the exercise of power: the control of constitutionality and the control of legality in the strictest sense.

In the case of state acts issued in direct execution of the constitution, that is to say, acts of Parliament, such as statutes or *interna corporis*; or acts of the head of state or of government, such as acts of government, issued on the basis of powers granted directly and exclusively by the constitution, these must be subject to some system of judicial control of constitutionality for it to be a Rule of law in the fullest sense of the term.

It is to this end, for example, that since the beginning of last century constitutional tribunals have been set up in the European Continental states, as constitutional bodies, with the basic aim of controlling the constitutionality of state acts issued in direct execution of the constitution.

The constitutionality of laws and acts as pertaining to the internal regulations of Parliament has been especially controlled, as well as that of acts of government and decree-laws.

It is not by chance that the countries in Europe in which the first constitutional tribunals were set up were precisely those in which the organization of the constitutional system was directly influenced by Kelsen's theory of a legal system as a hierarchy of norms. The precise purpose of these tribunals was to judge cases of unconstitutionality of state acts issued in direct execution of the constitution. That was the situation in Austria and Czechoslovakia in 1920, where the constitutions and legal systems of those countries were directly influenced by the doctrine of the Viennese School. However, it was not until the last decades of last century that constitutional tribunals were established in Continental Europe, to judge the constitutionality of laws and acts of government, particularly those having the force of law.

On the other hand, we must stress that precisely because of the absence of a constitutional body entrusted with the control of the constitutionality of state acts in direct execution of the constitution, together with the expansion of the principle of legality in relation to administrative acts, this led, in many cases, to a distortion of the situation of the *État de droit*. Such distortion can be seen in the development of the previously mentioned doctrine of the "act of government" or "political act", aimed at excluding the judgment of the legality of certain state acts issued by the head of state from the competence of the administrative judicial courts.

Thus, the famous doctrine of the "acts of government" in French law, or "political acts" in Italian or Spanish law, which was developed long before constitutional tribunals were established in those countries. As we have said, according to that doctrine, there were supposed to be certain executive acts that, although improperly considered as administrative acts, were not, however, submitted to the control of legality by the administrative judicial courts. This was because they were deemed to have been formulated initially for political reasons, or later, when the day of that doctrine was coming to an end, because it was considered that they referred to issues stipulated directly in the constitutions with reference to the relations between the different state powers or constitutional bodies, or to other states in the international order.

As we said, such acts were actually exempt from submission to administrative judicial control or from control of administrative legality, not because they were administrative acts issued for political reasons, but because, contrary to what was asserted, they were not really administrative acts. In effect, they were acts of government issued in direct execution of the constitution, and the only control to which they could be subjected was the control of constitutionality, that means submission to the rule, which was executed by their issuance, namely, the constitution itself.

Since there was no control of the constitutionality of state acts in those countries, there could be no judicial control over such acts, which contributed to the distortion of the doctrine of the "act of government." In countries such as Spain and Italy, the subsequent establishment of judicial review methods to allow the control over the constitutionality of laws and executive acts having the force of law resulted in the reduction or disappearance of the doctrine of the judicial immunity of political acts. They now came under the control of the constitutional tribunals.

Now, in the United Kingdom's legal system, in the absence of a written constitution in the sense of a formal document of the nature of a fundamental law governing the basic principles of the actions of state bodies and establishing a set of entrenched rights and constitutional guarantees, there can be, of course, no judicial control over the constitutionality of certain acts. Consequently, when there is no written constitution, in a graduated legal system, there is nothing in the nature of a fundamental rule or constitution to serve as a source of validity of lower–ranking laws.

In the absence of any such formal constitution serving as a fundamental law, as we have seen, the sovereign act in the British system is precisely the act of Parliament; hence, the principle of parliamentary sovereignty that implies that since Parliament is not subjected to any superior rule, it produces the superior rules itself. In this sense, an act of Parliament is not subjected to any other rule, and its constitutionality could not, therefore, be controlled with respect to any formal document.

Consequently, in the British legal system, a control of the constitutionality of acts of Parliament is inconceivable in the terms provided for in Continental European or American legal systems. Hence, the establishment of a precise hierarchy in the production of rules of law is also very difficult, since there is no such written constitution and, finally, the supreme rule is the rule of Parliament. Besides, there are no degrees of validity among statutes.[328]

Nevertheless, in relation to the legal order below the acts of Parliament, we think that a system of a graduated or hierarchical legal order can, in fact, be developed and

328 *Halsbury's Laws of England*, 4th Ed. London 1974, Vol. 8, p. 531.

that it is possible to establish a systematization of more or less the entire legal order, based, naturally, on the concept of the superiority of acts of Parliament.

In any case, apart from acts issued in direct execution of the constitution in graduated legal systems which have given rise to the systems of judicial review or control of constitutionality, it is evident that the principle of legality plays a more important role at the second level of execution of the legal order, that is to say, those state acts issued in direct execution of the legislation, or in indirect execution of the constitution. Here the principle of legality has developed in the fullest sense of the term, particularly in connection with the administration, both in the Continental European and in the United Kingdom's legal systems, giving rise to the judicial review for the control of the legality of administrative acts or actions, and therefore, to administrative law itself.

However, this principle of legality, mainly in legal systems with written constitutions implies, of course, not only that the executive or administrative power is subject to the rule of law, but that the other organs of the state, including the legislative organs, are also subject to the rule of law. Therefore, what the rule of law is all about, in relation to which each state organ is subjected, varies, and has a different confine or ambit, depending on the position that each norm or state act has in the hierarchical legal system. That is why, for the legislator, legality means constitutionality or submission to the constitution; as for the head of the state, with regard to acts of government, legality also means subjection to the constitution. In such cases, they are adopted in direct execution of the constitution, without the interference of acts of Parliament, so that they are submitted only to the constitution.

5. *The Principle of Legality and the Executive*

As far as executive and judicial powers are concerned, the principle of legality or the rule of law has a wider sense. It includes not only the constitution itself, but also all state acts of a general and normative nature, and especially those of a "legislative" level that include not only acts of Parliament, but also all other state acts having the same legal force, such as acts of the head of state issued within its constitutional powers. In the principle of legality related to the executive, all the other sources of legal rules that bind administrative action are also included as well as the general principles of law, or principles of natural justice that are to be observed by the public administration.

In this respect, it is obvious, in contemporary public law systems, that the principle of legality in relation to the executive and to administrative of action, is in fact, of more importance.

However, in the evolution of the contemporary state, the principle of legality was traditionally referred to the submission of the administration to the law, in the sense of "formal law," that is to say, acts issued by Parliament, meaning that the public administration always had to act on the basis of a pre–existent rule of law.

However, in continental legal systems, this principle of legality originally confined to submission to the formal law has been expanded to the extent that the term "legality" has become synonymous to legal order, in the sense that in a graduated legal system, the administration must be submitted to all the superior rules governing its activities.

In this context, therefore, law is not just law in the formal sense, but it also includes international treaties signed by the respective states, delegate legislation and

other resolutions of a general nature, as well as decree–laws and any other normative sources of law applied to the administration, including, the general principles of law.[329]

Naturally, this principle of legality in a State subjected to the Rule of Law, contrary to what occurs in authoritarian regimes, referring to public administration has been particularly implemented by the establishment of a system of control of the administration through the courts, either ordinary courts or special administrative judicial courts, and by the establishment of the principle of the responsibility of the state, particularly for damage caused to individuals by state actions.

In short, the principle of legality in relation to the executive implies the establishment of a system of judicial review of administrative actions; that is to say, it demands the establishment of a system of administrative justice to control the submission of public administration, precisely, to legality.

In this sense, in the *État de droit*, unlike the situation in absolutist regimes, the activities of the administration are subject to complete judicial supervision through the judicial mechanisms provided for in ordinary law, or established in a particular administrative law system, and implemented through actions granted to individuals, to control any legal infractions that may be committed by the administration itself.

Occasionally, the theory of discretionary powers opened a void in the principle of legality, but, little by little, the progressive judicial control of these discretiona-

329 See Allan R. BREWER-CARÍAS, "El tratamiento del principio de legalidad en las leyes de procedimiento administrativo de América Latina, in Domingo GARCÍA BELAÚNDE *et al*., *Homenaje a Valentín Paniagua*, Fondo Editorial de la Pontificia Universidad Católica del Perú, Lima, 2011, pp. 340-360.

ry acts has been allowed with the result that, despite the liberty granted to the administration to make decisions, such acts are also submitted to a judicial control of legality. They are no longer considered in any country as an exemption to the principle of legality, as was originally thought mainly under French administrative law.[330]

When granting discretionary powers, the law leaves to the administration a certain amount of freedom to take the most convenient action or decision according to its own interpretation. Nevertheless, it has been accepted and established through the judicial control of administrative action, that discretionary power has limits, and cannot transform itself into arbitrariness. Therefore, various limits to the exercise of discretionary power have been identified in Continental European administrative law, derived from the principles of proportionality, rationality, non–discrimination, equity, and justice.

It has also been accepted that the use of discretionary powers by the administration cannot lead to the violation of the general principles of administrative procedure, in particular, those connected to the right to a fair due process of law, granting the general right to citizens to seek their own defense. A demonstration of this is the right to a hearing before an administrative action can be taken, so that the individual who may be affected by such a decision may have the opportunity to express his position regarding the administrative action and argue his rights.

All these principles leading to limiting the discretionary power, even though originated in case law, have frequently been formally established in various countries in

330 See Allan R. BREWER-CARIAS, Les principes de la procédure administrative non contentieuse. Études de Droit Comparé (France, Espagne, Amérique Latine), (Préface de Frank Moderne), Editorial Económica, Paris 1992.

formal laws relating to administrative procedures. Venezuela can serve as an example of this process of formalization of the limits to discretionary power. Its Administrative Procedures Act of 1981[331] for instance, states in article 12:

> *"Art. 12*. When a norm of a Statute or of a general regulation issued by the Executive leaves an administrative measure or decision to be made by the competent authority based on its own understanding, such a measure or decision must maintain due proportionality and adequacy with the facts and aims established in the norm, and follow all the procedural rules and formalities needed for its validity and effectiveness."

That is to say, when an administrative authority has been granted by an act of Congress or by a general executive regulation, enough liberty to take any action or make any decision based on its own understanding of the circumstances and timing of the given action, it must, first, respect the principle of proportionality of the administrative action; second, it must seek the aims for which the discretionary powers were granted; third, it must observe the due fitness of the facts within such rules established in the norm; and fourth, it must always respect the procedural steps required for the validity and effectiveness of the administrative action.

Thus, the first limit on discretionary power in that law is the duty imposed by it on all administrative authorities to respect the due proportionality between the facts that motivated the administrative actions, and the consequences established in the latter. In this regard, if the norm au-

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331 Allan R. BREWER–CARÍAS, El derecho administrativo y la Ley orgánica de procedimientos administrativos, Caracas 1982, p. 379-414.

thorizes the administrative organ, for example, to apply a fine or penalty measured against two extremes, in accordance with its appreciation of the gravity of the offence, the action, that is to say, the fine or penalty imposed must have some proportion with the actual facts that occurred and gave rise to the administrative action deriving from rationality justice and equity.

This principle of proportionality as a limit on discretionary power leads to another, the principle of equality and non-discrimination, in the sense that if, in relation to a given fact, a measure has been taken or a decision has been made against an individual, the same measure or decision must be made against other individuals, if the facts coincide. Of course, this also implies that the principle of impartiality, as a general principle of administrative action, is also a limit on discretionary power.

But the norm of the Venezuelan Administrative Procedures Act that we are referring to as an example, also establishes as a limit on discretionary power, the need for an administrative authority to try to attain, when taking action or making a decision, the aims established in the norm when granting power to the public administration. Any deviation in obtaining or pursuing those aims can lead to judicial control of the administrative action for illegality, through the so-called *détournement de pouvoir,* or misuse of powers, in French administrative law.

Moreover, that same article of the Venezuelan Administrative Procedure Act established, also as a limit upon discretionary powers, the due fitness of the actual facts that motivated an administrative action regarding the ones established in the particular norm. That means that the public authority must first determine the facts that occurred; second, it must prove them, through the usual or technical means required; and third, it must qualify them appropriately, and finally, the facts must coincide with the ones

established in the norm authorizing the action. All these steps must be taken in accordance with the aforementioned principles of equality, impartiality, and justice, so that any violation thereof leads to illegality.

Finally, the norm states that in the use of discretionary powers by the public administration, the administrative organ must always respect the procedural steps normally required for the validity and effectiveness of the administrative action. Within these procedural rules, we must underline the right to defend oneself that must be guaranteed in all administrative actions, and which derives from the constitution itself. This right of every citizen to seek his own defense leads in the Administrative Procedures Act of Venezuela, to the formal establishment of a few other and derivative rights of the individual vis-à-vis the public administration. For instance, the right to be heard always before a decision can be made that affects his rights and interests; the right to participate in administrative procedures that could affect those rights and interests; the right to be formally and personally notified of every decision that may affect him; the right to have access to all official documents filed in the respective case file and the right to copy those documents; the right to present evidence before the public administration in one's own defense; and the right to be notified of the means of appeal or other actions that the individual can use for his defense, whether administrative or judicial.[332]

Therefore, as we can infer from this example of a formal establishment of limits on discretionary powers by statute and not only by means of case law, the principle of legality also related mainly to administrative actions, has expanded considerably. All such limits on the discretion-

[332] *Ibid*, p. 112-118.

ary powers of the executive, although now established, as we have seen from the Venezuelan example in particular laws or statutes, have undoubtedly been developed through judicial decisions (case law), even in civil law legal systems.

Of course, in common law legal systems, these limits have also been established in case law, particularly through the principles of natural justice.[333]

All these systems have in common the exclusion of the consideration of discretionary power as an exemption to the principle of legality or the rule of law, as well as the acceptance that, even in its discretionary power granted by law, administrative actions are entirely submitted to the rule of law.

However, regarding this exemption to the principle of legality as treated in Continental European legal systems a few decades ago, the same can be said of so-called government or political acts.

As we have said, in Continental Europe, certain acts of the executive, such as political acts, were traditionally seen as being exempt from the submission to legality. Nevertheless, even though such acts cannot be considered as administrative acts, not only has the legal state made an effort to gradually reduce the number of such political acts exempted from control, but with the establishment of constitutional tribunals in Continental Europe, it has been possible, in some countries to control the constitutionality of such acts of government, as acts in direct execution of the constitution.

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[333] See in general, P. JACKSON, *Natural Justice*, London 1979, p. 224; Allan R. BREWER-CARÍAS, "Sobre los límites al ejercicio del poder discrecional," in Carlos E. DELPIAZZO (Coordinador), *Estudios Jurídicos en Homenaje al Prof. Mariano Brito*, Fundación de Cultura Universitaria, Montevideo 2008, pp. 609-629.

In short, all the activities of the executive must be submitted to the principle of legality and must, therefore, be submitted to judicial review. Because of this, it is possible to demand that the administration be held responsible for damages caused by its actions. Of course, when we say that all activities of the executive must be submitted to the law, this naturally also includes all the normative activities of the executive itself, such as, regulations and different forms of delegated legislation, which are also submitted to review by independent judicial bodies.

6. *The Rule of Law and Dicey's Concepts*

As we said at the beginning, in the United Kingdom's legal system, what the Continental European legal systems call the principle of legality is included under the general term of "rule of law." It is true that this "rule of law" generally means the same as the *État de droit* for Continental states, that is to say, it is the laws that govern, not men.

However, there is perhaps a radical historical difference between the two systems: whereas the *État de droit* came into being on the continent as a rational system substituting the *Ancien Régime*, the "rule of law", since monarchical absolutism was unknown in England, is directly linked to the medieval doctrine of the *Reign of Law* in the sense that law, whether it be attributed to supernatural or human sources, ought to rule the world.[334]

Therefore, as E.C.S. Wade said, Dicey did not invent the notion of the rule of law,[335] but was the first writer to

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334 W. HOLDSWORTH, *A History of English Law*, Vol. II, London 1972, p. 121. *Cf.* E.C.S. WADE, "Introduction" to A.V. DICEY, *An Introduction to the Study of the Law of the Constitution*, London 1973, p. XCII.

335 E.C.S, WADE, "Introduction", *loc. cit*., p. XCII.

systematize and analyze the principle. That is why we think it is impossible to refer to the rule of law in the United Kingdom, without referring in one way or another to Dicey's approach, which has tended to govern modern discussions on the subject.[336]

According to Dicey's classical definition, the rule of law means three things: the absolute predominance of the law; equality before the law; and the concept according to which the constitution is the result of the recognition of individual rights by judges.

With regard to the first meaning, Dicey stated that by rule of law,

> "We mean... that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[337]

As Dicey himself stated, in this sense, the rule of law means:

> "The absolute supremacy or predominance of regular law as opposed to the influence of the arbitrary power, and excludes the existence of arbitrariness of prerogative, or even wide discretionary authority on the part of the Government.

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336 J.D.B. MITCHELL, *op. cit*., p. 53.

337 A.V. DICEY, *op. cit*., p. 188.

> Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else."[338]

In relation to this first meaning of the rule of law, we must observe that, as we have said, discretionary powers granted to government by the law is not necessarily equivalent to arbitrariness, on the contrary, the government itself has limits in its exercise.

We must also note when considering this first meaning of Dicey's rule of law, that while it is true that the government lacks arbitrary power, it is clear, however, that that power lies on Parliament, since, unlike the legislative bodies of other countries, Parliament's powers are not limited by a constitution. Consequently, the British Parliament, by virtue of its sovereignty, possesses, in principle, unlimited powers, not only to establish general rules, but also individual rules with any content.

Arbitrary regulation is not, therefore, constitutionally excluded, although, in principle, it must take the form of an act of Parliament or be authorized by such an act. But bearing in mind the government's factual supremacy over Parliament, due to the fact that the latter's decisions are determined by the former owing to the party system, the result is that the decision on measures is actually made, in the last resort, by the government, which may request action from Parliament, even after having taken such measures.

Thus, for example, it has been said that Parliament ratified and legalized in 1931 a series of illegal acts issued by the Cabinet with reference to the abolition of the gold

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338 *Ibid,* p. 202. In this concept, regular law is understood to mean statutory law and common law, but the former has supremacy over the latter.

standard. In this case, the arbitrary power of Parliament served to sanction illegal acts.[339]

According to Dicey, the rule of law also means legal equality. In this sense, Dicey wrote:

> "We mean in the second place, when we speak of the rule of law as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing), that here every man,
>
> whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[340]

However, in explaining this second meaning, he went further, also applying the concept to government officials. He said:

> "It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. The rule of law in this sense excludes the idea of any exemption of officials or other from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals."[341]

In this sense, Dicey's concept of the rule of law, excludes the idea of any exemption in favor of public officials or other individuals, and naturally excludes any idea of administrative judicial special courts in the French manner.

A consequence of this statement is his famous mistaken approach to "administrative law", which concludes that "there can be with us nothing really corresponding to

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339 I. JENNINGS, The Law and the Constitution, cit. p. 57-58.

340 A.V. DICEY, *op. cit*., p. 193.

341 *Ibid.* p. 202–203.

the "administrative law", *droit administratif* "or the "administrative tribunals" (*tribunaux administratives*) of France.[342]

Dicey really denounced what he understood French administrative law to be. He said that the *droit administratif* rested at bottom on various "leading ideas alien to the conceptions of modern Englishmen," within which he referred to the idea:

> "That in France, the government and every servant of the Government, possesses, as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges or prerogatives is to be determined on principles different from the consideration which fix the legal rights and duties of one citizen towards another."[343]

All these privileges and prerogatives referred to by Dicey lead to what he considered to be the main one in the French system: the existence of special administrative courts to judge public bodies and officials ranked in a separate system of judicature different to the judicial power, having at its apex not the *Cour de Cassation* but the *Conseil d'État*.

It has long been realized in Great Britain that Dicey's picture of administrative law was wrong[344] and that legal equality does not mean that the state bodies would be

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342 *Ibid.* p. 203.

343 *Ibid*. p. 336–337. "An individual in his dealing with the state does not, according to French ideas, stand on anything like the same footing as that on which he stands in dealing with his neighbor", p. 337.

344 H.W.R. WADE, *Administrative Law*, Oxford 1984, p. 25.

submitted to the same laws applicable to ordinary citizens. As J.D.B. Mitchell stated:

> "While the subjection of officials to law is desirable, it does not follow that this should in all cases, or generally, be a subjection to the law which is applicable to the ordinary citizen" (because)... it is clear that the powers of government cannot be those of an ordinary citizen... and that, as far as rights are concerned, public bodies and public officials cannot be governed by the ordinary law."[345]

Therefore, if it is desirable that the executive must, in principle, be subject to the same law as that governing the citizens, this does not, of course, exclude the possible need for the government, in view of its very nature, to have special prerogatives and powers. What the principle of the rule of law requires is that the government be granted no unnecessary privileges or exemptions in relation to ordinary laws. In this respect, for example, the fact that the crown could not be taken to court on the grounds of responsibility constituted an unnecessary privilege, which was eliminated in 1947 by the Crown Proceeding Act.[346]

In any event, in relation to this second meaning of the rules of law as developed by Dicey, we can conclude by saying that it really implies that government bodies should be subject to the law. In this same sense, we can say, based on the principle of the sovereignty of Parliament, that Parliament, in its capacity as the legislature, is sovereign and exempt from any legal control, that the principle of the rule of law means, that all government actions must be carried out in accordance with the law. When applied to administrative or governmental authorities, it implies that

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345 J.D.B. MITCHELL, *op. cit.,* p. 58.

346 H.W.R. WADE, *op. cit.*, p. 24.

all of such authorities, when issuing any act, must do so by means of an authorization granted in a law that, in general, must be understood to be an act of Parliament. In other words, the rule of law implies that any government act, which may affect some individual rights or liberties, must be carried out strictly under the authority of an act of Parliament.

However, the principle of the rule of law does not consist solely of submission to formal law. It also implies, as we have seen, the need for the administrative authority to submit to the principles and rules that limit any discretionary power granted to the said authority by an act of Parliament. That is the reason why it has been said that the principle of the rule of law was developed in relation to the administration, based on judicial limitations upon the powers which may have been granted to the administrative authorities by acts of Parliament.[347] The purpose of all this is to prevent and avoid abuse in the exercise of discretionary powers.

In addition to the foregoing, the principle of the rule of law, as a specific manifestation of the *État de droit* and of the principle of legality in the United Kingdom's legal system, implies that claims brought by individuals against administrative and government acts and officials must be judged by the judicial authority, that is to say, by judges completely independent from the executive bodies. Naturally, the principle of legality does not necessarily require that these judicial bodies that control administrative actions be separate from the ordinary judicial bodies. What legality and the state according to law demand is that con-

347 L.L. JAFFE and E.G. HENDERSON, "Judicial Review and the Rule of Law: Historical Origins", *The Law Quarterly Review*, 72, 1956, pp. 345–364. See in general, B. SCHWARTZ and H.W.R. WADE, *Legal Control of Government*, Oxford 1978, p. 350.

trol be exercised by judicial bodies, and that in the countries with common law systems, particularly in the United States and the United Kingdom, disputes between the administration and individuals be settled by the ordinary courts of law.[348]

Hence, contrary to the practice in the French system, in which disputes relating to the control of the legality of administrative action are brought before administrative courts organized separately from the judicial hierarchy, but independent from the government, in the British system, the right to have the public administration appear before ordinary courts and independent judges, in matters of control of legality, is one of the most important elements of the concept of the rule of law.

The third meaning of the rule of law according to Dicey is that the constitution was the result of the recognition of individual rights by judges, and therefore, that these rights were not the result of a written constitution.

Dicey explained this third meaning of the rule of law as follows:

> "We may say that the constitution is pervaded by the rule of law on the grounds that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution."[349]

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348 J.M. EVANS, de Smith's Judicial Review of Administrative Action, Fourth Ed., London 1980, p. 11.

349 A.V. DICEY, *op. cit.,* p. 195.

In other words, he described this third meaning of his conception of the rule of law by saying that this expression

> "May be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts."[350]

We do not think that this third meaning can be sustained firmly nowadays. The rights of individuals that a state has to ensure and protect today are not only personal liberties, such as free speech, which Dicey was concerned with, but rather rights such as the protection of physical well–being, having a proper home, being educated, having social security, a proper environment, etc., that cannot be the creation of judge–made laws, but require complex legislation.[351]

That is to say, "the common law does not assure the citizens economic or social well-being."[352]

Therefore, if it is true that ordinary courts continue to play a fundamental role in the protection of individual rights, it is also true that statutory regulations are required for the enforcement of such rights. Thus, they cannot only be the result of the courts' enforcement, but also, undoubtedly, of their establishment in acts of Parliament.

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350 *Ibid*, p. 203.

351 J.D.B. MITCHELL, *op. cit.,* p. 54–55.

352 E.C.S. WADE and G. GODFREY PHILLIPS, *Constitutional and Administrative Law*, London 1982, p. 89.

We must also bear in mind the primacy of statutory law over common law, hence, the latter can always be modified by Parliament, and the most fundamental liberties may be removed by statute.

Thus, Dicey's faith in the common law as the primary legal means for the protection of citizens' liberties against the state has been superseded and the experience of many western countries with entrenched declarations of human rights imposing legal limits upon the legislature to infringe it has proved to be of value.

Anyway, despite the well-known expansion of Dicey's concepts, particularly regarding his distrust of administrative law, this discipline widely developed in this country during the present century (twentieth century), and within its own rules, new concepts arose regarding the rule of law, always related to governmental action and more closely to the principle of legality developed in Continental Europe.

To understand this change, it will suffice to recall here two of the new and recent approaches to this matter.

The first is the concept developed by H.W.R. Wade in his well-known book on *Administrative Law*, in which he identified five different although related meanings of the rule of law. First, that all governmental action must be taken according to the law, in the sense that all administrative acts that infringe individual rights must be authorized by law. Second, that government should be conducted within a framework of recognized rules and principles that restrict discretionary power, in the sense that an essential part of the rule of law is that of a system of rules for preventing the abuse of such discretionary power. Third, that disputes as to the legality of acts of government are to be decided by courts that are wholly independent from the executive, which in this country are the ordinary courts of law. Fourth, that the law should be even handed between

government and citizen, in the sense that although it cannot be the same for both, the government should not enjoy unnecessary privileges or exemptions from ordinary law.

And fifth, outside the sphere of public administration, the rule of law means that no one should be punished except for legally defined crimes, a principle that applies, however, to administrative action in the sphere of administrative sanctions.[353]

In another more descriptive perspective, Joseph Raz enumerated a few principles, which can be derived from the basic idea of the rule of law, which undoubtedly complete the aforesaid view of Wade. Those principles are as follows: All laws should be prospective, open and clear; laws should be relatively stable; the making of particular laws should be guided by open, stable, clear and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the implementation of those principles; the courts should be easily accessible; and the discretion of the crime prevention agencies should not be allowed to hinder the law.[354]

All these meanings or principles related to the concept of the rule of law, in the British constitutional system and since Dicey's conception, obviously relate mainly to the activities of the executive or government, and to administrative action. Parliament, because of its sovereignty, is not included in the principle.

Therefore, due to the lack of a written constitution and the aforementioned principle of parliamentary sovereignty, Parliament, has in fact no entrenched law to which it

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353 H.W.R. WADE, *op. cit.,* p. 22, 24.

354 J. RAZ, "The Rule of Law and its Virtue", *The Law Quarterly Review*, 93, 1977, p. 198-202.

must be kept subjected. Thus, it has no legal limits upon its activities, and its acts cannot be judicially reviewed because no court has the power to control their constitutionality.

Here lies the real difference, nowadays, between the concept of the rule of law in the British constitutional system and the principle of legality in the legal states of Continental Europe and America.

In Continental Europe and America, the concept of the principle of legality also includes the legislative in the sense that Congresses, General Assemblies or Parliaments are, in general, submitted to and limited by the constitution, established as a written and rigid higher law, and that submission is judicially controlled by ordinary or special courts with sufficient power, in some cases, even to annul unconstitutional laws.

PART FIVE

THE DECLARATION OF FUNDAMENTAL RIGHTS AND LIBERTIES

The fifth characteristic of the *État de droit* is the establishment of a set of fundamental rights and liberties, normally enumerated in a formal declaration of constitutional rank or in a written constitution, in an entrenched manner and with the necessary guarantees and legal security to prevent its violation by the state itself.

In this sense, the first characteristic of this formal establishment of fundamental rights is that it is one of the main consequences of the aforementioned principle of the distribution of powers essential to the state according to law.

We have said that the distribution of power finally reveals itself in three ways: first, in a distribution of power between the citizens and the state; second, in a distribution of power between constituent and constituted powers; and third, in a distribution of power within the constituted power in a horizontal and vertical way, giving rise to the classical separation of state powers or to a politically decentralized form of the state.

The first form of distribution of powers, between citizens and the state is, precisely, the one related to the establishment of fundamental rights and liberties: the *État de droit* or state according to law always implies that there is a sphere of liberties granted to citizens out of reach of the state, and that the state also has powers and prerogatives to

ensure its functions, subject to particular rules different from those applied to individuals. This distribution of power between citizens and the state, implying the formal establishment of fundamental rights and liberties for the former, must be, of course, of an entrenched form, resulting from a constituent power, and, therefore, not subject to amendment by ordinary legislation.[355]

In any case, the constitutional establishment of fundamental rights appears as a central element of liberalism, as a result of the distinction between state and society and, of course, of the *État de droit*. In the latter, its aims are considered as being the protection, guarantee and fulfillment of human rights and fundamental liberties, contrary to those of the absolute or totalitarian state, where these rights do not exist.

That is why at its origin, the distribution of power between a citizen's sphere of liberties and state powers lead to the concept in which, in principle, individual liberty was unlimited, whereas the powers of the state were limited, precisely because the state was set up for the protection of the former.

1. *Theoretical Backgrounds and Historical Antecedents*

This conception lies beneath the whole construction of the *État de droit* from the very beginning of its philosophical background, and again, we must recall Locke's concepts in his *Two Treatises of Government* (1690), without doubt, the great classic of the most liberal tradition, and the book that most influenced the birth of the *État de droit*.

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[355] As O. HOOD PHILLIPS said: "The provisions that cannot be amended by ordinary legislative procedure are said to be "entrenched." *Reform of the Constitution*, London 1970, p. 3.

In effect, the establishment of a political or civil society according to Locke, as opposed to absolute monarchy, implies an agreement among men,

> "To join and unite into a community for their comfortable, safe, and peaceful living one among the other, in a secure enjoyment of their properties and a greater security against any that are not of it."[356]

Thereof, the power granted to the commonwealth, and in particular to the legislative, – he said –,

> "Is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people, for it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of nature before they entered into society and gave up to the community; for nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself and the rest of mankind, this is all he does or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power, in the utmost bounds of it, is limited to the public good of the society. It is a power that has no other

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356 J. LOCKE, *Two Treatises of Government*, quoted in W. LAQUER and B. RUBIN ed., *The Human Rights Reader*, New York 1979 p. 64.

> end but preservation, and therefore can never have a right to destroy enslave, or designedly to impoverish the subject."[357]

On this basis, Locke defined the "end of government" as "the good of mankind" and stated that "all the power government has is only for the good of the society." Therefore, opposed to civil society was the absolute arbitrary power or government without settled standing laws. Those, he said,

> "Can neither of them consist with the end of society and government which men would not quit the freedom of the state of nature and tie themselves up under, were it not to preserve their lives, liberties, and fortune, and by stated rules of right and property to secure their peace and quiet. It cannot be supposed that they should intend, had they a power so to do, to give to anyone, or more, an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them. This – he ended – were to put themselves into a worse condition than the state of nature, wherein they had a liberty to defend their right against the injuries of others and were upon equal terms of force to maintain it, whether invaded by a single man or many in combination."[358]

The conclusion of all this conception with regard to fundamental rights, or "property", as Locke identified them, was that,

> "The supreme power cannot take from any man part of his property without his own consent; for the preservation of property being the end of government

357 *Idem*, p. 65.
358 *Ibid*, p. 66.

> and that for which men enter into society, it necessarily supposes and requires, that the people should have property."[359]

In this perspective, as we have seen, all the construction of the Rule of Law apparatus as opposed to that of the absolute state was based on the idea of the existence of man's liberties, that were inalienable and which cannot be renounced, and that the state was to be set up for the protection and maintenance of such liberties.

In this same sense, the other two theoreticians of the state, whose ideas helped setting up the liberal state, are clear and eloquent. Rousseau, when referring to the nature of the rights of citizens, said:

> "To renounce one's liberty is to renounce one's quality as a man, the rights and the duties of humanity... such a renunciation is incompatible with man's nature, for to take away all freedom from his will is to take away all morality from his actions.
>
> In short, a convention which stipulates absolute authority on the one side and unlimited obedience on the other is vain and contradictory."[360]

Montesquieu, for his part, argued, as we have seen, that "political liberty" was to be found only in "moderate governments," that is to say, those where "there is no abuse of power,"[361] and those only exist in systems – he thought –, like the English, where power checked power. Thus, there is his theory of the distribution of power as a pre-requisite for political liberty.

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359 *Ibid*, p. 67.

360 J.J. ROUSSEAU, *The Social Contract*, quoted in W. LAQUER and B. RUBIN (ed.), *op. cit.,* p. 70.

361 MONTESQUIEU, *The Spirit of Laws*, quoted in W. LAQUER and B. RUBIN (ed.), *op. cit*., p. 68-69.

In this context, England again had a long tradition, and even though the idea of "natural rights" has been said to be "strictly a (English) commodity for export, particularly to France, and to the American colonies,"[362] the truth is that it had a tremendous influence both on English tradition of liberty and abroad.

The *Magna Carta* of 1215 is often referred to as the first declaration of fundamental rights. But, in reality, this Charter was the result of the struggle between the centripetal and centrifugal feudal forces, that is to say, on the one hand, the king's forces, particularly as a result of the tyranny of King John and the established central institution which administered a common law; and, on the other hand, the forces of the barons of the kingdom, who sought disintegration, which would mean independence and power, as well as the combined forces of landowners, ecclesiastics and traders.[363]

As a result of that struggle, the Great Charter was a formal charter in the feudal sense, that is to say, a free grant by the king. In fact, however, it resulted in a code for reforming laws passed by the whole body of barons and bishops and thrust upon a reluctant king.[364] That is why it opened a new chapter in English history and has been seen as the origin and source of English constitutional law.[365]

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362 K. MINOGUE, "The History of the Idea of Human Rights", in W. LAQUER and B. RUBIN (ed.), *op. cit.,* p. 6.

363 W. HOLDSWORTH, *A History of English Law*, Vol. II, London 1971, p. 207-208. *Cf.* F.W. MAITLAND, *The Constitutional History of England*, Cambridge 1968, p. 67.

364 F.W. MAITLAND, *op. cit*., p. 67.

365 W. HOLDSWORTH, *op. cit*., Vol. II, p. 209.

Nevertheless, as we mentioned, the Great Charter is one of many formal examples of stipulations between the king and the feudal knights; in that sense, it was a *stabilimentum* or an enactment formulated by the king, church, barons, and merchants as partners in the legislative powers of the nascent state, contained in a probatory document called a Charter. Thus, the Charter set forth a series of rights of a heterogeneous nature, all relating to the different classes participating in its enactment. Its clauses were classified into five groups; those granting the liberty of the church; those dealing with what is called feudal grievances; those relating to trade; those relating to central government; and those that placed limitation upon arbitrary power.[366]

Therefore, the Great Charter contained nothing resembling a general declaration of fundamental rights of the English people. The freemen whose rights the document refers to were not all but just a fraction of Englishmen, particularly the barons, and if it is true that in some clauses the Magna Carta mentioned all *liberi homines* in a sense that could include the villain, as Sir William Holdsworth said,

> "It is fairly clear that they were thus protected, not because it was intended to confer any rights upon them, but because they were the property of their lords, and excessive amercements would diminish their value."[367]

Thus, if it is true that the Magna Carta guaranteed all freemen certain rights of protection against the abuse of royal power, this is something quite different from a modern declaration of the rights of man and the citizen. In

366 *Idem*, p. 212.

367 *Idem*, p. 212.

those days, only the Barons were *liberi homines*; they alone were *liberi* and they alone were considered as *homines*. Thus, historically speaking, the Magna Carta was an agreement between a feudal aristocracy and its king, to whom it renewed its homage in exchange for guaranteed rights. In that context, the Magna Carta's 63 chapters contained limitations on the judiciary, for example, the affirmation that no freeman could be imprisoned or arrested, except by a legal court, composed of people of his own class, or in accordance with the law of the land; limitations upon taxation power, and above all, the establishment of a resistance committee in the event of failure to maintain these prescriptions.

Thus, there is no reference in the Magna Carta to the people as a whole, and this could not be otherwise, since such a reality had not yet made its appearance in history. Naturally, those historical facts do not detract from its crucial importance in British constitutional history, basically due to the symbolic association attached to it.

What is true is that the modern concept of fundamental rights, related originally to the idea of natural rights, only appears in more modern times after the end of the medieval age in the sixteenth century, and when the idea of duty gave way to the idea of rights,[368] and due, as we have seen in political theory, to the theoreticians of the absolute state. Thus, the first formal expression of this new concept can be found in the writ of *Habeas Corpus* developed by English courts, precisely because of the influence and interpretation of the Magna Carta. As Sir William Holdsworth pointed out:

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368 "A common and useful way of describing the change from the medieval to the modern world is to say that the idea of *duty* gave way to the idea of right." K. MINOGUE, *loc. cit*., p. 5.

> "Whether or not the famous clause of Magna Carta, which enacted that 'no free man shall be taken or imprisoned or diseased or exiled or in any way destroyed except by the lawful judgment of his peers or by the law of the land', was intended to safeguard the principle that no man should be imprisoned without due process of law, it soon came to be interpreted as safeguarding it.
>
> Because it was interpreted in this way, it has exercised a vast influence, both upon the manner in which the judges have developed the writs which could be used to safeguard this liberty, and upon the manner in which the Legislature has assisted that development."[369]

Moreover, precisely, the Habeas Corpus Act of 1679 is perhaps the first formal law in modern times related to a fundamental right, that of personal liberty, although it was applied only to detention for 'any criminal or supposed criminal matters'. It was passed to secure that persons detained on criminal charges were brought speedily to trial and to ensure that the power to detain persons on criminal charges was not abused.[370]

The first formal act that refers to fundamental liberties in a wider sense in modern time is undoubtedly the *Bill of Rights* of 1689, enacted at the end of the English Revolution of 1688-1689, and which marks the ultimate triumph of Parliament in its struggle against the crown.

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369 W. HOLDSWORTH, *op. cit.* Vol. IX, London 1966, p. 104.

370 E.C.S. WADE and G. GODFREY PHILLIPS, *Constitutional and Administrative Law*, ninth edition by A.W. BRADLEY, London 1980, p. 456.

This act of Parliament, adopted by the new true Parliament which resulted from the Convention Parliament in 1689, gave undoubted legal authority to all the provisions contained in the Declaration of Rights presented in February 1689 to Prince William and Princess Mary of Orange when the convention offered them the crown of England, and which contained all the major resolutions of the convention.

Therefore, its contents, more than just a statement of rights, have been considered as a political document containing 'the rights of the nation'[371] as had previously been established by legislation.[372]

Regarding rights, however, the Bill of Rights gave legal effect to those rights mentioned in the Declaration by means of a provision stating that:

> "All and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this Kingdom, and so shall be esteemed, allowed, adjudged, deemed, and so taken to be."[373]

In fact, the Declaration of Rights cannot only be thought of as a document tending only to restore the old and acknowledged rights of Englishmen that had been grievously violated by King James II. It must also be regarded, like the Bill of Rights, as a radical reforming document in the sense that it resolved long–standing disputes

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371 L.G. SCHWOERER, *The Declaration of Rights, 1689,* 1981, p. 19, 291.

372 That is why W. HOLDSWORTH considered that in the Bill of Rights there is no "statement of constitutional principles," *op. cit*., Vol. VI, London 1971, p. 241.

373 Quoted by P. ALLOT, "The Courts and Parliament: Who Whom? *The Cambridge Law Journal*, 38 (1), 1979, p. 98.

in ways favorable to Parliament and the individual, and according to the libertarian political principles that the Revolution embodied.

As L.G. Schwoerer stated in his study of the Declaration of Rights 1689, that Declaration and the Bill of Rights:

> "Dealt with royal prerogatives that lie at the very heart of sovereignty, royal power respecting law, military authority, and taxation. They sought also to strengthen the role of Parliament, by claiming the rights of free election, free speech, free debate, free proceedings, and frequent meetings. And they guaranteed rights to the individual – to petition the King without fear of reprisal, to bear arms (under certain restrictions) and to be protected against certain judicial procedures (excessive bail, excessive fines, cruel and unusual punishments, and the granting and promising of fines and forfeitures before conviction)."[374]

In so doing, this document must be thought of as the necessary ingredient of the 1688-1689 Revolution so as not to be seen as a simple *coup d'Etat*. On the contrary, the Revolution has been thought of as real, not only because it destroyed the essential elements of the *Ancien régime*, but also because it also restored certain rights which had been assaulted by the Stuarts and, in resolving certain long–term controversies, it created a new kingship.

Thus in the new political system which was born, the principles of divine–right monarchy, the idea of direct hereditary succession, the prerogatives of the king over law, the military, taxation and judicial procedures which

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374 L.G. SCHWOERER, *op. cit*., p. 283.

were to the detriment of the individual, all underwent radical changes; and Parliament definitively gained supremacy in its struggle against the king.

This revolution has been considered by Schowerer as

> "The greatest, in the sense of being the most effective, of the revolutions that occurred in early modern European history. And its legacy was ongoing in the revolution (and the document accompanying it) that occurred at the end of the eighteenth century in the American colonies."[375]

The importance of the Bill of Rights 1689, therefore, lies in two principal aspects: first, because it paved the way for the transition from the ancient system of class rights towards modern individual rights in the sense that the Bill of Rights declared individual rights, not of some privileged classes but of English people as a whole; and second, because of its influence on the first declarations of fundamental rights in modern times, those of the English colonies of North America.

2. *The American and French Declarations*

In fact, it has been considered that the first of the formal declarations of individual rights in the modern constitutional sense are the bills of the American colonies. They differed from the English precedents mainly because, in establishing those rights, they did not refer to rights based on the common law and tradition, but rather to the rights derived from human nature. Hence, the rights declared in the Bill of Rights of those colonies were natural rights

375 *Idem*, p. 291.

which "do pertain to... (the people) and their posterity, as the basis and foundation of government," as stated in the Virginia Declaration of Rights of June 12, 1776.[376]

In the brief preamble to that Declaration, the relation between natural rights and government was clearly established, and thus the direct influence of Locke's theories in the sense that political society forms itself upon those rights as the basis and foundation of government.

The first three sections of the Declaration clearly followed these ideas:

> *"Section 1*: That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter a state of society, they cannot by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
>
> *Section 2*: That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.
>
> *Section 3*: That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an

[376] See the text in J. HERVADA and J.M. ZUMAQUERO, *Textos internacionales de derechos humanos*, Pamplona 1978, p. 25.

> indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."[377]

In addition, Section 4 established the prohibition of privileges and Section 5 prescribed the separation of powers and the temporal condition of public offices.

From these sections in the Declaration, the theory of the social contract or pact, based on the existence of inherent and inalienable rights of man, is clear; and the democratic basis of government also as its best and must just form, thus the theory of democratic representation through free elections (Section 7); and the right of resistance, a product itself of the social pact.

The other eleven sections are devoted to regulating a few fundamental rights, among which are the right to a speedy trial, with due guarantees, the right not to be condemned to excessive fines or to cruel and unusual punishment, and the freedom of the press.

The same fundamental liberal principles of the Virginia Declaration can also be found in the Declaration of Independence of the United States of America, approved less than one month later (April 7, 1776). It stated:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That, to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That, whenever any form of government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on

377 *Idem*, p. 27–29.

> such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness'."[378]

These declarations, undoubtedly, marked the beginning of the democratic and liberal era of the modern state according to law, although the 1787 Constitution of the United States did not contain a declaration of fundamental rights, it nevertheless constituted one of the main characteristics of American constitutionalism, which influenced modern constitutional law.[379] The 1787 Constitution was criticized for the fact that it did not include a statement of fundamental rights, but that lack was resolved two years later when ten amendments to the Constitution were drafted by the first Congress and approved on September 25, 1789, just one month after the French Declaration of the Rights of Man and the Citizen.[380]

In effect, on August 27, 1789, the representatives of the French People, organized in the National Assembly, approved a Declaration of the Rights of Man and the Citizen, where all the fundamental rights of man were recognized and proclaimed in seventeen articles. The undoubted influence of the American Declarations upon it was decisive, particularly in the principle itself of the need of a formal declaration of rights, and in its contents. The mutual influences between the two continents at the time are well known: the French philosophers, including Montesquieu and Rousseau were studied in North America; French participation in the War of Independence was important;

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378 *Idem*, p. 37.

379 Ch. H. MCILWAIN, *Constitutionalism and the Changing World*, Cambridge 1939, p. 66.

380 See the text in W. LAQUEUR and B. RUBIN, *op. cit*., p. 106-118. *Cf.* A.H. ROBERTSON, *Human Rights in the World*, Manchester 1982, p. 7.

Lafayette was a member of the drafting committee of the Constituent Assembly which produced the French Declaration and who submitted his own draft based on the Declaration of Independence and the Virginia Bill of Rights; the *rapporteur* of the constitutional Commission proposed "transplanting to France the noble idea conceived in North America"; and Jefferson himself was present in Paris in 1789, having succeeded Benjamin Franklin as American Minister to France.[381]

Anyway, the main objectives in both declarations were the same: to protect the citizen against arbitrary power and to establish the rule of law.

However, it is certain that the French Declaration was obviously more directly influenced by the thoughts of Rousseau and Montesquieu. The drafters of the Declaration took from Rousseau the principles of considering the role of society as being related to the natural liberty of man, and the idea that the law, as the expression of the general will passed by the representatives of the nation, cannot be an instrument for oppression. They also took from Montesquieu his fundamental distrust of power, and therefore, the principle of separation of powers.[382] Of course, the rights proclaimed in the Declaration were natural rights of man, thus inalienable and universal. These were not rights that political society granted, but rights belonging to nature, inherent in human beings.

This conception is clear in the text of the Declaration issued by the representatives of the French people, by "considering that the ignorance, forgetfulness or contempt of the rights of man are the sole causes of public misfor-

381 J. RIVERO, *Les libertés publiques*, Paris 1973, Vol. I, p. 45; A.H. ROBERTSON, *op. cit*., p. 7.

382 J. RIVERO, *op. cit.*, p. 41-42.

tunes and of the corruption of government." The Declaration was, then, a perpetual reminder of the "natural inalienable and sacred rights of man."[383]

The first articles of the Declaration that recognized and proclaimed the rights of man and citizen were, undoubtedly, a sort of compilation of all the liberal principles based on the ideas of Locke, Montesquieu and Rousseau, and concretized in the American Revolution. They were:

"1. Men are born and remain free and equal in rights; social distinctions may be based only upon general usefulness.
2. The aim of every political association is the preservation of the natural and inalienable rights of man; these rights are liberty, property, security, and resistance to oppression.
3. The source of all sovereignty resides essentially in the nation; no group, no individual may exercise authority not emanating expressly therefrom.
4. Liberty consists of the power to do whatever is not injurious to others; thus, the enjoyment of the natural rights of every man has as its limits only those that assure to other members of society the enjoyment of those same rights; such limits may be determined only by law.
5. The Law has the right to forbid only actions which are injurious to society. Whatever is not forbidden by law may not be prevented, and no one may be constrained to do what it does not prescribe.

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383 See the text in J. HERVADA and J.M. ZUMAQUERO, *op. cit.*, p. 39-40; W. LAQUEUR and B. RUBIN, *op. cit.*, p. 118.

6. Law is the expression of the general will. All citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes...

16. Every society in which the guarantee of rights is not assured, or the separation of powers not determined, has no constitution at all."[384]

The rest of the Declaration concerned with individual rights, for instance, the principle *nullum crimen nulla poena sine legge*; the presumption of innocence until a declaration of guilt; the right of free expression and to free communication of ideas and opinions, considered in the Declaration as "one of the most precious of the rights of man"; and the right to property, considered "sacred and inviolable."

We could say that the whole process of the development of the Rule of Law on the basis of this fifth, general feature, of the establishment of a declaration of rights, took its lead from these two formal declarations, the American and the French, subsequently incorporated into written constitutions.[385] They first had an impact in Latin America, long before than in other European countries.

In this sense, what can be considered as the third formal declaration of rights by an independent state in constitutional history was the Declaration of Rights of the People adopted by the Supreme Congress of Venezuela in 1811, four days before the formal Independence Act of July 5, 1811 was issued.[386] The content of that Declaration

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384 *Idem*, pp. 41-49 and pp. 118-119.

385 The French declaration was incorporated in the preamble to the Constitution of 1791.

386 See the text in A. R. BREWER–CARÍAS, Las Constituciones de Venezuela, Madrid 1985, pp. 175–177. See A. R. BREWER-CARÍAS, *Los derechos humanos en Venezuela: casi 200 años de*

followed the French one, but in much more detail in its enumeration of rights, including new ones in relation to the previous American and French Declarations, such as the right to industrial and commercial freedom and the freedom to work; the right to consider one's home as inviolable, and the right to petition before authority without limitation. The Declaration was also incorporated as a final Chapter of 59 articles in the first Latin American constitution, the Venezuelan of December 21, 1811.[387]

Afterwards, the declarations of fundamental rights by all the newly independent states of Latin America at the beginning of the nineteenth century spread as a basic constitutional feature of our countries.

In any case, it must be said that, in general, the American – North American and Latin American, and the French declarations of rights were different in their content and meaning.

In the French Declaration, it was not a case of establishing a new state but of the continuation of a national state already in existence. Therefore, the concept of the citizen was taken for granted, whereas in the American Declarations, new states were being built upon a new basis.

Consequently, the purpose of the French Declaration, as stated in its introduction, was to solemnly remind all members of the community of their rights and duties.

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historia, Caracas, 1990; y Las declaraciones de derechos del pueblo y del hombre de 1811 (Bicentenario de la Declaración de "Derechos del Pueblo" de 1º de julio de 1811 y de la "Declaración de Derechos del Hombre" contenida en la Constitución Federal de los Estados de Venezuela de 21 de diciembre de 1811), Academia de Ciencias Políticas y Sociales, Caracas 2011.

387 Allan R. BREWER-CARÍAS, *Las Constituciones de Venezuela*, *cit*., p. 196-200.

Hence, the new principle of individual liberty appeared only as an important modification within the context of a political unity already in existence.

Whereas in the North American and Latin American declarations, the enforcement of rights was an important factor in the independence process, and thus of the building of the new states upon a new basis, particularly the principle of the sovereignty of the people with all its democratic content. Therefore, on the American continent, the solemn Declaration of Fundamental Rights signified the establishment of principles on which the political unity of the nations was based, and the validity of which was recognized as the most important premise in the emergence and formation of that unity.

3. *The Situation of Fundamental Rights in the British Constitutional System*

England has rightly been called the land of liberalism: Locke was English, Montesquieu's system is based on his interpretation of the English constitution, and, from the point of view of positive law, the declarations of rights have their antecedents in English constitutional history. Because of those antecedents, in general, liberal democratic constitutions nowadays normally contain a declaration of rights. However, in the United Kingdom, in the absence of a written constitution and, apart from references to historical statutes, up to 1998 there was no declaration or special code relating to fundamental rights. That is why, as Sir Ivor Jennings said, there were "no fundamental rights" and "no special protection for "fundamental rights."[388]

[388] I. JENNINGS, *The Law and the Constitution*, London 1972, p. 40, 259.

This situation changed at least regarding fundamental civil rights, when Parliament issued the *Human Rights Act 1998* giving "further effect to rights and freedoms guaranteed under the European Convention on Human Rights,"[389] the United Kingdom being one of the States that drafted it and one of the first States to ratify it in 1951. The Convention, which came into force in the United Kingdom in 1953,[390] has been considered by John Bell as a major "constitutional statute on fundamental rights"[391] and can lead "to either the narrowing of the scope of legislation by means of an interpretation, which makes the statute compatible with the Convention, or a declaration of incompatibility, which empowers a minister to amend or repeal an incompatible statutory provision."[392]

Before such ratification, consequently, the rights of the British people equivalent, of course, to those established elsewhere in entrenched declarations, were based on two postulations: in the first place, that citizens can do or say anything, provided it is not an infringement of a law or of other citizens' rights; and, in the second place, that the

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389 See at: https://www.legislation.gov.uk/ukpga/1998/42 /section / 1. See also The Human Rights Act 1998 (Amendment) Order 2004, at: https://www.legislation.gov.uk/uksi/2004/1574/article /2/made

390 See at: https://www.gov.uk/government/collections/human-rights-the-uks-international-human-rights-obligations#:~:text=The%20 European%20Convention%20on%20Human%20Rights%20(ECHR) %20is%20an%20international,came%20into%20force%20in%201 953.

391 See John BELL, "Constitutional Courts as positive Legislators. British National Report," in Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study,* Cambridge University Press 01, p. 805 ff.

392 See N. BAMFORTH, "Parliamentary Sovereignty and the Human Rights Act 1998," [1998] Public Law 572. See the reference in John BELL, "Constitutional Courts as positive Legislators. British National Report," *Idem*.

authorities can only do what is permitted by statutory or common law.[393] Consequently, in the United Kingdom's legal system, rights were expressed, in principle, not positively, but negatively. Hence, strictly speaking, rather than rights they were liberties.

That is why, as E.C.S. Wade and G. Godfrey Phillips pointed out:

> "The approach of the law in Britain to the citizen's liberty has often been to treat it as a residual concept: The citizen may go where he pleases and do or say what he pleases provided he does not commit a criminal offence or infringe the rights of others."[394]

Accordingly, we can say that in the system of the United Kingdom prior to 1998, the principle was that "anything is lawful which is not unlawful," in other words, "it is lawful to do anything which is not unlawful, or which cannot be prohibited by public authorities."[395]

Therefore, the essence of the provisions related to fundamental rights regulation in Britain was founded upon whom could establish unlawful actions or prohibit them. Naturally, these limits were to be found primarily in legislation, that is to say, in Acts of Parliament.[396]

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393 M. GARCÍA PELAYO, *Derecho Constitucional Comparado*, Madrid 1957, p. 278.

394 E.C.S. WADE and G. GODFREY PHILLIPS, *Constitutional and Administrative Law*, ninth edition by A.W. BRADLEY, London 1982, p. 441.

395 I. JENNINGS, *op. cit*., p. 41, 262. "It asserts the principle of legality, that everything is legal that is not illegal."

396 Delegated Legislation in relation to fundamental rights, in principle, is only possible in cases of state of emergency in accordance with the Emergency Powers Act 1920. E.C.S. WADE and G. GODFREY PHILLIPS, *op. cit*., p. 567.

It was precisely this negative approach to fundamental rights in England that led Dicey to establish a contrast between the Continental and the English constitutions, as we have seen, saying that on the Continent, individual rights result, or appear to result, from the general principles of the constitution," whereas in England, "the general principles of the constitution (as, for example, the right to personal liberty, or the right of public meeting) are... the result of judicial decisions determining the rights of private persons in particular cases brought before the courts." As a result of which, – Dicey concluded –:

> "The rules which in foreign countries naturally form part of a constitutional code are not the source but the consequence of the rights of individuals, as defined and enforced by the courts."[397]

Dicey's views in relation to the situation of the United Kingdom prior to 1998 were expressed more than one hundred years ago. The first edition of *An Introduction to the Study of the Law of the Constitution* was published in 1885. Nonetheless, at that time, the role of Parliament and the Courts was quite different one from the one developed as a consequence of the impact upon fundamental rights produced by the Welfare state or the Social *État de droit,* as it is called in Continental Europe.

As makers of law, J.D.B. Mitchell said, "the courts have declined in importance. In part, this is the obvious result of the development of Parliament, in part the result of changes in ideas about the functions of a state."

Moreover, he added,

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397 A.V. DICEY, *An Introduction to the Study of the Law of the Constitution*, with an "Introduction" by E.C.S. WADE, 1973, p. 195, 196, 203. See also WADE comments, p. CXVIII.

> "The development of the Welfare state has meant that rights with which individuals are increasingly concerned, protections or hedges against poverty, ill health, and the like, cannot be the creation of judge–made law as could be the rights of speech, etc., with which Dicey was concerned. These newer rights can only be the result of complex legislation."[398]

And it has been so, even though the role of ordinary courts continues to be important as the ultimate guardians of fundamental rights, and not as their creators.

Nevertheless, despite all the British tradition, prior to 1998, discussions were held in the United Kingdom particularly during the years after the Second Word War, on the need and possibility of enacting an entrenched Bill of Rights, which still apply regarding social and economic rights.

The principal argument for a Bill of Rights was to restrain excess or abuse of power by public authorities, and to consider that with it, the power to bring legal actions against the state and agencies of government will improve; in other words, it was thought correctly that a Bill of Rights is potentially a more fruitful source of remedies.[399]

This reasoning in favor of the enactment of a Bill of Rights has been summarized in 1983 by P.S. Atiyah, as follows:

> "That there ought to be, and are, certain basic human rights which ought not to be at the mercy of a government and legislature; that – governments and legislatures derive their power from the people, and that the people cannot be assumed to have granted

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398 J.D.B. MITCHELL, *Constitutional Law*, Edinburgh 1968, p. 55.

399 M. ZANDER, *A Bill of Rights?* London 1985, p. 27.

> away unlimited and despotic powers just because they have elected a Parliament (by a process set by Parliament itself); that a majority of the people is no doubt entitled to elect a majority government and parliament to represent their views, but this does not give, and ought not to give, that government and parliament unlimited power to oppress the minority or minorities; and that at the very least, the basic structure of the democratic process – which alone gives legitimacy to the power of governments and parliaments ought to be entrenched so as to be unalterable by Parliament."[400]

Evidently, these arguments in favor of the enactment of a Bill of Rights in Britain, which follow the most orthodox liberal tradition, had to consider the principle of Parliamentary sovereignty. As a matter of principle, an entrenched Bill of Rights would limit the powers of the ordinary legislator to modify it, which is contrary to the main principle of the British constitution. On the other hand, a Bill of Rights formally entrenched in the constitution would mean that judges would become the ultimate arbiters of the powers of Parliament, and that, – it has been said – would be disastrous unless judges could be persuaded to alter their traditional methods of interpretation. "For traditional and crabbed methods of interpretation – P.S. Atiyah said –, could often lead to the invalidation of legislation which is absolutely necessary to keep pace with changing values or conditions; huge tensions would then build up in the legal and political system, and general discredit could be thrown on the law."[401]

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400 P.S. ATIYAH, *Law and Modern Society*, Oxford 1983, p. 109.

401 *Idem*, p. 111.

The main arguments against the enactment of a Bill of Rights that were exposed, were clearly summarized and critiqued by Michel Zander in his pamphlet entitled *A Bill of Rights*?[402] originally published in 1975. Among those arguments we may point out the following:

In the first place, it has been said that a Bill of Rights is an "un-British way of doing things,"[403] based on the well-known apprehensiveness to written constitutions or constitutional documents, that in constitutional law derives from Dicey's concepts.

To say that a Bill of Rights is "un-British" says M. Zanders, "is to show an ignorance of history."[404] In fact, it can be said that the United Kingdom invented the Bill of Rights with the Magna Carta in 1215 and the Bill of Rights in 1689; it influenced the Declaration of Rights in the American Colonies 1776, and the content of the first ten amendments of the North-American constitution (1789); and in more recent times, the United Kingdom has been the main exporter of the ideas of fundamental rights and freedoms established in an entrenched way, to the Commonwealth countries on a scale without parallel in the rest of the world.[405]

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402 London 1985, p. 106.

403 *Idem*, p. 43.

404 *Ibidem*, p. 44.

405 A. LESTER, "Fundamental Rights: The United Kingdom Isolated?" *Public Law*, spring 1984, p. 56, 57; M. ZANDERS, *op. cit*, p. 28-30. To realize the extent of this contribution, we only have to mention the amendments adopted by the British Parliament in 1982, with regard to the British. North American Act of 1867, renamed in 1982 the Constitution Act of 1867, in which the Canadian Charter of Rights and Freedom was included at the same time in which the last vestige of the colonial relationship with regard to constitutional amendments in Canada disappeared.

All the countries of the Commonwealth, except New Zealand, have written constitutions and a formal declaration of fundamental rights.

The second argument against the enactment of a Bill of Rights was that it was not needed because human rights are adequately protected in Britain.

This was also the main argument used up to 1998 to justify[406] why the European Convention on Human Rights was not transformed into domestic law in the United Kingdom. "At the time of ratification [1951], – Drzemczewski said – the government of the day assumed that domestic law was in full conformity with the Convention's provisions, and successive governments have since that time expressed the opinion that the rights and freedoms enumerated are in all cases already secured in domestic law."[407]

In relation to this argument, Zander, bearing in mind that in Britain a system of remedies rather than of rights exists, said that "the existing ways of getting remedies all leave much to be desired",[408] and in fact, as Anthony Lester pointed out in his article about the isolation of the United Kingdom concerning fundamental rights and the European Convention, "no other country which belongs to the Convention systems has been faced with so many cases" of importance, adding:

406 M. ZANDERS, *op. cit*., p. 45.

407 Q.Z. DRZEMCZEWSKI, *European Human Rights Convention in Domestic Law. A Comparative Study*, Oxford 1985, p. 178.

408 M. ZANDERS, *op. cit*., p. 45.

> "It is not the sheer volume of cases which is so telling, but the proportion of cases declared admissible by the commission and of cases decided against the United Kingdom."[409]

The third argument against the enactment of a Bill of Rights was based on the principle of sovereignty of Parliament, as we have seen. A Bill of Rights needs to be entrenched, and that would restrict Parliament's freedom to legislate in the future. As O. Hood Phillips said:

> "The primary characteristic of our constitution is the legislative supremacy of Parliament. This means that Parliament can pass a law on any subject matter, even of a fundamental constitutional nature, and can do so by the ordinary procedure of an Act of Parliament... this legally unlimited power of Parliament to make laws on any subject matter is a corollary of the absence of "entrenched" provisions and of the flexible nature of the British Constitution. It also follows that we have no strictly fundamental rights."[410]

Along the same line of thought, H.W.R. Wade says:

> "...The one inherent limit on Parliamentary omnipotence, which is the consequence of that omnipotence itself, is that the Parliament of today cannot fetter the Parliament of tomorrow with any sort of permanent restraint, so that entrenched provisions are impossible."[411]

However, in practice, even this substantive formal argument was not really an obstacle to an entrenched Bill of Rights. Anthony Lester said in his article:

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409 A. LESTER, *loc. cit.*, p. 65.

410 O. HOOD Phillips, *Reform of the Constitution*, *cit*, p. 11, 12.

411 H.W.R. WADE, *Constitutional Fundamentals*, London 1980, p. 25.

> "Normally only the very young have fantasies of omnipotence. Growing up involves accepting the necessity for laws, rules, and limits. A mature Parliament would not insist upon the continuous assertion of its fanatical absolute powers at the expense of individual justice.
>
> A mature Parliament would use its sovereign law–making powers to confine those powers within proper constitutional limits.[412]

In any case, the fact is that, even if a Bill of Rights in part has been adopted in an entrenched way by means of the *Human Rights Act of 1998*, that only imply that the provisions of the Bill of Rights prevail unless subsequent enactment explicitly stated otherwise, which would not prevent the express will of Parliament from prevailing in the end. It would mean, however, "that the courts could strike down a statute as being contrary to the Bill of Rights unless it contained an express provision modifying the Bill of Rights to that extent.[413]

This leads us to a final argument against the enactment of an entrenched Bill of Rights in the United Kingdom, related to the powers of courts to review acts of Parliament. As D.G.T. Williams pointed out:

> "An entrenched Bill of Rights would, of course, involve the exercise of judicial review by English and other courts of the United Kingdom, in the sense that would entrust domestic courts of a blank check to protect certain fundamental freedoms even against the legislature itself."[414]

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412 A. LESTER, *loc. cit.*, p. 71.

413 M. ZANDERS, *op. cit.*, p. 70.

414 D.G.T. WILLIAMS, "The Constitution of the United Kingdom", *The Cambridge Law Journal*, 31, (1), 1972, p. 277.

Therefore, the real problem of a Bill of Rights, adopted in the ordinary, constitutional way of impeding its modification by ordinary legislation, in a constitutional system like the British, was that it could imply the powers of courts to review the conformity of acts of Parliament with that Bill, which could not be acceptable in the British constitutional system unless greater modification of the constitution itself took place.

All these arguments could be overcome if the United Kingdom limited its search for establishing a positive code of rights and freedoms by granting domestic status to the European Convention on Human Rights and therefore, allowing the courts to apply and interpret the Convention and to secure speedy and effective domestic remedies for the citizens of this country against the violation of their fundamental human rights.[415]

This, prior to 1998, was the best alternative to the matter today,[416] although it involved a number of questions regarding relations between international law and English law and the interpretation of the Convention in English law.[417]

In any case, as already mentioned, the *Human Rights Act of 1998* giving effects to the Convention as domestic law, gave "further effect to rights and freedoms guaranteed under the European Convention on Human Rights," specifically to the following Convention Rights: *Article 2:* Right to life; *Article 3:* Prohibition of torture; *Article 4:* Prohibition of slavery and forced labor; *Article 5:* Right to liberty and security; *Article 6:* Right to fair trial; *Article 7:*

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415 A. LESTER, *loc. cit.*, p. 66.

416 M. ZANDERS, *op. cit*., p. 83-89.

417 J. JACONELLI, *Enacting a Bill of Rights*. *The Legal Problems*, Oxford 1980, p. 270-277.

No punishment without law; *Article 8:* Right to respect for private and family life; *Article 9:* Freedom of thought, conscience and religion; *Article 10:* Freedom of expression; *Article 11:* Freedom of assembly and association, *Article 12:* Right to marry; *Article 14*: Prohibition of discrimination; *Article 16*: Restriction on political activity of aliens; *Article 17*: Prohibition of abuse of rights; *Article 18*: Limitations on use of restrictions on rights; *First Protocol*, *Article 1*: Protection of property; *Article 2*: Right to education; *Article 3*: Right to free elections. The direct consequence of the Act, as stated therein is that it declares "unlawful for a public authority to act in a way that is incompatible with a Convention right."

The *Human Rights Act of 1998* also specifically provided for the "interpretation of Convention rights," precisely according to the Convention, establishing that "a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27 (2) of the Convention, or (d) decision of the Committee of Ministers made under Article 46 of the Convention.

On the other hand, more important in domestic law, the *Human Rights Act of 1998* also provides for the "interpretation of legislation," specifying that "as far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights." Consequently, a "declaration of incompatibility" is provided to be applied "in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right," being empowered to "make a declaration of incompatibility."

Finally, another important provision of the *Human Rights Act of 1998*, is the specific regulation of judicial remedies providing that "a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful" could "bring proceedings against the authority" in the appropriate court or tribunal, or "rely on the Convention right or rights concerned in any legal procee-dings, but only if he is (or would be) a victim of the unlawful act." In addition, the *Human Rights Act of 1998*, gives the courts "in relation to any act (or proposed act) of a public authority which it finds is (or would be) unlawful, the power to "grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

In any case, with or without a domestic Bill of Rights, the validity of rights in the United Kingdom, at least from the point of view of a foreign lawyer, is inseparable from the total structure of the British constitution. Consequently, abolishing freedom and liberties would be tantamount to abolishing the entire British constitution, which makes no sense.

In any event, what we wanted to point out is that, in the modern *État de droit*, further to the limitation of powers and the submission of all state organs to the rule of law, its third main feature is the existence of a formal declaration of fundamental rights and liberties, normally of an entrenched nature and embodied in a written constitution. This is the general trend in today's constitutional law.

4. *The Declaration of Fundamental Rights at the origin of the Hispanic American Revolution*

As has been said, the principle of the constitutional declaration of fundamental human rights as an essential principle of the rule of law, after the American and French Revolutions, found its first field of application

in Hispanic America as of 1811, where both the Declaration of Rights adopted in the independent Colonies of North America in 1776 and the Declaration of the Rights of Man and of the Citizen proclaimed by the French Revolution had been prohibited texts.

In fact, the same year of the adoption of the French declaration in 1789, the Tribunal of the Inquisition of *Cartagena de Indias* had formally prohibited its circulation in Hispanic America; a decision that was ratified the following year, in 1790, by the Viceroys of Peru, Mexico and Santa Fe, and by the President of the High Court or *Audiencia* of Quito. That is why, also, that the Captain General of Venezuela, on the occasion of the penetration of revolutionary ideas in the colonial Provinces, informed the Crown of Madrid "that in the heads of the Americans, principles of liberty and independence were beginning to ferment, very dangerous to the sovereignty of Spain."[418]

And so it was. The ideas penetrated and with all the danger to the colonial regime, ended up being adopted as the basis for the constitutions of the new independent states that began to flourish after 1810.

This process of penetration of ideas, in spite of the prohibitions, was possible through several translations of the French Declaration, among which the one by Antonio Nariño in Santa Fe de Bogotá, in 1792, is worth highlighting. It was the translation of the text of the Declaration that preceded the French Constitution of 1791, which circulated in New Granada in 1794, having been the object of a very famous case against Nariño, in which he was sentenced to ten years of prison in Africa, the confiscation of

418 See in J. F. BLANCO and R. AZPÚRUA, *Documentos para la historia de la vida pública del Libertador,* Ediciones de la Presidencia de la República, Caracas, 1983, Tomo I, p. 177.

all his goods and to perpetual expulsion from America, it being ordered to burn by the hand of the executioner the book that contained the translation of the Rights of Man.[419]

Around the same time, on June 7, 1793, the Secretary of the Royal and Supreme Council of the Indies had addressed a note to the Captain General of Venezuela, calling his attention to the plans of the Government of France and some French revolutionaries to subvert order in America, as well as other promoters of subversion in Spanish dominions in the New World, who, it said, "send books and papers harmful to the purity of religion, public tranquility and due subordination of the colonies."[420]

Three years later, in 1796, the French Declaration would penetrate again in the provinces of Venezuela, but this time by the hand of some conspirators of the so-called Conspiracy of San Blas, which on February 3, 1796, should have provoked a revolutionary movement in Madrid to establish a Republic in substitution of the Monarchy. After being arrested, tried, and sentenced to death, the conspirators, among them the Majorcan Juan Bautista Mariano Picornell y Gomilla, had their sentences commuted to life imprisonment in the dungeons of the Castles of Puerto Cabello, Portobello, and Panama, in the Caribbean. Thus, they arrived in the port of La Guaira being imprisoned in Puerto Cabello, from where they managed to escape with the complicity of Manuel Gual and José María España, local conspirators who would lead the so-called Conspiracy of *Gual and España*, considered as "the

419 See the text in *idem.* Tomo I, pp. 257-259.

420 *Idem.* Tomo I, p. 247.

most serious attempt of liberation in Hispanic America before Miranda's in 1806."[421]

Among the papers that remained from it and that were to have the greatest influence on the constitutional process in Hispanic America was the text of the book entitled *Derechos del Hombre y del Ciudadano con varias Máximas Republicanas y un Discurso Preliminar dirigido a los Americanos*, probably printed in Guadalupe in the same year 1797,[422] where Picornell had ended up, and which contained the translation, this time of the French Declaration that preceded the Constitution of 1793,[423] of the Reign of Terror period.[424] The text was banned on December 11, 1797 by the Royal Court of Caracas, considering that it had "the full intention of corrupting customs and making odious the royal name of His Majesty and his just government; that in order to corrupt customs, its authors follow the rules of spirits plagued with a multitude of vices, and disfigured with various appearances of humanity."[425]

That text, in any case, was the most important source of inspiration for what would later become the first Bill of Rights to be adopted in Hispanic America, which was the

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421 P. GRASES, La Conspiración de Gual y España y el Ideario de la Independencia, Caracas, 1978, p. 27.

422 In spite that it appears as published in "Madrid, En la imprenta de la Verdad, año de 1797. See on this, Pedro GRASES, "Estudio sobre los 'Derechos del Hombre y del Ciudadano'," in *Derechos del Hombre y del Ciudadano* (Estudio Preliminar por Pablo RUGGERI PARRA y Estudio histórico-crítico por Pedro GRASES), Academia Nacional de la Historia, Caracas 1959, pp. 147, 335. A recent edition of the book was published by Aranzadi, Thomson Reuters Civitas, Madrid 2011.

423 P. GRASES, La Conspiración de Gual y España. *op. cit.*, pp. 37 ss.

424 *Idem*.

425 *Idem*, p. 30.

"Declaration of the Rights of the People,"[426] sanctioned by the Legislative Section of the Province of Caracas of the General Congress of Venezuela on July 1, 1811, even before the adoption of the Declaration of Independence by the same General Congress, on July 5, 1811. This text was historically the third declaration of rights of a constitutional rank in the history of modern constitutionalism, after those proclaimed in the French Revolution and the American Revolution. The drafting of the Venezuelan declaration was in charge of Juan Germán Roscio (1763-1821), one of the experienced lawyers, ideologists and heroes of independence.

This declaration of the "Rights of the People", considered by Pedro Grases, as "the philosophical declaration of Independence,"[427] was a text of 43 articles divided into four sections on: "Sovereignty of the People", "Rights of Man in Society", "Duties of Man in Society", and "Duties of the Social Body", which were preceded by a Preamble. The following, in summary, was the content and rights declared in the document:

Section One: Sovereignty of the people: Sovereignty (arts. 1-3); usurpation of sovereignty (art. 4); temporality of public employment (art. 5); proscription of impunity and punishment of the crimes of representatives (art. 6); equality before the law (art. 7).

Section Two: Rights of Man in Society: The Purpose of Society and Government (art. 1); the rights of man (art. 2); law as expression of the general will (art. 3); freedom of expression of thought (art. 4); purpose of law (art. 5); obe-

426 Allan R. BREWER-CARÍAS, Las Constituciones de Venezuela, Academia de Ciencias Políticas y Sociales, Caracas 2008, Tomo I, pp. 549-551.

427 P. GRASES, *La Conspiración de Gual y España..., cit,* p. 81.

dience to law (art. 6); right to political participation (art. 7); right to vote (arts. 8-10); due process (art. 11); proscription of arbitrary acts, official responsibility, and citizen protection (art. 12-14); presumption of innocence (art. 15); right to be heard (art. 16); proportionality of penalties (art. 17); security (art. 18); property (art. 19); freedom of work and industry (art. 20); guarantee of property and contributions only through representatives (art. 21); right to petition (art. 22); right to resist (art. 23); inviolability of home (art. 24); rights of foreigners (arts. 25-27).

Section Three: Duties of Man in Society: limits to the rights of others (art. 1); duties of citizens (art. 2); the enemy of society (art. 3); the good citizen (art. 4); the good man (art. 5).

Section Four: Duties of the Social Body: the social guarantee (art. 1); limits of powers and civil service responsibility (art. 2); social security and public assistance (art. 3); public instruction (art. 4).[428]

However, additionally, without doubt other influences were reflected in this text of the 1811 Declaration, coming from the section on the "Duties of Man in Society" of the "*Déclaration des Droits et Devoirs de l'Homme et du Citoyen*" which preceded the text of the French Constitution of 1795,[429] as well as the declarations of rights that were incorporated in the Constitutions of the former Brit-

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428 See P. GRASES, *La Conspiración de Gual y España…*, *cit.,* p. 147. In this book there is an important comparison between the Declaration of 1797, the Declaration of 1811 and the Constitution of 1811. See also Pedro GRASES, "Estudio sobre los 'Derechos del Hombre y del Ciudadano'," in *Derechos del Hombre y del Ciudadano* (Estudio Preliminar por Pablo Ruggeri Parra y Estudio histórico-crítico por Pedro Grases), Academia Nacional de la Historia, Caracas 1959, pp. 168 ss.

429 See the texts in J. M. ROBERTS and J. HARDMAN, *French Revolution Documents,* Oxford, 1973, 2 vols.

ish Colonies in North America, including the Virginia Declaration of Rights of June 12, 1776, and the Constitution or form of Government, agreed to and resolved upon by the Delegates and Representatives of the several Counties and Corporation of Virginia of June 29, 1776.[430] These texts were translated into Spanish in the book by Manuel García de Sena, *La Independencia de Costa Firme justificada por Thomas Paine Treinta años ha* (The Independence of Costa Firme justified by Thomas Paine Thirty years ago) of 1811, which circulated in Caracas the same year. [431]

Therefore, this mixture of sources, the order given to the articles and the systematization adopted in the Venezuelan Declaration of 1811 was different from that of the French texts, so that the four sections that group them together in the 1811 Constitution can be considered original to the Venezuelan text, with some additional inspiration in the works that appeared under the signature of William Burke[432] published in the *Gaceta de Caracas* between

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430 See Allan R. BREWER-CARÍAS, Las Declaraciones de Derechos del Pueblo y del Hombre de 1811 (Bicentenario de la Declaración de "Derechos del Pueblo" de 1º de julio de 1811 y de la "Declaración de Derechos del Hombre" contenida en la Constitución Federal de los Estados de Venezuela de 21 de diciembre de 1811)**,** Prólogo de Román José Duque Corredor), Academia de Ciencias Políticas y Sociales, Caracas 2011.

431 See in Manuel GARCÍA DE SENA, *La Independencia de Costa Firme justificada por Thomas Paine treinta años ha*, Edición del Ministerio de Relaciones Exteriores, Caracas 1987, p. 90.

432 "William Burke" was a pseudonym used, among others, by Francisco de Miranda and his close aids to write and publish articles in the *Gaceta de Caracas*, many of which were based on documents that were part of his Archive. See on this: Allan R. BREWER-CARIAS, *Sobre Miranda. Entre la perfidia de uno y la infamia de otros, y otros escritos, Segunda edición corregida y aumentada,* Editorial Jurídica Venezolana. Caracas / New York 2016.

1810 and 1811, such as the title of the section on "*Derechos del hombre en Sociedad*" (Rights of Man in Society).[433]

The influence of the American documents is also evidenced by the fact that the title of the Declaration of 1811 itself was not on the "Rights of Man and Citizen," but on the *Derechos del pueblo* (Rights of the People), an expression that was not found in the French texts, and that, in fact, came from the translation of the word "people" (*pueblo*) from the texts of the American declarations, which are also found both in the texts signed by William Burke and in the works of Thomas Paine translated by Manuel Garcia de Sena, also in 1811.

Specifically, in the works attributed to William Burke, and later collected in the book *Derechos de la América del Sur y México*, published in Caracas in 1811, the expression "*derechos del pueblo*" (rights of the people) was constantly used[434] when arguing about the rights declared in the American Constitutions, considering that "The people are, in all times, the true and legitimate sovereign. All the elements of supremacy reside in it and derive from it."[435] Referring to the Constitutions of the United States, Burke's texts even stated that they "declare positively and particularly, that sovereignty resides essentially and constantly in the people;" that "by the system of representa-

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433 William Burke used in one of his articles in the *Gaceta de Caracas* in 1811, the expression "*Derechos del Hombre en Sociedad*" that was incorporated in the Declaration of 1811. See in William BURKE, *Derechos de la América del Sur y México,* Academia Nacional de la Historia, Caracas 1959, Vol. I., p. 107.

434 See William BURKE, *Derechos de la América del Sur y México,* Academia Nacional de la Historia, Caracas 1959, Vol. I., Vol. I, pp. 118, 123, 127, 141, 157,162,182, 202, 205, 241.

435 *Idem*, p. 113.

tion, the people actually and efficiently secure their right of sovereignty; ...a principle which forms the principal distinction between authoritative and free governments, so much so that the people may be said to enjoy liberty in the proportion as they make use of the representation."[436]

On the other hand, in García de Sena's translation of *The Independence of the Costa Firme justified by Thomas Paine Thirty years ago*, the expression "rights of the people" was also used when arguing about the two possible forms of government: "the Government by hereditary succession" and "the Government by election and representation," stating his opinion that:

> "The revolutions that are now spreading in the world have their origin in the state of the case, and the present war is a conflict between the representative system founded on the rights of the people, and the hereditary system founded on usurpation."[437]

In addition, when referring to representative government, Paine identified it as that in which the sovereign power rests with the People. For this, he began with the consideration that:

> "In Republics similar to that which is established in America, the sovereign power, or the power over which there is no other authority, and that governs all others, is where nature has placed it, in the People; for the People in America are the origin of power. It is

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436 *Idem*, pp. 119, 120.

437 Written by PAINE in his "Disertation on the First Principles of Government" written in 1795, in times of the French revolution. See in Michael FOOT and Isaac KRAMNICK (editors), *Thomas Paine. Reader* Penguin Books, 1987, p, 453; and in Manuel GARCÍA DE SENA, *La Independencia de Costa Firme justificada por Thomas Paine treinta años ha*, *cit.,* p. 90. The expression is also used in other Disertations, pp. 111, 112.

there as a principle of right recognized in the Constitutions of the country, and the exercise thereof is constitutional, and legal. This Sovereignty is exercised by electing and deputing a certain number of persons to represent and act for it all, who not acting rightly, may be deposed by the same power that placed them there, and others elected and deputed in their stead."[438]

From these concepts of Paine, which undoubtedly influenced the conception of the declaration of the "Rights of the People" decreed by the General Congress of Venezuela in 1811, it can be understood why it begins in Section One with the provisions on sovereignty as a power that lies in the people – not in the Nation, as in France –, which exercises it through representatives, thus departing from the order of the French Declarations where the articles on sovereignty are not at the beginning of the same.

After the adoption of the Declaration of Rights of the People, as mentioned above, on July 5 of the same year, the General Congress of the Provinces of Venezuela approved the Declaration of Independence and the new nation was renamed the American Confederation of Venezuela; and in the following months, also under the inspiration of the principles of modern constitutionalism that had been molded in the American and French Constitutions,[439] the 21st of December, 1811, the first Venezuelan Constitution and that of all Latin American countries was sanctioned.[440]

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438 *Idem,* pp. 118, 119.

439 *Cf.* José GIL FORTOUL, *Historia Constitucional…, op. cit.,* Tomo Primero, pp. 254 and 267.

440 See the text of the 1811 Constitution, in Allan R. BREWER-CARÍAS, *Las Constituciones de Venezuela, cit*., Tomo I, pp. 555-579; and in English in: Allan R. BREWER-CARÍAS, *Documentos Constitucionales de la Independencia / Constitucional Docu-*

Chapter VIII incorporated the declaration of the "Rights of Man to be recognized and respected throughout the State," which was also subdivided into four sections as in the Declaration of 1811: *Sovereignty of the people* (Sections 141 to 159), *Rights of man in society* (Sections 151 to 191), *Duties of man in society* (Sections 192 to 196) and *Duties of the social body* (Sections 197 to 199), complemented by various provisions incorporated in Chapter IX on General Provisions.

In this Chapter VIII, the articles of the Declaration of the Rights of the People of 1811 were included, enriched, so that it can be said that their drafting was directly influenced by the text of the Declarations of the former American colonies, the Amendments to the Constitution of the United States of America and the French Declaration of the Rights of Man and Citizen, and in relation to the latter, by the documents of the conspiracy of Gual and España of 1797.[441] The various sections regulated the rights as follows:

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ments of the Independence 1811, Colección Textos Legislativos No. 52, Editorial Jurídica Venezolana, Caracas 2012, 644 pp. This book includes a facsimilar edition of the book: *Interesting Documents relating to Caracas/ Documentos Interesantes relativos a Caracas; Interesting Official Documents relating to the United Provinces of Caracas*, *viz. Preliminary Remarks, The Act of Independence. Proclamation, Manifest to the World of the Causes which have impelled the said provinces to separate from the Mother Country; together with the Constitution framed for the Administration of their Government. In Spanish and English*," bilingual publication made in London in 1812 (pp. 301-637).

441 See Allan R. BREWER-CARÍAS, *Los Derechos Humanos en Venezuela: casi 200 años de Historia,* Academia de Ciencias Políticas y Sociales, Caracas 1990, pp. 101 ff

The First Section on the "Sovereignty of the People" specified the basic concepts that at the time originated a republic, beginning with the meaning of the "social pact" (articles 141 and 142), continuing with the concept of sovereignty (art. 143) and its exercise through representation (arts. 144-146); the right to hold public office on an equal basis (art. 147), the proscription of privileges or hereditary titles (art. 148); the notion of the law as an expression of the general will (art. 149), and the nullity of acts dictated in usurpation of authority (art. 150).

In the Second Section on the "Rights of Man in Society," when defining the purpose of the republican government (art. 151), liberty, equality, property, and security are listed as such rights (art. 152), and the content of each is then detailed: liberty and its limits are defined only by law (art. 153-156), equality (art. 154), property (art. 155) and security (art. 156). Additionally, this section regulates due process rights: the right to be tried only for causes established by law (art. 158), the right to the presumption of innocence (art. 159), the right to be heard (art. 160), and the right to trial by jury (art. 161). It further regulates the right not to be subject to search (art. 162), the right to inviolability of the home (art. 163) and the limits of authorized visits (art. 164), the right to personal security and to be protected by the authorities in his life, liberty and property (art. 165), , the right to have taxes established only by law enacted by the representatives (art. 166), the right to work and industry (art. 167), the right to complain and petition (art. 168), the right to equality with respect to aliens (art. 169), the proscription of the non-retroactivity of the law (art. 170), the limitation of unfair or extreme penalties and punishments (art. 171) and the prohibition of excessive treatment and torture (arts. 171-173), the right to bail (art. 174), the prohibition of infamy befalling the offspring or descendants of the accused for treason or any other crimes (art. 175), the limitation of the use of military

jurisdiction over civilians (art. 176), the limitation of military requisitions (art. 177), the militia regime (art. 178), the right to bear arms (art. 179), the elimination of privileges (180) and the freedom of expression of thought (art. 181). The Section concludes with the enumeration of the right of petition of provincial Legislatures (art. 182) and the right of assembly and petition of the citizens (art. 183-184), the exclusive power of the Legislatures to suspend laws or stop their execution (art. 185), the power to legislate attributed to the Legislative Branch (art. 186), the right of the people to participate in the legislature (art. 187), the principle of republican alternation (art. 188), the principle of separation of powers between the Legislative, the Executive and the Judicial branches (art. 189), the right to free transit among the provinces (art. 190), the end of governments and the citizen's right to abolish and change them (art. 191).

In the Third Section on "Duties of Man in Society," which establishes the interrelation between rights and duties (art. 192), the interrelation and limitation between rights (art. 193), the duties to respect the laws, maintain equality, contribute to public expenses and serve the country (art. 194), what it means to be a good citizen (art. 195), and what it means to violate the laws (art. 196).

In the Fourth Section on "Duties of the Social Body," where the relations and duties of social solidarity are specified (art. 197-198), and in article 199, the general declaration on the supremacy and constitutional validity of these rights, and the nullity of laws contrary to them is established.

These first constitutional texts of Hispanic America marked the beginning of a successive process of constitutionalization of fundamental rights, so that all the Constitutions of Latin American countries issued during the nineteenth century always included a declaration of rights,

which has always been preserved to this day, adding from the beginning of the twentieth century, to the initial individual and political rights, social and economic rights.

5. *Constitutionalization and internationalization of declarations of fundamental rights*

After the process developed since the first decades of the nineteenth century, we can say that the general declaration of fundamental rights and liberties became normal practice all over the world. Therefore, it is difficult to find in the past two centuries written constitutions without a declaration or an enumeration of fundamental rights including not only the traditional liberties of men, but also the new social and economic rights developed during this century (twentieth century) within the framework of the welfare state. That is why it can be said that the most important contemporary sign of the declarations of fundamental rights as a pillar of the rule of law has been their progressive extension, not only in the very text of the respective Constitutions, but also in International Instruments.

When the Universal Declaration of the Rights of Man and Citizen was adopted in 1789, expressing that "the aim of every political association is the preservation of the natural and imprescriptible rights of man," the rights declared in fact covered a narrow field of freedom, equality before the law, personal security, and private property.

This may be said to be the scope of human rights in the first stage of the human rights regime, when individual rights and freedoms were the exclusive object of regulation by constitutional law, and so it was until the first half of the twentieth century, when there was a considerable expansion in the scope of these rights.

This occurred as a result of the postulates incorporated in the Constitutions of Queretaro in Mexico in 1917, of the Soviet Union in the same year, and of Weimar in Germany in 1919, from which it can be said that the process of constitutionalization of social rights began and the principle of the social function of economic rights, particularly the right to property, was formulated. Subsequently, political rights were expanded in order to strengthen democracy itself, leading to the right to political participation.

In this way, in the contemporary world it can be said that there has been a transition in the declarations of human rights, from the rights of the so-called first generation of classical constitutionalism, reduced to individual rights, which are rather freedoms with their own particular treatment, to the rights of a second generation, comprising rights of an economic, social and cultural nature, which entail more of an obligation on the part of the State to provide benefits.

Furthermore, the declarations of law have gradually incorporated the so-called third generation rights, which include the right of peoples and individuals to development, to a certain quality of life, to environmental protection, to enjoy a cultural heritage, and even the right to peace, as has been expressly enshrined, for example, in the 1991 Constitution of Colombia, and which characterize Latin American constitutionalism.

This progressive expansion of rights can be seen in Latin America, among others, in five Constitutions from the end of last century and the beginning of the current century that can be cited as examples of a very extensive enumeration of rights, as is the case, initially, the Constitution of Brazil (1988), and later on, the Constitutions of Colombia (1991), Venezuela (1999), Ecuador (2008) and Bolivia (2009), which devote a large number of articles to the enumeration and regulation of individual, political,

economic, social, educational, cultural, environmental and indigenous peoples' rights, as well as many of the third generation rights.

What is important to point out with respect to these declarations is that, first of all, from the legal point of view, even though they are incorporated in constitutional and international norms, they are not constitutive declarations of rights; as their very name implies, they are of a declarative nature, of recognition of rights, and therefore do not exclude all those not enumerated that are inherent in the human person.

For this reason, even following the orientation of the Ninth Amendment of the Constitution of the United States ("the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"), in Latin America the enunciative clause of the rights of persons has also been incorporated in the Constitutions, ratifying that constitutional rights are not limited to those expressly enumerated in the constitutional declaration, but that all other rights inherent to the human person, or those declared in international instruments, are also considered constitutional rights. In this way too, the human rights established in international instruments are integrated into constitutional rights with the same value and rank, as a strategy for using the Inter-American system for the protection of human rights from the constitutional perspective.

However, the sign of our times has not only been the constitutionalization of the declarations of rights, but their internationalization, particularly after World War II.[442]

This serious event and the horrors that it provoked, which exposed the most aberrant violations of human rights ever imagined, led to the beginning of the search for a necessary universal scope in the struggle for the protection of human rights, imposing, in addition, the consequent and progressive recomposition of the very concept of sovereignty, key in the configuration of the constitutional law of the time.

International law thus began to play a significant role in establishing limits to constitutional law itself, as a result of the new international principles and commitments that were being shaped to ensure peace. It is not surprising, therefore, that after the horrors seen during World War II, a process of internationalization of human rights began, not only with the issuing of declarations without the means to enforce them, such as the American Declaration of the Rights and Duties of Man adopted by the Organization of American States and the Universal Declaration of Human Rights approved by the United Nations, both in 1948; but also as formal international conventions and treatises, like the European Convention on Human Rights of 1950; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights by the United Nations of 1966; and the American Convention on Human Rights of 1969 in the Inter-American sphere; texts that, in most of the

442 See on these processes: Allan R. BREWER-CARÍAS, Mecanismos nacionales de protección de los derechos humanos (Garantías judiciales de los derechos humanos en el derecho constitucional comparado latinoamericano), Instituto Interamericano de Derechos Humanos (IIDH), Costa Rica, San José 2005.

countries that ratified them, are considered as formal laws and part of the law of the land.[443]

Thus, the initial constitutionalization of human rights, marked by national declarations, was followed by a second stage marked by the process of their internationalization. Its development, as an instrument for the protection of such rights, has even contributed to the development of a third stage in the protection of rights, now consisting of the constitutionalization of the internationalization of human rights, which has been brought about precisely by the introduction of international protection systems into domestic law.

This process has been manifested, in the first place, by granting a certain normative rank in domestic law to international instruments, that specifically establish, in the Constitutions, the principle that the international provisions relating to human rights must prevail in the event of conflict between them and the domestic law; this has not only been declared in the Constitutions by granting supra-constitutional rank, constitutional rank, supra-legal rank or only legal rank[444] to international instruments, but also by providing, in the Constitutions, principles of constitutional interpretation that give precedence to international instruments over domestic law.

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443 See the text in M. TORRELLI and R. BAUDOUIN, *Les droits de 1'homme et les libertes publiques par les textes*, Montreal, 1972, p. 388; J. HERVADA and J.M. ZUMAQUERO, *Textos internacionales de derechos humanos*, *cit*., p. 994.

444 See, in general, on this clasification: Rodolfo E. PIZA R., *Derecho internacional de los derechos humanos:* La Convención Americana, San José 1989; and por Carlos AYALA CORAO, *La jerarquía constitucional de los tratados sobre derechos humanos y sus consecuencias*, México, 2003.

In any case, what can be deemed to be a particular feature of the declarations of rights in the Rule of law State is that, in general, they were and are normally incorporated in written constitutions. Besides, those written constitutions had been and still are rigid, wherefore the declarations of fundamental rights are normally entrenched declarations in the sense that the ordinary legislator cannot eliminate or modify their contents.

Of course, not all the rights contained in those declarations as fundamental ones are formally established in the same manner. Some of them, particularly traditional individual rights, like the right to live, are established in an absolute way in the sense that no legislation can be passed limiting their enjoyment. On the contrary, other rights are established in a way that the constitution itself allows for the possibility of the Legislator to regulate or limit those rights, but only within the limits established in the constitution. However, in some cases, the constitutional authorization for the legislative power to regulate certain rights is established in a way that legislation must be passed for their effective enjoyment. That happens in some countries where, for instance, the right to strike in public services can only be exercised in cases expressly established in a law.

In any case, the establishment of an entrenched declaration of fundamental rights and freedoms, in a written and rigid constitution, implies that the first and most important guarantee of those rights is the principle of a "legal reserve" in favor of the legislative power for their regulation and limits according to what is determined in the constitution.

That means, in all cases in which the constitution allows possible further regulation and limits to the enjoyment of rights, that those regulations and limits can only be established through formal laws or acts of Parliament.

Therefore, the administration itself cannot set any limits whatsoever on constitutional rights. Only, exceptionally, in constitutional systems that allow the possibility for Parliament to delegate legislative powers to the executive, can it be possible, within the limits of such delegation, for the executive to establish regulations in relation to some rights by means of delegate legislation or decree-law.

Thus, within the concept of the Rule of Law or state submitted to law, the principle relating to individual rights and liberties, which stipulates that an *État de droit* is one in which the state can only intervene in the sphere of individual liberties on the basis of a formal law, has a special meaning. A state according to law is, therefore, one in which intervention in individual liberties is only possible through formal law, in which the administration cannot, therefore, invade this reserve granted to formal law.

This concept of Rule of Law is evidently established against the administration, bearing in mind that only a state in which all administrative actions are subject to the law is really an *État de droit*. That is why the principle of legality related to the administration has been so characteristic to this concept of the state, together with the consequent establishment of a series of guarantees against abuse of power by the administration.

Naturally, in this concept of Rule of Law, in which the law has supremacy over the administration and in which individual rights can only be regulated by the law, there is another fundamental characteristic, namely that of judicial independence, which is the only instrument capable of guaranteeing adequate judicial control over the exercise of power by the administration. Hence, the definition of Rule of Law as one in which judicial control of the administration exists, also referred to as a "state of Justice."

Therefore, in the constitutional *État de droit* or state according to the rule of law, the establishment and regulation of constitutional rights with or without possible further regulation by the legislator, implies the need for a system of guarantees for such rights: on the one hand, as already explained, guarantees of regulation and limitation through the so–called "legal reserve", and, on the other, guarantees against abuse of public powers in relation to those rights, through judicial mechanisms ensuring their implementation, either by means of the ordinary judicial remedies or through special ones, like the writ of *habeas corpus*, concerning individual liberty, or through special "actions for protection" to protect all constitutional rights or, in general, the means of judicial control of the constitutionality of any laws that may violate those rights.

6. *Fundamental Rights beyond the written text of the Constitution*

If it is true that with the dual and parallel process of constitutionalization and internationalization of the declarations of human rights, the list of fundamental rights in the contemporary world has been extended, in many cases, declarations not so extended that are inserted in the Constitutions have imposed upon their guardians, the Constitutional Judges, the duty to "discover" fundamental rights that were not expressly listed, consequently enlarging the scope of the constitutional provisions. This, because constitutional courts, in addition to judicial review, always have had an additional duty to defend the foundational values of the Constitution at any given time.

That is why it is considered legitimate for constitutional courts, in their interpretative process, to "adapt" a constitution to the current values of society and the political

system, "to keep the constitution alive."[445] To that end, because a constitution is not a static document, constitutional courts have been creative in effectively applying, in contemporary times, constitutions that may have been written, for instance, in the nineteenth century, particularly when controlling the constitutionality of legislation according to the evolving social needs and institutions of the country.

This also occurs in the case of more recent constitutions, even with an extended declaration of fundamental rights, but that in some cases are expressed in a vague and elusive way, with provisions stipulated in ambiguous, but worthy, terms, such as *liberty*, *democracy*, *justice*, *dignity*, *equality*, *social function*, and *public interests*.[446] This leads to the need for judges to have an active role when interpreting what have been called the constitution's "precious ambiguities"[447] and "majestic generalities."[448]

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445 See Mauro CAPPELLETTI, "El formidable problema del control judicial y 1a contribución del análisis comparado," in *Revista de Estudios Políticos* 13, Madrid 1980, p. 78; "The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis," in *Southern California Law Review*, 53, 1980, p. 409 ff.

446 See Mauro CAPPELLETTI, "Nécessité et légitimité de la justice constitutionnelle," in Louis Favoreu (ed.), *Cours constitutionnelles européenes et droits fundamentaux*, Economica, Presses Universitaires d'Aix-Marseille, 1982, p. 474.

447 "If it is true that precision has a place of honor in the writing of a governmental decision, it is mortal when it refers to a constitution which wants to be a lively body." S. M. Hufstedles, "In the Name of Justice," *Stanford Lawyers* 14, nº 1 (1979), pp. 3-4, quoted by Mauro Cappelletti, "Nécessité et légitimité de la justice constitutionnelle," in Louis Favoreu (ed.), *Cours constitutionnelles européennes et droits fondamentaux*, Economica, Presses Universitaires d'Aix-Marseille, 1982, p. 474; L. Favoreu, *Le contrôle juridictionnel des lois et sa légitimité. Développements récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala 1984, (mimeo), p. 32.

It is precisely on these matters, as mentioned by Laurence Claus and Richard S. Kay, that the U.S. Supreme Court's elaboration of constitutional principles and values "provides perhaps the most salient example of positive lawmaking in the course of American constitutional adjudication."[449] It was in that sense that the Court, for instance, interpreted the equal protection clause of the Fourteenth Amendment to expound the nature of equality; arguing about the constitutional guarantee of due process (Amendments V and XIV), and the open clause of the Ninth Amendment, to construct a sense of liberty.[450] As Geoffrey R. Stone has pointed out regarding the text of the U.S Constitution:

> "It defines our most fundamental rights and protections in open-ended terms: "freedom of speech," for example, and "equal protection of laws," "due process of law," "unreasonable searches and seizures," "free exercise" of religion and "cruel and unusual punishment." These terms are not self-defining; they did not have clear meaning even to the people who drafted them. The framers fully understood that they were leaving it to future generations to use their intelligence, judgment and experience to give concrete meaning to the expressed aspirations."[451]

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448 See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). See Laurence CLAUS and Richard S. KAY, "Constitutional Courts as Positive Legislators in the United States. *U.S. National Report*," in Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A comparative Law Study,* Cambridge University Press, 2011, pp. 815 ff. (footnote 33).

449 *Idem.*

450 *Idem*.

451 See Geoffrey R. Stone, "Our Fill-in-the-Blank Constitution," oped, *New York Times*, April 14, 2010, p. A27.

For instance, it was in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), that this process of adapting the U.S. Constitution began for matters of fundamental rights. It is important to bear in mind that the 1789 U.S. Constitution and the 1791 Amendments did not establish the principle of equality and that the Fourteenth Amendment (1868) included only the equal protection clause, which until the 1950s had been interpreted differently.

This process converted the Court, according to Claus and Kay, into "the most powerful sitting lawmaker in the nation,"[452] by having used old but renewed means of relief, particularly equitable remedies, to move beyond prohibitory to mandatory relief. This is one of the most striking developments in modern constitutional law, and it produced changes impossible to imagine a few years earlier.

As aforementioned, these means were broadly applied in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), where the Supreme Court held that racial segregation in public education was a denial of the "equal protection of the laws," which, under the Fourteenth Amendment, no state was to deny to any person within the state's jurisdiction. The Court needed to answer various questions to find segregation unconstitutional, such as whether the ruling should order that African-American children "forthwith be admitted to schools of their choice" or whether the court should "permit an effective gradual adjustment" to systems.[453] Eventually, these inquiries led the

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[452] See Laurence CLAUS and Richard S. KAY, "Constitutional Courts as Positive Legislators in the United States. *U.S. National Report*," *loc. Cit.* The authors argue that "the law of liberty and equality in America is now, in large measure, ultimately created and shaped by the Supreme Court,"

[453] *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953). See Laurence CLAUS and Richard S. KAY, "Constitutional Courts as Positive

Supreme Court, in May 1954, to declare racial segregation incompatible with the Fourteenth Amendment. It issued the final ruling in the case in May 1955, two and a half years after the initial argument.[454]

In effect, in *Brown*, the Supreme Court changed the meaning of the Fourteenth Amendment. Chief Justice Warren said:

> "In approaching this problem we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

This assertion led Chief Justice Warren to conclude:

> "In the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs, and others similarly situated from whom the actions have been brought are by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

On the other hand, this was a confirmation that according to the Ninth Amendment, the list of constitutional rights does not end with those that are expressly listed in the constitutional declaration, but include all other rights that are inherent in the individual, as was argued for ins-

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Legislators in the United States. *U.S. National Report*, *loc cit.* (footnote 89).

454 *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953). See in *Idem* (footnote 91).

tance, in the case *Griswold v. Connecticut* decided on June 7, 1965 by Justice Goldberg, delivering the opinion of the Court, holding the unconstitutionality of Connecticut's birth-control law because it intruded upon the right of marital privacy.

The ruling said:

> "The Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive…
>
> The entire fabric of the constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family – a relation as old and fundamental as our entire civilization – surely does not show that the Government was meant to have the power to do so.
>
> Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution."[455]

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[455] (381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 510; 1965). The Supreme Court also ruled: "As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental

In other contexts, particularly in France, where the Constitution does not make a declaration of fundamental rights, the role of the Constitutional Council during the last decades of the last century must be highlighted, beginning with the important decision adopted on July 16, 1971, concerning freedom of association.[456] In that case, the Constitutional Council accepted the positive legal value of the Preamble to the 1958 Constitution with all its con-

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personal liberties from abridgment by the Federal Government or the States." See, e.g., *Bolling v. Sharpe*, 347 U.S. 497; *Aptheker v. Secretary of State,* 378 U.S. 500; *Kent v. Dulles*, 357 U.S. 116; *Cantwell v. Connecticut*, 310 U.S. 296; *NAACP v. Alabama*, 357 U.S. 449; *Gideon v. Wainwright*, 372 U.S. 335; *New York Times Co. v. Sullivan*, 376, U.S. 254. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments… In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 94-95. In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]… as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' …" *Powell v. Alabama*, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of ... specific [constitutional] guaranties" and "from experience with the requirements of a free society." *Poe v. Ullman*, 367 U.S. 497, 517.

456 See L. FAVOREU and L. PHILIP, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, p. 222–237; Bertrand MATHIEU, *French National Report*, p. 2.

sequences,[457] conforming what Louis Favoreu called the *bloc de constitutionnalité*.[458]

Consequently, regarding the particular law establishing a procedure to control the acquisition of legal capacity by association, the Constitutional Council considered it against the Constitution,[459] arguing that the Preamble to the 1946 Constitution referred to the "fundamental principles recognized by the laws of the Republic," among which the principle of liberty of association was to be included. The Council, in accordance with such principle, considered that associations were to be constituted freely and able to develop their activities with the only condition of filing a declaration before the Administration, that was not submitted to a previous authorization by either administrative or judicial authorities. Thus, the Constitutional Council decided that fundamental constitutional principles were included not only in the Preamble of the 1958 Con-

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457 See L. FAVOREU, "Rapport général introductif," in *Cours constitutionnelles européenes et droits fondamentaux*, Economica, Presses Universitaires d'Aix-Marseille, 1982, pp. 45-46.

458 See L. FAVOREU, "Le principe de Constitutionalité. Essai de definition d'apres la jurisprudence du Conseil Constitutionnel," *Recueil d'Étude en Hommage a Charles Eisenman*, Paris 1977, p. 34. On comparative law, see also Francisco ZÚÑIGA URBINA, "Control de constitucionalidad y sentencia," in *Cuadernos del Tribunal Constitucional*, nº 34, Santiago de Chile 2006, pp. 46-68.

459 See the Constitutional Council decision in L. FAVOREU and J. PHILIP, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, p. 222. See the comments of the July 16, 1971, decisions in J. RIVERO, "Note," *L'Actualité Juridique. Droit Administratif*, Paris, 1971, p. 537; J. RIVERO, "Principles fondamentaux reconnus par les lois de la République; une nouvelle catégorie constitutionnelle?" *Dalloz 1974*, Chroniques, Paris 1974, p. 265; J. E. BRADSLEY, "The Constitutional Council and Constitutional Liberties in France," *American Journal of Comparative Law* 20, nº 3 (1972), p. 43; B. NICHOLAS, "Fundamental Rights and Judicial Review in France," *Public Law*, 1978, p. 83.

stitution, but also in the Preamble of the 1946 Constitution, and through it, in the Declaration of Rights of Man and Citizens of 1789. Thus, the limits imposed on associations by the proposed bill establishing prior judicial control of the Declaration were deemed unconstitutional.

In this way, according to Jean Rivero:

> "The liberty of association, which is not expressly established either in the Declaration or by the particularly needed principles of our times, but which is only recognized by a Statute of 1 July 1901, has been recognized by the Constitutional Council decision, as having a constitutional character, not only as a principle, but in relation to the modalities of its exercise."[460]

This sort of adaptation of the French Constitution was also developed by the Constitutional Council in the well-known *Nationalization* case in 1982, which applied the article concerning the right to property in the Declaration of the Rights of Man and Citizen of 1789 and declared the right to property as having constitutional force. In its decision of January 16, 1982,[461] even though the article of the 1789 Declaration concerning property rights was considered obsolete, and so its interpretation could not result in a completely different sense from the one defined in 1789,[462] the Constitutional Council stated:

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460 See J. RIVERO, "Les garanties constitutionnelles des droits de l'homme en droit français," in *IX Journées Juridiques Franco-Latino Américaines*, Bayonne, May 21–23, 1976 (mimeo), p. 11.

461 See L. FAVOREU and L. PHILIP, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, pp. 525–562.

462 See L. FAVOREU, *Le contrôle juridictionnel des lois et sa légitimité. Développements récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala 1984 (mimeo), p. 32.

> "Taking into account that if it is true that after 1789 and up to the present, the aims and conditions of the exercise of the right to property have undergone an evolution characterized both, by a notable extension of its application to new individual fields and by limits imposed by general interests, the principles themselves expressed in the Declaration of Rights of Man have complete constitutional value, particularly regarding the fundamental character of the right to property, the conservation of which constitutes one of the aims of political society, and located on the same rank as liberty, security and resistance to oppression, and also regarding the guarantees given to the holders of that right and the prerogatives of public power."[463]

In this way, the Constitutional Council not only created a constitutional right by giving the 1789 Declaration constitutional rank and value, but also adapted the "sacred" right to property established two hundred years earlier to the limitable right of our times, thus allowing the Council to declare unconstitutional certain articles in the Nationalization statute regarding the banking sector and industries of strategic importance (especially in electronics and communications).

The role of constitutional courts in adapting the Constitution to guarantee fundamental rights not expressly established in the Constitution, even in the absence of open constitutional clauses like the Ninth Amendment to

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463 See L. FAVOREU and L. PHILIP, *Les grandes décisions du Conseil Constitutionnel*, Dalloz, Paris 1984, p. 526; L. Favoreu, "Les décisions du Conseil Constitutionnel dans l'affaire des nationalisations," *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 98, nº 2, Paris 1982, p. 406.

the U.S. Constitution, has been commonly accepted, mainly because of the principle of progressiveness in the protection of fundamental rights,[464] converting the Constitutional Judge into a positive legislator.[465]

Of course, all these constitutional adaptations are considered legitimate because they follow the basic principle of the progressive protection of human rights; it being, on the contrary, a sign of the pathology of judicial review[466] when courts make such mutations, for example, to reduce the scope of protection of fundamental rights, or to change the basic principles of the rule of law, assuming the infamous role of being the instrument of authoritarianism.[467]

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464 See Pedro NIKKEN, *La protección internacional de los derechos humanos: Su desarrollo progresivo*, Instituto Interamericano de Derechos Humanos, Ed. Civitas, Madrid 1987; Mónica PINTO, "El principio *pro homine*: Criterio hermenéutico y pautas para la regulación de los derechos humanos," in *La aplicación de los tratados sobre derechos Humanos por los tribunales locales*, Centro de Estudios Legales y Sociales, Buenos Aires 1997, p. 163.

465 See Allan R BREWER-CARÍAS, Constitutional Court as Positive Legislator. A comparative Law Study, Cambridge University Press, 2011.

466 See Allan R. BREWER-CARÍAS, *La patología de la Justicia Constitucional*, Third edition, Editorial Jurídica Venezolana, Caracas 2014.

467 As has been the case, for example of the Constitutional Chamber of the Supreme Tribunal since 2000. See Allan R. BREWER-CARÍAS, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *Revista de Administración Pública*, No. 180, Madrid 2009, pp. 383-418; and *La Constitución de plastilina y vandalismo constitucional. La ilegítima mutación de la Constitución por el Juez Constitucional al servicio del autoritarismo*, Colección Biblioteca Allan R. Brewer-Carías, Instituto de Investigaciones Jurídicas, Universidad Católica Andrés Bello, No. 13, Editorial Jurídica Venezolana, Caracas 2022.

PART SIX

JUDICIAL REVIEW OF LEGALITY AND CONSTITUTIONALITY OF THE ACTS OF THE STATE

From what has been said above about the fundamental principles that characterize the Rule of Law in contemporary constitutional law, the most important common element among all is that it is, above all, a State with limited powers in order to guarantee freedom, a limitation that is established through a system of distribution of power.

The Rule of Law, in this perspective, is the contrary to the absolute state, and this limitation of powers is expressed in three sorts of state power distribution: in the *first place*, by a distinction between the powers of the state themselves and an area of liberties, freedoms and rights of citizens that are beyond the sphere of state action. In the *second place*, by a distinction in the state between constituent power, attributed to the people as sovereign electorate, which demonstrates its activity normally through a written constitution and the constituted powers, represented by the organs of the state, comprising the legislature, all submitted to the constituent powers will. Finally, in the *third place*, by a separation of powers within the constituted organs, in a vertical and horizontal way. In the vertical way, the separation of powers leads to a system of political decentralization throughout state organs at various territorial levels, including the federal form of the state. In the horizontal way, the separation of powers leads to the

classical division between the legislative, executive and judicial organs, with their respective powers in a checks and balances system with established mutual interference and restraint.

The other main feature of the Rule of Law, besides the distribution and separation of powers, is that the state is submitted to the law, in the sense that all state organs are submitted to limits imposed by the law. Therefore, the only body not submitted to legal limitations is the sovereign, identified in most States with the people as electoral body. This is, as we have said, the constituent power whose actions are normally reflected in a written constitution.

In relation to the state organs, however, the rule of law or the principle of legality implies their necessary submission to the law, varying the scope or ambit of legality, in relation to the level that the particular acts of those state organs have in the graduated or hierarchical system of rules of law that, in general, can be established in all legal systems. In this context, we have said that legality in relation to state organs means "legal order" and not just an act of the legislative organ.

Therefore, legality could just mean "constitutionality," or submission to the constitution, if a particular act is issued in direct execution of the constitution; or "legality" in a broader sense, as submission to the legal order, if a state act is issued in indirect execution of the constitution. Regarding the administration, this is the traditional meaning of legality.

Finally, apart from the principles of distribution of powers and of the submission of the state to the rule of law, we have also referred to the third main feature of the modern Rule of Law state, that of the establishment of an entrenched Bill of Rights, as a guarantee to individuals against state organs, normally in a written constitution.

These three main characteristics of the *État de droit*, in contemporary constitutional law, have been constitutionalized, in the sense that they have been formally established in a written and rigid constitution. Therefore, the *État de droit* implies that the principles of distribution and separation of powers, the subjection of the state organs to the rule of law, and the declaration of rights and liberties must all be embodied in a written constitution formulated in an entrenched way so as to be protected from changes introduced by the ordinary legislator.

However, all these principles of the Rule of Law and their establishment in a written and rigid constitution require some means of protection to guarantee the existence of the limits imposed on the state organs and on the enjoyment of individual rights. In this respect, the argument of John Marshall in the famous *Marbury v. Madison case* decided by the United States Supreme Court in 1803 was precise:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons upon whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."[468]

Moreover, along the same line of reasoning we can ask to what purpose are state powers limited, to what purpose is the principle of legality established, to what purpose are fundamental rights and liberties formally declared, and to

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[468] *Marbury v. Madison*, 5.U.S. (1 Cranch) 137; (1803); 2 L, Ed 60 (1803). See the text in R.A. ROSSUM and G. A. TARR, *American Constitutional Law*. *Cases and Interpretation*, New York 1983, p. 70.

what purpose are all those principles committed to writing in a constitution considered as fundamental law, if there is no means for guaranteeing the existence and permanence of said limits, of the state organs' submission to legality and of the effective enjoyment of the citizens' rights and liberties?

Therefore, the Rule of Law, with all its characteristics, only exists if these means of protection of the Constitution and of legality are established, and if the judiciary is in charge of enforcing those means of protection.[469] Consequently, the courts in the Rule of Law state must ensure the effectiveness of the limits imposed on the state organs, their submission to the rule of the constitution and to the principle of legality, and the enjoyment of the fundamental rights and liberties of individuals.

Thus, there is no Rule of Law, if there is no power granted to the courts of the state to control the submission of the state organs to the rule of law.

Therefore, we can say that the basic element of the Rule of Law or state submitted to the rule of law or to the principle of legality is the existence of a system of judicial review, aimed at controlling that submission to the rule of law of all the state acts, particularly, of legislative, administrative, and even judicial acts. The two fundamental objectives of this system of judicial review are obviously: one, to ensure that all those acts of the state are adopted or issued in accordance with the law of the said state, and two, to ensure that state acts respect the fundamental rights and liberties of citizens.

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469 See, in general, H. KELSEN, "La garantie juridictionnelle de la Constitution (La justice constitutionnelle)", *Revue du droit public et de la science politique en France et à l'étranger*, T. XLV, Paris 1928, p. 197-257.

Thus, we can distinguish two main judicial review systems in the contemporary Rule of Law: On the one hand, a system which seeks to control the conformity of all state acts to the law; and on the other hand, a system which seeks to guarantee the fundamental rights and liberties of individuals; both giving individuals, precisely, a fundamental right to accede to justice by means of judicial actions aimed at obtaining such control.

1. *Judicial control of the conformity of State acts with the rule of law*

As we said, the first of these systems of judicial review or control has the purpose of ensuring the effective submission of state acts to the rule of law or to the principle of legality. However, as we have seen, the sphere or confines of "legality" are certainly not the same for all state acts. In other words, "legality" does not mean the same for all acts of the state. Its meaning or the confines of legality for each of these acts, depends on the rank that the specific act holds in the legal order, particularly in relation to the constitution or to the supreme law of the land.

So, one distinction above all can be traced in legal systems with written constitutions, namely that between state acts that are issued in direct execution of the constitution, and acts that are issued in indirect execution of the constitution. This distinction between state acts leads, of course, to a distinction between the systems of judicial review or control that are laid down.

In effect, as we have studied, there are some state acts that are adopted in direct execution of the constitution, in the sense that they are acts that have their origin in powers granted directly in the constitution and to the state organ that produces them, and to which they must be submit-

ted.[470] In relation to these acts, the system of judicial review has and can only have the purpose of ensuring that the said acts are issued or adopted in accordance to the constitution itself. In this case, as Hans Kelsen pointed out in 1928:

> "The guarantee of the constitution means guarantees of the regularity of the constitution's immediate subordinated rules, that is to say, essentially, guarantee of the constitutionality of laws."[471]

Therefore, with regard to those acts of the state, "legality" as we already know, is equivalent to "constitutionality," and judicial review or control of legality is also equivalent to judicial control or review of the constitutionality of such acts.

Of course, this distinction between acts issued in direct execution of the constitution and acts issued in indirect execution of the constitution, and consequently, the distinction between judicial control of constitutionality and the judicial control of legality only exists, in the strictest sense of the term, in those legal systems possessing a written constitution as a fundamental law constituting the superior source of the whole legal order. Therefore, in systems without a written constitution, and where acts of Parliament are the supreme law, this distinction cannot be made and a system of judicial review of constitutionality cannot exist.

On the contrary, this control of constitutionality in legal systems with written constitutions has been developed particularly in relation to legislative acts, especially to normative acts of Parliament. Hence, one usually speaks

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470 See, on the graduated and hierarchical system of the legal order, what has been said in *Part Four* of this book.

471 H. KELSEN, *loc.cit*., p. 201.

of judicial control of the constitutionality, of legislation or simply of "judicial review of the constitutionality of legislation."[472]

In effect, if Parliament, Congress or the National Assembly, as a representative of the sovereign people, is and must be the supreme interpreter of the law, and through the law, of the general will, it always does so in execution of constitutional rules, particularly in those cases where a written and rigid constitution exists, which cannot, therefore, be changed by the ordinary legislator. Consequently, the law, as an act of Parliament, is always submitted to the constitution, and when it exceeds the limits established by that constitution, the act of Parliament is unconstitutional and, therefore, liable to be annulled. As stated in the *Marbury* v. *Madison case* by the United States Supreme Court in 1803:

> "Certainly, all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void."[473]

Therefore, judicial review or control of the constitutionality of laws gives the courts the possibility of determining their unconstitutionality and deciding not to apply them, giving preference to the provisions of the Constitution, and in some cases allowing some special courts to declare the nullity of the law that has been deemed unconstitutional, with general effects.

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472 M. CAPPELLETTI, *Judicial Review in the Contemporary World*, Indianapolis 1971, p. VII.

473 *Marbury v. Madison*, 5.U.S. (1 Cranch), 137; (1803); 2 L, Ed. 60, (1803).

It has been said that judicial review is the most distinctive feature of the North American constitutional system,[474] and we must add that, in fact, it is the most distinctive feature of almost all the constitutional systems in the world today.

All over the world, with or without similarities to the North American system of judicial review, the courts – special constitutional courts or ordinary courts– have the power to declare a law unconstitutional. Accordingly, they have the power to refuse to enforce it, because it is considered null or void, and in some cases, they have the power to declare the annulment of the said unconstitutional law.

As it is known, the system of the United Kingdom has been traditionally different; the lack of judicial review of legislation having been the classical feature that also distinguishes the British constitutional system. That is why, decades ago, D.G.T. Williams said:

> "Most British judges and the vast majority of British lawyers must have had little or no contact with the problems and workings of judicial review."[475]

This substantial difference between the constitutional systems of the United Kingdom and, in general, the other constitutional systems in the world, derived from a few but very important principles, unique to the British constitution, and influencing all of them. It is the principle of the

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474 E.S. CORWIN, "Judicial Review," *Encyclopaedia of the Social Sciences*, Vol. VII-VIII, p. 457.

475 D.G.T. WILLIAMS, "The Constitution of the United Kingdom", *Cambridge Law Journal*, 31, (1) 1972–B, p. 277.

sovereignty of Parliament, called by Dicey the "secret source of strength of the British constitution" or the "element of power which has been the true source of its life and growth."[476]

This principle, with all its importance in constitutional law in Great Britain, has been, at the same time, the most powerful obstacle to the judicial review of the constitutionality of legislation. It has implied that even if it is true that the courts in the United Kingdom are the ultimate guarantors of the rule of law, they are bound to apply to an Act of Parliament whatever view the judges could have taken of its morality or justice, or of its effects on important individual liberties or human right.[477] This has been so due to the absence of a written constitution in the modern constitutional form, with its entrenched declaration of fundamental rights and liberties.

It will suffice at this point to quote the words of Lord Wilberforce in the House of Lords case of *Pickin* v. *British Railways Board* in 1974, in a conclusive way regarding the consequences of parliamentary sovereignty, and also concerning the traditional absence of judicial review of legislation. In that particular case, it was stated:

> "The idea.... that an Act of Parliament, public or private, or a provision in an Act of Parliament, could be declared invalid or ineffective in the courts on account of some irregularity in Parliamentary procedure, or on the ground that Parliament in passing it was misled, or on the ground that it was obtained by deception or fraud, has been decisively repudiated by authorities

476 A.V. DICEY, *England's Case Against Home Rule* (3rd. ed. 1887), p. 168 quoted by D.G.T. WILLIAMS, *loc. cit*., p. 277.

477 T.R.S. ALLAN, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism", *Cambridge Law Journal*, 44, 1, 1985, p. 116.

> of the highest standing from 1842 onwards. The remedy for a Parliamentary wrong, if one has been committed, must be sought from Parliament, and cannot be gained from courts."[478]

This traditional and radical situation undoubtedly has changed in the past decades. It is true that the British Constitution is not a single and overarching written document like the constitutions of other contemporary democratic states.[479] Furthermore, it is not possible, in principle, to formally distinguish a constitutional statute from an ordinary statute. Nonetheless, the British Constitution undoubtedly exists, and it is possible to attach the label "constitutional" to some legal[480] and nonlegal rules,[481] called "conventions of the Constitution," which are considered binding rules of political morality and called the "common

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478 A.C. 765 (1974)- See the text also in O. HOOD PHILLIPS, *Leading Cases in Constitutional and Administrative Law*, London 1979, pp. 1-6. See the comments in P. ALLOTT, "The Court and Parliament: Who whom?" *Cambridge Law Journal*, 38, 1, 1979, pp. 80-81.

479 See, on the British Constitution, what has been said in *Part One* of this book.

480 An example is the agreement reached by the Prime Ministers of the British Empire in 1931 for the U.K. Parliament to not legislate for Dominions without consent of their parliaments. See John BELL, "Constitutional Courts as positive Legislators. British National Report," in Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2010, pp. 803 ff.

481 One example is the Nolan principles (1995), which govern standards in public life and introduce a set of values governing the holders of a range of public offices. See John BELL, "Constitutional Courts as positive Legislators. British National Report," in *Idem*

law constitution," as a set of legal principles and rules that have been laid down over time, typically by judges.[482]

It is possible, therefore, to identify a judicial process of controlling the subjection of statutes to these conventions, which can be called "constitutional review."[483] As it has been summarized by John Bell:

> "Britain has neither "specific constitutional or statutory provisions that empower constitutional judges, by means of interpreting the Constitution, to adopt obligatory decisions on constitutional matters" nor specific decisions on constitutional matters. But this would be too simplistic an approach. The nature of a common law constitution is that the basic "rules of recognition" (H. L. A. Hart) are not contained in statute, but are in the common law. The principles are rather like the "fundamental principles recognized by the laws of the Republic" in French law, which are not laid down by statute, but which are judicially identified, even if formally not created by judges. There do arise a number of issues on which ordinary judges have to make decisions which are binding and which could be characterized as constitutional."[484]

In this respect, regarding the conventions to the British Constitution, it is also possible to call this process of constitutional review – of course, in its own historical context – a judicial control of conventionality.

However, in other constitutional matters, given the evolution of the British Constitution after the creation of a Supreme Court in 2009, it is also possible to distinguish constitutional review powers exercised by the courts. This

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482 *Idem*.

483 *Idem*.

484 *Idem*.

is the case on matters of devolution, regarding the control of the validity of the legislation of the three devolved assemblies (Wales, Scotland, and Northern Ireland) that can be referred to the Supreme Court by the British Secretary of State, the British Attorney General, or the national Attorneys General (or equivalent), or by the national courts before which the issue is raised.[485]

In this regard, w one must refer to one recent decision in which the Supreme Court exercised judicial review, issued in November 2022, rejecting a proposal for a "Scottish Referendum Bill" containing a question of whether Scotland should "be an independent country." The Supreme Court considered it a "reserved matter" (not a devolution issue), contrary to the constitutional principles of the "Union of the Kingdoms of Scotland and England" (that is contrary to the integrity of the United Kingdom) and contrary to the "Parliament of the United Kingdom" (that is contrary to the sovereignty of the British Parliament).[486]

Another important case that must be mentioned regarding judicial review in the United Kingdom is the decision issued by the High Court of Justice *(Queen's Bench Division, Divisional Court*) of the United Kingdom, on November 3, 2016 (Case: *Gina Miller* et al. v the *Secretary of State for Exiting the European Union),* [487] to decide on the constitutional matter of whether, under the constitutional order of Great Britain, it was possible for the Government, in exercising the Crown's prerogative powers and without

485 *Idem.*, p. 2.

486 Case: Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act of 1998, Judgment given on November 23, 2022. Available at: https://www.supreme court.uk/cases/docs/uksc-2022-0098-judgment.pdf

487 *Idem*.

the intervention and prior decision of Parliament, to decide to serve notice on the European Union, under Article 50 of its Treaty, of the decision on the United Kingdom's withdrawal from said Union, pursuant to the people's recommendation expressed in the referendum of June 23, 2016.

To decide on the proposed constitutional matter, the High Court confirmed that in the United Kingdom, as a constitutional democracy, the bodies of the State are subordinated to the rule of law, wherefore the courts of the United Kingdom, as stated by the High Court itself, have a:

> "Constitutional duty fundamental to the rule of law in a democratic state to enforce the rules of constitutional law in the same way as the courts enforce other laws."

This statement by the High Court is without doubt one of the clearest acknowledgements by the British judicial bodies regarding the existence of a constitutional jurisdiction in the United Kingdom,[488] based on which the High Court, exercising its power of judicial review, confirmed that in order to decide on this specific case, it was precisely called upon to:

> "Apply the constitutional law of the United Kingdom to determine whether the Crown has prerogative powers to give notice under Article 50 of the Treaty on the European Union to trigger the process for withdrawal from the European Union."[489]

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488 See Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, New York 2011, p. 25.

489 The High Court decision was ratified by the Supreme Court of the United Kingdom in a judgment issued on February 24, 2016 (Case: *R (on the application of Miller an another) v Secretary of State for Exiting the European Union)* ([2017 UKSC 5) (UKSC 2016/0196). Available at: in: https://www.supremecourt.uk/cases

All this set clear that the United Kingdom has a constitution as supreme rule that prevails over State decisions, and that the courts have judicial review powers over state decisions.[490]

This judicial review of the constitutionality of legislation, in other words, of laws and other legislative acts, requires at least three conditions for it to function in a given constitutional system. In the first place, it requires the existence of a constitution, generally a written one, conceived as a superior and fundamental law with clear supremacy over all other laws. Second, such a constitution must be of a "rigid" character, which implies that the amendments or reforms that may be introduced can only be put into practice by means of a particular and special process, preventing the ordinary legislator from doing so. And third, the establishment in that same written and rigid constitution, of the judicial means for guaranteeing the supremacy of the constitution over all other state acts, including legislative acts.

Judicial review of legislation as the power of courts to decide upon the constitutionality of legislation has been considered one of the main contributions of the North

/docs/ uksc-2016-0196-judgment.pdf See press information on the decision in https://www.supremecourt.uk/cases/docs/uksc-2016-0196-press-summary.pdf. See on this decision the comments in Allan R. BREWER-CARIAS, **"**The "Brexit" Case Before the Constitutional Judges of the United Kingdom: Comments regarding the Decision of the High Court of Justice of November 3, 2016, confirmed by the Supreme Court in Decision dated January 24, 2017," in *Revue européenne de droit public*, *European Review of Public Law,* ERPL/REDP, vol. 31, No. 1, Spring/ Printemps 2019, *European Group of Public Law* (*EGPL*), pp. 77-103.

490 Something that had not been readily accepted some decades ago. See Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

American constitutional system to the political and constitutional sciences.[491] However, the so-called "American system" of judicial review is not the only one that exists in present constitutional law. There is also the so-called "Austrian system" of judicial review, originally established in the 1920 Austrian Constitution and the mixed systems, mainly in Latin America, that have adopted the main feature of both the American and Austrian systems.

The main distinction between both systems of judicial review of legislation, the American and the Austrian, is based on the judicial organs that can exercise this power of constitutional control: [492] The "American system" entrusts that power of control to all the courts of a given country. It is for this reason that the system is considered a decentralized or diffused one. On the contrary, the "Austrian system" entrusts the power of control of the constitutionality of laws either to one existing court or to a special court, and it is therefore considered a centralized or concentrated control system.

In any case, in legal systems with judicial review of constitutionality, all acts of the legislature other than formal laws, which are also issued by Parliament in direct

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491 J.A.C. GRANT, "El control jurisdiccional de la constitucionalidad de las leyes: una contribución de las Américas a la Ciencia Política", *Revista de la Facultad de Derecho de México*, 45, 1962, pp. 417-437.

492 See, in general, regarding judicial review: Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law. Course of Lectures, Cambridge 1985-1986*, Ediciones Olejnik, Santiago, Buenos Aires, Madrid 2021; *Judicial Review. Comparative Constitucional Law Essays, Lectures and Courses (1985-2011)*, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014, 1197 pp.; *Judicial Review in Comparative Law*, (Prólogo de J. A. Jolowicz), Cambridge Studies in International and Comparative Law. New Series, Cambridge University Press, Cambridge 1989, 406.

execution of the constitution, can likewise be submitted to judicial control of constitutionality. This is the case, for example, of internal regulations for the functioning of legislative bodies, and of parliamentary acts of specific effect, issued for the purpose of authorizing or approving some executive acts, like the appointment of some officials, or the adoption of some budget changes. All these acts, in written constitutional legal systems, are subject to and must be adopted according to the constitution, and therefore, can be judicially controlled to ensure their submission to the fundamental rules of the constitution.

Moreover, not only the acts of legislative bodies are subject to judicial control of constitutionality. In general, all acts of state bodies and organs issued in direct and immediate execution of the constitution are also subject to such control.

In particular, acts of government with or without the same force of formal law, issued by the head of state or by the government in direct execution of powers provided for directly in the constitution, and which due to the distribution of powers, cannot be regulated by Parliament, are also subject to judicial control of constitutionality.

In short, it is through this system of judicial review of the constitutionality of state acts that the effective submission of state organs to the constitution can be ensured when they execute it directly. Therefore, this is possible only in legal systems with written constitutions, where the courts have such powers of judicial review.

Consequently, when there is no written constitution, or when although this fundamental law exists, the courts do not have the power to control the constitutionality of legislative acts, the legal situation is very similar.

As J.D.B. Mitchell pointed out:

> "The mere fact of there being a written Constitution does not by itself necessarily mean that courts play any greater role in protecting individual rights or policing the Constitution.
>
> Where there is such a Constitution but courts do not possess the power to declare legislation unconstitutional, the only means by which the courts can protect the basic principles of that constitution from encroachment of erosions is by the restrictive interpretation of legislation. In such circumstances the position of the courts and the protection for fundamental constitutional principles do not differ materially from those which exist when there is no written Constitution."[493]

Therefore, the real difference between a legal system with a written constitution and one without a written constitution really lies in the powers granted to the courts to control the constitutionality of state acts. Mitchell also mentioned this in relation to the British constitutional system:

> "The real contrast with our own system is afforded by a system under which there is not only a written constitution but also a recognised power in the courts to declare legislation invalid as being unconstitutional."[494]

In any case, the control of the constitutionality of formal laws, or of any other state act issued in direct execution of the constitution, is only possible in those constitutional systems possessing a written constitution and, furthermore, where the constitution is rigid, that is, it cannot be changed through the channel of ordinary legislation.

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493 J.D.B. Mitchell, *Constitutional Law*, Edinburgh 1968, p. 13.

494 *Idem*, p. 13.

The rules established in this type of constitution are, of course, applied directly, and the constitution itself occupies a pre-eminent rank in the hierarchy of the legal order. In this respect, it is precisely in the countries where the courts have been granted the power to control the constitutionality of the laws that the juridical-normative nature of the constitutions and their mandatory character is clearest. Likewise, it is in those countries that the principle of the hierarchical pre-eminence of the constitution in relation to the ordinary laws has its origin.

This first system of judicial review of constitutionality, particularly of legislation, is generally organized in two ways: by assigning the power to decide upon the unconstitutionality of laws to all the courts of the particular judicial order of a state, or by reserving that power to one judicial organ only, the Supreme Judicial Court of the country or to a special constitutional court or tribunal, giving rise to the distinction between the diffuse and concentrated systems of judicial review of constitutionality.

Apart from state acts adopted in direct execution of constitutional powers granted to state organs, such as the legislative acts and acts of government, there are other state acts adopted in direct execution of the "legislation", that is to say, the first level of constitutional execution, whose legality not only means submission to the constitution, but also to all the other rules of law comprised in the legal order. Therefore, in relation to those acts, particularly administrative and judicial acts, "legality" means submission to the legal order considered as a whole, and the rule of law must provide the means for judicial control or review to ensure the effective submission of the state organs to the rule of law when issuing such acts. This has led to the establishment of systems of judicial review of administrative actions and of judicial review of judicial decisions themselves in the modern Rule of law state.

Regarding the judicial review of administrative action, or judicial control of administration, one can say that it is more developed in modern constitutional and administrative law, particularly as a result of the submission of administration to the principle of legality. So important has this system of judicial review been, that one can even say that judicial review of administrative action has given rise to the development of administrative law itself, not only in Continental European countries but also in common law countries. It is through the exercise by the courts of their inherent power to control the legality of administrative action, that the fundamental principles of administrative law have been developed, particularly during the last century.

Therefore, judicial review of administrative action is the power of the courts to decide upon the legality of the activities undertaken by the administrative organs of the state, in other words, to decide in relation to the submission of the activities of the executive organs of the state to the law or rather to the principle of legality. Law, understood in this context, means legal order, that is, not only the formal law, but also all the norms and rules that are comprised in the legal order, including, of course, the constitution itself.

There is a substantial difference regarding the organization of judicial review of administrative action, between the legal systems influenced by the European continental countries, mainly France, and the systems influenced by the Anglo-American common law countries. Judicial review in the Latin and German tradition is the power of special courts to decide on the legality of administrative action, when demanded through special judicial means, or actions granted to individuals with the necessary standing to bring an action to declare a particular administrative act void.

This led to the development *of* the *contentieux administrative* recourses in Continental Europe and Latin America that are to be decided by special judicial-administrative courts.[495] In some cases, these special courts were established completely separated from the ordinary courts, as is the case in France of the *jurisdiction contentieux administrative*. In other cases, the special judicial administrative courts are established within the ordinary judicial order, in the same manner as there are special courts on labor law, civil law or commercial law. In all these cases, not only are the remedies for judicial review, special ones, but the courts that are to exercise the review power, are also special.

By contrast with this situation, the common law tradition on judicial review generally implies that the ordinary courts of justice are the ones that exercise the power of judicial review of administrative action through the ordinary remedies established in common law and also used in private law, although it is certain that in more recent times special remedies of public law have been developed.

Nevertheless, all over the world, the most traditional and popular judicial control of the submission of the state to the rule of law has been the judicial review of administrative action.

However, the term Rule of Law or *État de droit* does not only imply the need for systems of judicial review of the constitutionality of legislation and acts of government, and the judicial review of administrative action, in other words, the judicial control of legislative and administrative action to ensure its conformity with the rule of law, but also the need for establishing a system of judicial control of judicial decisions themselves.

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[495] See regarding the Hispanic American countries: Allan R. BREWER-CARÍAS, *La justicia administrativa en América Latina*, Ediciones Olejnik, Buenos Aires, Santiago de Chile, Madrid 2019.

The courts are, in effect, typical "executive" bodies of the state. Consequently, all their activities in the application of the law must be submitted to the whole legal order, comprising the constitution, the formal laws and delegate legislation, and the regulations and other normative acts of the state organs. Consequently, in the *État de droit*, court decisions must be also subject to judicial control, which is normally implemented through two mechanisms.

On the one hand, the ordinary appeal systems that allow for control of the decisions of the inferior courts by the superior courts, within the hierarchy of the judicial system; and, on the other, the system of control of the legality of judicial decisions through extraordinary remedies, as happens in continental law, for example with the *recours de cassation*, developed in the systems influenced by continental European procedural law.

By these means of control, Supreme Courts have the power to verify the legality of decisions made by inferior courts, and deciding upon them, considering the merits of the decision under appeal, or just controlling the legal aspects of the decision in the recourse of cassation. In this case, it is also a matter of control of the legality of state acts.

All these three systems of control of the submission of the state organs and acts to the rule of law, the control of the constitutionality of legislation, the judicial review of administrative action, and the judicial control of court decisions, are basically a question of formal control, which seeks to determine the conformity of state decisions with the superior rules contained in the legal order, applicable to the specific act. Of all three, the first one related to the control of the constitutionality of legislation, the protection of the constitution being its fundamental objective when its norms are executed directly by state organs.

2. *Judicial guarantees of Fundamental Rights*

Apart from these judicial systems of control of state acts to ensure their submission to the principle of legality or to the rule of law, there is another system of control of state actions aimed at the protection of fundamental rights and liberties generally established in the constitution and which is normally established in the constitution as a guarantee for the effective fulfilment of such rights and liberties.

We have seen, in effect, that the principle of distribution of powers in the legal state, expresses itself in various ways, among them, in a system of distribution of powers between, on the one hand, the sphere of the citizens and individuals to whom the constitution grants various fundamental rights and liberties that only be eliminated or restricted by the means established in the constitution; and, on the other hand, the powers of the state organs.

This distribution of powers is normally established in a written constitution or in an entrenched Bill of Rights, so that encroachments on the sphere of fundamental rights and liberties by the state, or even by other individuals, are subject to judicial control or protection.

This judicial protection of fundamental rights, in the end, is also a protection of the constitution itself because such rights and liberties are established in the constitution, and therefore, all violations or infringements upon such rights and liberties are at the same time, violations of the constitution.

The Rule of Law has developed mechanisms to assure the protection of these fundamental rights and liberties and to avoid their violation mainly by public bodies, either by actions brought before the ordinary courts through ordinary actions or remedies, like the injunctions, or by special

actions of protection brought before ordinary courts or before a special constitutional court, like the *amparo* proceeding.[496]

In fact, the judicial guarantee of constitutional rights can be achieved through the general procedural regulations that are established in order to enforce any kind of personal or proprietary rights and interests, as, for instance, is the case in the United States and in Europe; or it can also be achieved by means of a specific judicial proceeding established only and particularly for the protection of the rights declared in the constitution.

In the United States, in effect, following the British procedural law tradition, the protection of civil, constitutional and human rights has always been achieved through the general ordinary or extraordinary judicial means, and particularly, by means of the remedies established in Law or in Equity, the most important of said legal remedies being the damage remedies, the restitution remedies and the declaratory remedies[497]; and the equitable remedies, the injunctions, in which the judicial resolution "does not come from established principles but simply derives from common sense and socially acceptable notions of fair play."[498] By means of these equitable remedies, a court of equity can adjudicate extraordinary relief to an aggrieved party, consisting of an order by the court commanding the defendant or the injuring party to do something or to re-

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496 See on the amparo proceeding in comparative law: Allan R. BREWER-CARÍAS, Constitutional protection of human rights in Latin America. A Comparative Study of the Amparo Proceedings, Cambridge University Press, New York 2008.

497 See in William TABB and Elaine W. SHOBEN, *Remedies,* Thomson West, 2005, p. 13; and James M. FISCHER, *Understanding Remedies,* LexisNexis 2006.

498 See William M. TABB and Elaine W. SHOBEN, *Remedies, cit*. p. 13.

frain from doing something. They are called coercive remedies because they are backed by the contempt power, that is, the power of the court to directly sanction the disobedient defendant.

Both legal and equitable remedies are used for the protection of rights, so that there are no specific remedies conceived for the protection of constitutional rights. They are all remedies that may and are commonly and effectively used for the protection of all constitutional rights and legal rights in the sense of being based on statutes or contracts or that are derived from common law.[499]

Regarding the protection of civil or constitutional rights, the extra-ordinary coercive equitable remedies, particularly the writ of injunction, can be classified in the following four types:[500]

First, (i) the preventive injunctions, in the sense of avoiding harm, in which it is possible to distinguish the mandatory injunctions, like the writ of mandamus; the prohibitory injunctions, like the writ of prohibition, or the quia-timet injunctions;[501] (ii) the structural injunctions, developed by the courts after the *Brown v. Board of Education* case 347 U.S. 483 (1954); 349 U.S. 294 (1955), in which the Supreme Court declared the dual school system discriminatory, using injunction as an instrument of reform, by means of which the courts, in certain cases, undertake the supervision over institutional State policies and practices in order to prevent discrimination;[502] (iii) the

499 See in Owen M. FISS, *Injunctions, cit.* p. 8.

500 See William M. TABB and Elaine W. SHOBEN, *Remedies,* T *cit.* pp. 13 ff. and 86 ff.

501 See William M. TABB and Elaine W. SHOBEN, *Remedies*, *cit.* pp. 86 ff.

502 See Owen M. FISS, *The Civil Rights Injunctions*, Indiana University Press, 1978, pp. 4–5; and in Owen M. FISS, and Doug REN-

restorative injunctions, also called reparative injunctions, devoted to correct past wrong situations;[503] (iv) the prophylactic injunctions, issued also to safeguard the plaintiff's rights, preventing future harm, by ordering certain behaviors from the defendant, other than the direct prohibition of future actions.[504]

The most important of all these injunctions, when referred to the protection of rights, are the preventive injunctions (whether mandatory or prohibitory), and the restorative ones; and within this context, the procedural institutions for the protection of constitutional rights that most resemble the Latin American *amparo* actions existing in the United States, are precisely the equitable remedies, particularly the injunctions.

Yet, other than the injunctions for the protection of freedoms and constitutional rights, particularly against government actions, the other extraordinary remedy in the United States – following the long British tradition – has been the writ of habeas corpus, the oldest judicial means for the protection of life and personal integrity, employed to bring a person before a court in order to prove or certify that he is alive and in good health, or to determine that his imprisonment is not illegal.

In conclusion, in countries like the United States, the protection of constitutional rights is assured by the general (ordinary or extraordinary) law and equitable remedies, particularly the injunctions that, of course, are also used to protect non-constitutional rights. Consequently, neither the

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DELMAN, *Injunctions*, The Foundation Press, 1984, pp. 33-34. William M. TABB and Elaine W. SHOBEN, *Remedies*, *cit.* pp. 87-88.

503 See William M. TABB and Elaine W. SHOBEN, *cit.* pp. 86 ff.

504 *Idem*, pp. 86 ff.

constitution in the United States nor the legal system provide for specific judicial means designated for the protection of human rights, contrary to what happens in Latin America with the *amparo* action.

In Europe, in general, in a way similar to the preventive injunctions in the United States, the protection of human rights is also assured by general judicial means, and, in particular, by the extraordinary preliminary and urgent proceedings established in the Procedural Codes devised to prevent an irreparable injury from occurring, which can be issued before or during trial and before the court has the chance to decide on the merits on the case. Only in Austria, Germany, Spain and Switzerland can one find judicial means similar to the Latin American *amparo* recourse for the protection of fundamental rights.[505] In Spain, in addition to the recourse for *amparo* filed before the Constitutional Tribunal, fundamental rights can be immediately protected by the ordinary courts by means of the "*amparo judicial*."[506]

As stated, the courts in Europe generally protect rights by means of ordinary or extraordinary judicial procedures, such as the French *référé*, the Italian extraordinary urgent measures and the precautionary measures ("*misura precauzionale*") regulated in the Civil Procedure Codes, all of them conceived as procedural institutions used for the protection of individual rights, including constitutional rights.

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505 See Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, Edit. Porrúa, México, 2006, pp. 761 ff.; 789 ff., and 835 ff.

506 See Encarna CARMONA CUENCA, "El recurso de *amparo* constitucional y el recurso de *amparo* judicial," in *Revista Iberoamericana de Derecho Procesal Constitucional*, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, n° 5, México, 2006, pp. 3-14.

Although the general trend regarding the protection of constitutional rights is achieved in Europe by means of general ordinary or extraordinary judicial procedures, in some countries, individual actions or *amparo* recourses as specific judicial means for the protection of fundamental rights have been established. This is the case in Austria, Germany, Spain and Switzerland, where a recourse for the protection of some constitutional rights has been regulated, particularly as a consequence of the adoption, under Hans Kelsen's influence, of the concentrated method of judicial review, resulting in the creation of Constitutional Courts or Constitutional Tribunals.[507] These courts were empowered not only to act as constitutional judges controlling the constitutionality of statutes, executive regulations and treaties, but also to grant constitutional protection to individuals against the violation of fundamental rights.

The process began in 1920, in Austria, by granting individuals the right to bring before the Constitutional Tribunal recourses or complaints (*Verfassungsbeschwerde*) against administrative acts when the claimant alleges that they infringe upon rights guaranteed in the constitution (Article 144).[508]

This was the origin of the development of a special judicial means for the protection of fundamental rights in Europe, although with a concentrated character that establishes the difference regarding Latin American *amparo* recourses that, except in Costa Rica, El Salvador and Nicaragua, are filed before all the first instance courts.

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[507] See H. Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)," in *Revue du droit public et de la science politique en France et à l'étranger*, Paris, 1928, pp. 197-257.

[508] See, in general, Norbert LÖSING, "El derecho de *amparo* en Austria," in Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, *cit.,* pp. 761-788.

The Austrian model influenced the establishment of the other concentrated systems of judicial review in Europe. Such was the case, in 1931, of the Spanish Second Republic, where the constitution of that year (December 9, 1931) created a Tribunal of Constitutional Guarantees,[509] which had the exclusive powers to judge upon the constitutionality of statutes, and additionally, to protect fundamental rights by means of a recourse for constitutional protection called "*recurso de amparo*." Some scholars have also found some influence of the Mexican *amparo*[510] on the Spanish one, which disappeared after the Spanish Civil War.

After World War II, also following the Austrian model, the 1949 Constitution of Germany created a Federal Constitutional Tribunal (FCT) as the "supreme guardian of the Constitution,"[511] empowered to decide in a concentrated way, not only regarding the abstract and particular control of constitutionality of statutes, but also the constitutional complaints for the protection of a fundamental right. This *Verfassungsbeschwerde,* complaint or recourse can be brought before the Federal Constitutional Tribunal

509 See José Luis MELIÁN GIL, *El Tribunal de Garantías Constitucionales de la Segunda República Española*, Madrid, 1971, pp. 16-17, 53; P. CRUZ VILLALÓN, "Dos modos de regulación del control de constitucionalidad: Checoslovaquia (1920-1938) y España (1931-1936), in *Revista española de derecho constitucional*, 5, 1982, p. 118.

510 See Eduardo FERRER MAC-GREGOR, *La acción constitucional de amparo en México y España, Estudio de Derecho Comparado*, *cit.,* p. 27.

511 See G. MÜLLER, "El Tribunal Constitucional Federal de la República Federal de Alemania," in *Revista de la Comisión Internacional de Juristas*, Vol. VI, Ginebra, 1965, p. 216; F. SAINZ MORENO, "Tribunal Constitucional Federal alemán," in *Boletín de Jurisprudencia Constitucional,* Cortes Generales, 8, Madrid, 1981, p. 606.

against judicial decisions considered to have violated the rights and freedoms of a person by reason of the application of a statute that is alleged to be unconstitutional (Article 93, 1, 4,a, FCT Law).[512]

Finally, more recently, the current 1978 Spanish Constitution by recreating the Constitutional Tribunal has also established a concentrated method of judicial review,[513] and, in addition to its power to decide, the "recourse of unconstitutionality against laws and normative acts with force of law" (Article 161, 1, a Constitution), it has also been empowered to decide the *recurso de amparo* for the protection of constitutional rights. These recourses can be directly brought by individuals before the Constitutional Tribunal when they deem that their constitutional rights and liberties have been violated by administrative acts, juridical decisions or by simple factual actions by public entities or officials (Article 161, 1, b, Constitution; Article 41, 2 Organic Law 2/1979),[514] and only when the ordinary judicial means for the protection of fundamental rights have been exhausted (Article 43,1 Organic Law 2/1979). Consequently, the recourse for *amparo*, in general, results in a direct action against judicial acts[515] and can only indi-

512 See, in general, Peter Häberle, "El recurso de *amparo* en el sistema de jurisdicción constitucional de la República Federal Alemana," in Héctor FIX-Zamudio and Eduardo FERRER MAC-GREGOR, *El derecho* de *amparo en el mundo*, *cit.,* pp. 695-760.

513 See P. BON, F. MODERNE and Y. RODRÍGUEZ, *La justice constitutionnelle en Espagne*, Paris 1982, p. 41.

514 This recourse for the protection of fundamental rights can only be exercised against administrative or judicial acts, as well as against other acts without force of law produced by the legislative authorities. Article 42, Organic Law 2/1979.

515 See Louis FAVOREU, "Actualité et légitimité du Contrôle juridictionnel des lois en Europe occidentale," in *Revue du droit public et de la science politique en France et à 1'étranger*, Paris, 1984 (5), pp. 1155-1156.

rectly lead to the judicial review of legislation when the particular state act that is challenged by it is based on a statute that is deemed to be unconstitutional (Article 55, 2 Organic Law 2/1979).[516] The Organic Law of the Constitutional Tribunal was reformed in 2007 (Law 6/2007), imposing the need for the plaintiff to allege and prove the "special constitutional importance" that justifies filing the recourse and the Constitutional Tribunal's decision (Articles 49, 2 and 50, 1, b).[517]

In Switzerland, a limited diffuse and concentrated system of judicial review was first established in the 1874 Constitution, but regarding constitutional rights, the 1999 Constitution also established the jurisdiction of the Federal Tribunal to decide cases of constitutional complaints that the individuals may file in cases of the impairment of constitutional rights (Article 189,1,a).[518] This public law recourse before the Swiss Federal Tribunal is essentially of a subsidiary nature, that is, it is only admissible when the alleged violation of the right cannot be brought before any other judicial authority through other legal means established either under federal or cantonal law (Article 84, 2, Law of Judiciary Organization). Consequently, the action

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516 See, in general, Francisco FERNÁNDEZ SEGADO, "El recurso de *amparo* en España," in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *El derecho de amparo en el mundo*, *cit.,* pp. 789-834.

517 See Francisco FERNÁNDEZ SEGADO, *La reforma del régimen jurídico-procesal del recurso de amparo*, Ed. Dykinson, Madrid, 2008, pp. 86 ff.

518 See E. ZELLWEGER, "El Tribunal Federal suizo en calidad de Tribunal Constitucional," in *Revista de la Comisión Internacional de Juristas*, Vol. VII (1), 1966, p. 119. See, in general, Joaquín Brage Camazano, "La Staatsrechtliche Beschwerde o recurso constitucional de *amparo* en Suiza," in Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, *cit.,* pp. 835-857.

cannot be admitted unless all existing cantonal remedies have been exhausted, except in cases of violation of freedom of establishment, the prohibition of double taxation in fiscal matters, the citizen's right to appear before his "natural" judge, and the right to legal aid (Article 86, 2, Law of Judiciary Organization), which can be brought before the Federal Tribunal in a principal way.

A few general trends can be identified in all these European *amparo* recourses, in contrast with the Latin American institution: first, it is conceived as a concentrated judicial means for the protection of fundamental rights against State actions, by assigning to a single Constitutional Tribunal the power to decide upon them; second, particularly in Germany and Spain, it is established to protect certain constitutional rights listed in the constitutions as "fundamental" rights, more or less equivalent to civil or individual rights; and third, except in Switzerland, it is conceived as an action to be filed only against the State.

In contrast, one important feature of the Latin American system for the protection of constitutional rights, is that, in addition to the common and general judicial guarantees of such rights, the constitutions establish a specific judicial action, recourse or remedy for their guarantee called the *amparo* proceeding, perhaps one of the most Latin American constitutional law institutions.[519] This *amparo* action or recourse can be exercised before all courts except in some countries where it has to be filed before the Supreme Court (Costa Rica, El Salvador and Nicaragua). In general,

[519] See Allan R. BREWER-CARÍAS, "The *Amparo* as an Instrument of a *Ius Constitutionale Commune,"* in Armin VON BOGDANDY, Eduardo FERRER MAD-GREGOR, Mariela MORALES ANTONIAZZI, Flávia PIOVESAN and Ximena SOLEY (Editrors), *Transformative Constitutionalism In Latin America. The Emergence of A New Ius Commune,* Oxford University Press 2017, pp. 171-190.

and also with some exceptions (Brazil, El Salvador, Mexico, Nicaragua, Panama), it can also be exercised not only against State acts, but also against individuals, and in addition, in general, it can be exercised for the protection of all constitutional rights, including social and economic ones.

This proceeding initially introduced in Mexico as the *juicio de amparo* (1857), spread during the nineteenth and twentieth centuries throughout all of Latin America, receiving various names, always meaning the same, as follows: *Amparo* (Guatemala); *Acción de amparo* (Argentina, Ecuador, Honduras, Paraguay, Uruguay, Venezuela); *Acción de tutela* (Colombia); *Juicio de amparo* (Mexico); *Proceso de amparo* (El Salvador, Peru); *Recurso de amparo* (Bolivia, Costa Rica, Dominican Republic, Nicaragua, Panama); *Recurso de protección* (Chile) or *Mandado de segurança* and *mandado de injunçao* (Brazil);[520] conceived as a judicial proceeding initiated by means of an action or a recourse filed by a party, which ends with a judicial order or writ.

In the Guatemalan, Mexican and Venezuelan constitutions, the *amparo* action also includes the protection of personal liberty or freedom (*habeas corpus*), which contrasts with the constitutional regulations in all other countries, whose constitutions have set forth, in addition to the *amparo* action, a different recourse of habeas corpus for the specific protection of personal freedom and integrity.

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520 See, in general, Allan R. BREWER-CARÍAS, *El amparo a los derechos y garantías constitucionales (una aproximación comparativa)*, Caracas, 1993; *El proceso de amparo en el derecho constitucional comparado de América Latina,* (Edición mexicana), Ed. Porrúa, México, 2016; (Edición Peruana), Ed. Gaceta Jurídica, Lima 2016. See, also, Eduardo FERRER MAC-GREGOR, "Breves notas sobre el amparo latinoamericano (desde el derecho procesal constitucional comparado)," in Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, *cit*. pp. 3-39.

In recent times, some constitutions have also provided for a recourse called of *habeas data* (Argentina, Brazil, Ecuador, Paraguay, Peru, Venezuela), whereby any person can file a suit in order to request information regarding the content of the data referred to itself, contained in public or private registries or data banks, and in case of false, inaccurate or discriminatory information, to seek suppression, rectification, confidentiality and updating thereof.

3. *The normative character of the Constitution*

In the contemporary world, the most characteristic sign of the Rule of Law or of the State subject to the law, in addition to the existence of a system of judicial review or control of the conformity of administrative acts with the law through the traditional contentious-administrative control is, as aforementioned, the existence of a system of control of the constitutionality of laws and other State acts of similar rank through the system of judicial review or constitutional justice.[521] Hence, Jean Rivero's appropriate affirmation, particularly in France, that the last step in the construction of the *État de droit* is that the Legislator himself is subject to a higher norm, the Constitution.[522]

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[521] See Allan R. BREWER-CARÍAS, "La justicia constitucional como garantía de la Constitución," in Armin VON BOGDANDY, Eduardo FERRER MAC-GREGOR and Mariela MORALES ANTONIAZZI (Coord.), *La Justicia Constitucional y su Internacionalización. ¿Hacia un Ius Constitutionale Commune en América Latina?* Instituto de Investigaciones Jurídicas, Instituto Iberoamericano de Derecho Constitucional, Max Planck Institut Für Ausländisches Öffentliches Rechts Und Völkerrecht, Universidad Nacional Autónoma de México, México 2010, Tomo I, pp. 25-62. Also published in *Revista de Derecho Público*, Nº 9-10, Asociación Costarricense de Derecho Administrativo, San José, Costa Rica 2010, pp. 9-28.

[522] See Jean RIVERO in "Rapport de Synthèse", in L. FAVOREU (ed.), *Cours constitutionnelles européennes et droits fundamentaux,*

This principle, which today can be considered elementary, having had its roots in American constitutionalism,[523] was only consolidated in continental Europe a few decades ago, with the adoption of the notion of a rigid Constitution, the principle of its supremacy, the guarantee of the nullity of State acts that violate it, the constitutional enshrinement of fundamental rights, and the consideration of the Constitution as a rule of positive law directly applicable to citizens.[524] That is why its acceptance was even described towards the end of the twentieth century, as the product of a "revolution,"[525] because it was only in the last decades of that century that European countries started to "rediscover."[526]

Now, constitutional justice, that is, the possibility of judicial control of the constitutionality of laws and other state acts, derives precisely from this idea of the Constitution as a fundamental and supreme norm, which must prevail over any other norm or state act; this implies the power

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Paris, 1982, p. 519. Also P. LUCAS MURILLO DE LA CUEVA, qualified judicial review as "the culmination of the construction of the *Estado de derecho*," in "El Examen de la Constitucionalidad de las Leyes y la Soberanía Parlamentaria", in *Revista de Estudios Políticos,* Nº 7, Madrid 1979, p. 200.

523 See, in particular, A. HAMILTON, *The Federalist* (ed. B. F. Wright), Cambridge Mass. 1961, *letter* Nº 78, pp. 491-493. See the comments of Alexis DE TOCQUEVILLE, *Democracy in America* (ed. J. P. Mayer and M. Lerner), London 1968, vol. I, p. 120.

524 Eduardo GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal Constitucional*, Madrid 1981.

525 See J. RIVERO, "Rapport de Synthèse", in L. FAVOREU (ed.), *Cours constitutionnelles européennes et droits fundamentaux,* Paris 1982*,* p. 520.

526 See Louis FAVOREU, "Actualité et légitimité du contrôle juridictionnel des lois en Europe Occidentale," in *Revue du Droit Public et de la Science Politique en France et á l'étranger,* Paris 1984, p. 1.176.

of judges or certain constitutional organs exercising jurisdictional functions, to control the constitutionality of state acts, including laws, even declaring them null and void when they are contrary to the Constitution. This was the great and principal contribution of the American Revolution to modern constitutionalism, and its progressive development has been the foundation of the systems of constitutional justice in the contemporary world.

As Manuel García Pelayo put it at the time:

> "That the constitution, as a fundamental positive norm, links all the public powers, including Parliament, and, consequently, the law cannot be contrary to constitutional precepts, to those principles which arise or are to be inferred from them, and to the values which it aspires to put into practice. This, – he concluded –, is the essence of the *Estado de Derecho."*[527]

That is to say, as Mauro Cappelletti also pointed out at the time, the Constitution conceived "not as a mere guideline of a political, moral, or philosophical nature, but as a real law, itself a positive and binding law, although of a superior, more permanent nature than ordinary positive legislation."[528]

Therefore, constitution are normative realities and not the occasional political commitment of political groups, changeable at any moment when the balance between

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527 M. GARCÍA PELAYO, "El Status del Tribunal Constitucional", *Revista española de derecho constitucional*, 1, Madrid 1981, p. 18.

528 M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy. Recent Development. General Report. International Association of Legal Sciences*, Uppsala 1984, (mineo), p. 20; also published as the "Rapport Général" in L. FAVOREU and J.A. JOLOWICZ (ed.). *Le contrôle juridictionnel des lois. Légitimité, effectivité et développement récents*, Paris 1986, pp. 285-300.

them is modified. In this sense, as Eduardo García de Enterría pointed out five decades ago at the beginning of the democratic process in Spain, in the contemporary world, constitutions are effective juridical norms which overrule the whole political process, the social and economic life of the country, and give validity to the whole legal order.[529]

In this sense, constitution, as a supreme real and effective norm, must contain rules applicable directly to state organs and to individuals.

This concept, although novel in the practice of democratic Spain, was the concept adopted in the United States of America from the beginnings of constitutionalism, and which since the nineteenth century was followed in Latin American countries. It was also the concept adopted in Europe after the French Revolution, and after being abandoned during the nineteenth century, it was rediscovered during the twentieth century, particularly after World War II.

That is, in relation to the state, constitution today has the same fundamental character that it had in the origins of constitutionalism in North America, and that was later changed in Europe during the course of the nineteenth century.

The constitution was originally a fundamental law limiting state organs, and it declared the fundamental rights of individuals, as a political pact given by the people themselves and, therefore, directly applicable by the courts. The adoption of this concept in Continental Europe by the French Revolution was later modified by the monarchical principle, which turned the concept of the constitution into a formal and abstract code of the political system, given

529 E. GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal Constitucional*, Madrid 1985, pp. 33, 39, 66, 71, 177, 187.

by the monarch, and not to be applied by the courts. The constitution, in this context, had no norm directly applicable to individuals who were only ruled by the formal laws, and even though it contained an organic part, the absence of means of judicial review brought about the loss of its normative character.

In the European continental legal systems, the concept of the constitution has changed particularly after World War II and is again closer to its original conception as a higher law with norms applicable to state organs and to individuals, judged by the courts, and not only good intentions. In this sense, we can consider valid the terms of the American Supreme Court's decision in *Trop.* v. *Dulles*, 1958, in which stated the following in relation to the normative character of the constitution:

> "The provisions of the constitution are not time–worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation. They are rules of government. When the constitutionality of an act of Congress is challenged in this Court, we must apply those rules.
>
> If we do not, the words of the constitution become little more than good advice."[530]

The normative character of the constitution, relating to state organs and to individuals, and its enforcement by the Courts, has also brought about a change in the so–called "programmatic norms" of the constitution, which have been considered as norms directly applicable only to the legislator.[531]

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530 356 US 86 (1958).

531 E. GARCÍA DE ENTERRÍA, op. cit., p. 37, 69. Cf. P. BISCARETTI DI RUFFIA and S. ROZMARYN, La Constitution comme loi fonda-

In effect, it is current to find in modern constitutions, even in the context of social and economic rights, norms that, in fact, are formulated as a political guideline directed to the legislator. This has led to the consideration that those constitutional norms were not directly applicable to individuals until the legislator itself had adopted formal laws in accordance with the "program" established in the constitution. Therefore, only laws issued for its legal development were to be applied by the courts.

On the contrary, the normative character of the constitution as a fundamental trend of contemporary constitutionalism tends to overcome this programmatic character attributed to certain constitutional norms and seek their enforcement by the courts as norms directly applicable to individuals, so as not to consider them as those pieces of "good advice" referred by Chief Justice Warren to in the *Trop v. Dulles case* (US. 1958).

Therefore, those "programmatic norms" or provisions of state aims must be also enforceable by the courts as principles that must guide the actions of the state.

This is true even in France, where in the traditional constitutional system after the 1875 Constitutional Laws, due to the exclusion of the declaration of rights from the text of the constitution,[532] its provisions were considered not to be directly applicable to individuals.

However, after important decisions of the Constitutional Council adopted in the seventies of the last century, the *bloc de la constitutionalité*[533] was enlarged to include

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mentale dans les Etats de l'Europe occidentale et dans les Etats socialistes, Torino 1966, p. 39.

532 J. RIVERO, *Les libertés publiques*, Vol. 1, Paris 1973, p. 70.

533 L. FAVOREU, "Le principe de constitutionalité. Essai de définition d'après la jurisprudence du Conseil constitutionnel", in *Re-*

the Declaration of Rights of Man and Citizens of 1789, the Preambles of the 1946 and 1958 Constitutions, and the fundamental principles recognized by the laws of the Republic.[534] This led Jean Rivero to say, with regard to the creation of the law by the constitutional judge, that with the decisions of the Constitutional Council, based on "the constitution and particularly on its Preamble", a "revolution" has taken place. He wrote:

> "In a single blow, the 1789 Declaration, the 1946 Preamble, the fundamental principles recognized by the laws of the Republic, have been integrated into the French constitution, even if the Constituent did not want it. The French Constitution, has doubled its volume through the single will of the Constitutional Council."[535]

The Constitution thus configured in a State under the Rule of Law, must in any case, and above all, be endowed with supremacy in relation to any other legal norm or any act emanating from the State, which implies that the acts of Parliament and of absolutely all the other organs of the State cannot violate the norms of the Constitution nor the constitutional principles deriving from them.

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cueil d'études en 1'honneur de Charles Eisenmann, Paris 1977, p. 33.

534 L. FAVOREU, *Le contrôle juridictionnel des lois et sa légitimité*. Développements *récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala 1984, (mineo), p. 8; also published in L. FAVOREU and J.A. JOLOWICZ, *op. cit*., pp. 17–68.

535 J. RIVERO, "Rapport de Synthèse" in L. FAVOREU (ed.), *Cours constitutionnelles européenes et droits fundamentaux,* Aix–en–Provence 1982, p. 520.

It must not be forgotten that contemporary constitutions contain, at the same time, an organic part and a dogmatic part; the former referring to the organization of the State, the distribution and separation of the Public Power and the mechanisms relating to its functioning; the latter, to the fundamental rights and the limitations imposed on the organs of the State for the respect and prevalence thereof. Therefore, the pre-eminence of the Constitution not means only the strict observance of the rules and procedures established in the Constitution to regulate the functioning of the organs of the State, but also the respect for the fundamental rights of the citizens, declared or implicit in the Constitution.

Of course, all this implies,, for example, with regard to the Parliament, not only the obligation to respect the constitutional rules governing the separation of powers and avoid usurping the powers of the Executive and the Judiciary, but also the need to act in accordance with the procedures for the drafting of laws provided for in the Constitution, which in no event may violate the fundamental rights guaranteed by the Constitution. The same applies to the actions of the other organs of the State, particularly the Executive and the courts themselves, including the Constitutional Courts, which, as guarantors of the Constitution, are, above all, subject to it.

The submission to the supremacy of the Constitution by all the organs of the State, on the other hand, not only implies submission to the rules of an organic and procedural nature, but also to those of a substantive nature. For this reason, a law may be unconstitutional not only due to defects in the procedure for the formation of the laws that affect its elaboration, but also for substantive reasons, when its content is contrary to the norms or principles set forth in the Constitution, including those related to fundamental rights or derived from them.

Therefore, the unconstitutionality of State's acts may be of form or of substance.[536]

4. *Constitutional supremacy and its guarantees*

Of course, like all normative supremacy, in order to be effective, it needs to be guaranteed, that is to say, it needs to be endowed with the necessary legal guarantees, which, in the case of the Constitution as supreme norm, turn out to be the culmination of the construction of the rule of law. Among them is precisely the system of constitutional justice or judicial review, conceived precisely by Hans Kelsen in the first decades of the last century, as the jurisdictional guarantee par excellence of the principle of constitutional supremacy.[537]

And, indeed, the supremacy of the Constitution would be imperfect and inoperative from the legal point of view, if the necessary guarantees were not established to protect it against unconstitutional acts of the State or any breach of the constitutional order, that is, the means to protect both its organic part, including constitutional processes and procedures; and the dogmatic part that refers to fundamental rights.

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536 See H. KELSEN, "La garantie juridictionnelle de la Constitution (La justice constitutionnelle)", in *Revue du Droit public et de la Science politique en France et à l'étranger,* Paris 1928, p. 202.

537 Idem., p. 214. See Allan R. BREWER-CARÍAS, "La Justicia Constitucional", in *Revista Jurídica del Perú,* Nº 3, 1995, Trujillo, Perú, pp. 121 a 160; "Control de la constitucionalidad. La justicia constitucional," in *El Derecho Público de finales de Siglo. Una perspectiva iberoamericana***,** Fundación BBV, Editorial Civitas, Madrid 1996, pp. 517–570; *Instituciones Políticas y Constitucionales, Tomo VI: La Justicia Constitucional*, Universidad Católica del Táchira - Editorial Jurídica Venezolana, Caracas, San Cristóbal, 1996, 21 ss.; *La Justicia Constitucional. Procesos y procedimientos constitucionales*, UNAM, México 2007.

In general, and historically, two types of guarantees of the supremacy of the Constitution have been distinguished: political and jurisdictional. The former is generally attributed to the supreme political representative bodies of the State, and was the one that existed, in general, in legal systems where an extreme interpretation of both the principle of the separation of powers and the principle of the unity of the State's power was imposed. In the first case, this was traditionally the situation in France until the creation of the Constitutional Council, where the National Assembly was the only branch of the State with the power to oversee the constitutionality of laws. In the second case, it was the system that was adopted in almost all the former socialist countries of Eastern Europe, and which still exists in the American continent in Cuba, where only the supreme political representative body can exercise control over the constitutionality of laws.

In France, in fact, as aforesaid, the principle of the supremacy of the law as the expression of the general will, led to considering it simply unthinkable that Parliament could ever commit an error with respect to the constitution. The enemy of the constitution, in the liberal framework of the last century, was really the executive –the monarch– who was tempted to put his individual will before that of the people, as expressed in Parliament. Thus, the possibility that Parliament could be in error or act mistakenly was not conceivable.

In effect, it was Jacobinism, based on the absolute representative principle of the general will, which led to the dogma of parliamentary sovereignty in France. According to this principle, all power over the Assembly was resolutely proscribed and, of course, the judiciary power was a simple executive instrument of the laws passed by the Assembly, with absolutely no liberty even to interpret the laws.

Thus, the well-known figure of the *référé législatif* according to which judges were obliged to consult the National Assembly when they had doubts about the interpretation of a Statute.[538]

This limitation was based on the purest tradition of the thoughts of Montesquieu, who considered the national judges, "... as no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor";[539] this was expressly established in the well-known Statute of August 16-24, 1790, referred to the judiciary organization. Article 10 of this law regulated the separation between legislative and judicial powers, by saying that, "the courts could not take part directly or indirectly in the exercise of legislative power, neither prevent nor suspend the execution of acts of the legislative body..." adding in article 12 that the Courts "could not make regulations, but they must always address themselves to the legislative body when they think it necessary to interpret a Statute or to make a new one."[540]

The *référé législatif* then was the instrument of the legislative body for interpreting the laws, which could not even be done by the judges." Thus, Robespierre said that the word "jurisprudence" should be eliminated from the French language, adding:

538 E. GARCÍA DE ENTERRÍA, La Constitución como norma y el Tribunal Constitucional, Madrid 1981, p. 164.

539 Quoted by Ch. H. MCILWAIN, *The High Court of Parliament and its Supremacy*, Yale 1910, p. 323

540 Quoted by E. GARCÍA DE ENTERRÍA, *op. cit*., p. 164, note 88.

> "In a State that has a Constitution a legislation, the jurisprudence of the courts is nothing other than the law...if an authority other than the legislator could interpret the laws, it would elevate its will above that of the legislator."[541]

Therefore, it was precisely this Jacobin principle of the assembly, a product of the French Revolution, which maintained the negation of the legitimacy of the courts to be able to annul the normative products of the assembly for a long time; and in the United Kingdom it is precisely the same principle of the sovereignty of Parliament, a product of the glorious Revolution of 1688, which actually prevents the courts from controlling the constitutionality of legislation. According to this principle, the judges must apply laws and, of course, interpret them, but they are not to control them because the acts of the legislative body are the expression of the sovereign will of the people.

In this traditional framework of the separation of powers, a system of judicial review of the constitutionality of laws was considered a violation of the principle of parliamentary sovereignty, based on the pre–eminence of the legislative power over other state powers. This was because Parliament was constituted by the representatives of the people who, as such, in the representative democratic state represented the sovereign. Through this approach, any intervention by a constitutional body to limit the autonomy of the supreme representative organ of the state was considered inadmissible, and therefore, legislation could only be controlled by that supreme representative organ.

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541 Quoted by M. TROPER, *La séparation des pouvoirs et l'histoire constitutionnelle française*, Paris 1980, *cit*., p. 60.

In any case, this principle of popular sovereignty expressed in modern constitutions today as the basic dogma of the democratic Rule of Law, is a political principle that refers to the constituent power of the state, represented in all the constituted bodies of the state, and not to the power of one or other of the constituted bodies that exercise public power. It thus cannot lead to a discussion about the relative sovereignty of the constituted state bodies, since all the bodies of the state are the product of the sovereign and are its representatives. Thus, it makes no sense today to preach the sovereignty of Parliament, to reject a mechanism that guarantees the constitution to which Parliament is also subject.

To stress this reasoning in another way, one must not forget that in presidential and Parliamentary democratic systems, the president of the republic or the head of government are designated by popular election and are thus a product of the sovereignty of the people, just as Parliament is. From the moment the constitution attributes sovereignty to the people, it is definitely clear that this quality cannot be affirmed in one body of the state with respect to another; therefore, all the powers of the state and all the bodies that carry them out find their legitimacy in the people. Thus, no constitutional body is or can be sovereign, not even the Chambers of Parliament,[542] and all of them must be submitted to the constitution.

Furthermore, in contemporary democracies, political and social forces produce a greater relativity in the constitutional functions of the state bodies, converting Parliament into a forum for the political parties and subjecting the government to necessary negotiations with them and

[542] P. Lucas MURILLO DE LA CUEVA, "El examen de la constitucionalidad de las leyes y la soberanía parlamentaria", in *Revista de estudios políticos*, 7, Madrid 1979, p. 212.

with trade unions and pressure groups. On many occasions, this primacy of the parties has erased the principle of the separation of powers and has conversely led to its factual concentration in the hands of the government and or those of the parties themselves.

Thus, there can be no doubt about the need to adopt measures that serve to guide the activities of state bodies and those of the parties themselves, within constitutional channels.[543] It is not infrequent that, in addition to controlling the constitutionality of laws, the constitutionality of the actions of political parties may also be controlled by the bodies of control of constitutionality.

5. *Judicial Review and the end of parliamentary absolutism*

In any case, exception being made of the United Kingdom, this very myth of parliamentary sovereignty was broken in Europe, with some exceptions, such as in The Netherlands, whose Constitution expressly states that "the constitutionality of acts of parliament and treaties cannot be reviewed by the courts." (Article 120).

In contrast, it can be said that the Judicial Review of constitutionality really appeared in Europe after the great crisis brought about by World War I and by the tragedies that political irrationality caused throughout Europe that made individual rights disappear. This led both to the transformation of the constitution into a normative code that could be directly applicable and enforceable, and to the establishment of a constitutional body for constitutional justice, which would ensure the supremacy of the constitution not only over the executive power which, apart from

543 *Idem*, p. 212.

this, was controlled by another type of tribunal, but basically over Parliament; that is to say, over legislative acts, and particularly, the laws.

Consequently, the sovereignty of Parliament ceased to be above justice, and judicial review of constitutionality was to become the instrument governing the subjection of Parliament to the constitution whenever, because of occasional majorities, the balance was upset among state powers or in the rationality of political and social relations themselves. In fact, the terrible lessons learnt from the abuses of the Nazi and Fascist regimes in Europe, doubtlessly brought about a complete change in the existing myths and theories in Europe regarding the infallibility of the law. Thus, as Favoreu pointed out, the Rousseaunian myth of the infallibility of the law and, thus, of Parliament, which expresses the general will, began to collapse, and the celebrated formula, according to which the legislator could do no wrong" *(ne peut mal faire)*, began to be reexamined.[544]

Indeed, the European experience of the last century, acquired during the period between the two wars, gave rise to a feeling of caution, marked by skepticism, with reference to Parliaments and their assumed sovereignty and the myth of representativeness. As Mauro Cappelletti said, "it was realized that there was too much illusion in the Liberal democratic theory" in the sense that most often

[544] See L. FAVOREU, "Europe occidentale," in L. FAVOREU and J. A. JOLOWICZ. (ed) *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents,* Paris 1986, p. 43. Published as "Actualité et légitimité du contrôle juridictionnel des lois en Europe Occidentale", in *Revue du droit public et de la science politique en France et à l'étranger*, Paris 1984 (5), p. 1147 and 1201. Also published in L. FAVOREU and J.A. JOLOWICZ (ed.), *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents*, Paris 1986, p. 17-68.

the reality was far from the myth of the supremacy of the people's will and that "Parliaments and their legislation, too, would become instruments of despotic regimes; and that majorities could themselves be brutally oppressive."[545]

In fact, the legislators of Weimar Germany and Mussolini's Italy failed as guarantors of freedom. On the contrary, they became the instruments of circumstantial majorities for consolidating totalitarian regimes.

Consequently, these two countries learnt from experience and in their new post–war constitutions they not only established entrenched fundamental values, freedoms, and rights out of the reach of Parliament, but also adopted the principle of the judicial review of constitutionality of laws, as it was previously established in the Austrian system in the 1920's.

In this way, the awareness that it was necessary to protect liberties not only from the executive, but also from the legislative grew. As Jean Rivero described,

> "The old idea that marked the liberal nineteenth century, that of the protection of liberty *by the law*, tended to be substituted by the experimental idea of the need of protection of liberties *against the law*. This evolution made the extraordinary phenomenon of the acceptance of a superior authority to the Legislator itself, of an authority in charge to impose upon the Legislator the respect of the constitution possible."[546]

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545 See M. CAPPELLETTI, "Rapport général," in L. FAVOREU and J. A. JOLOWICZ (ed) *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents,* Paris 1986, pp. 293-294. Also published in L. FAVOREU and J.A. JOLOWICZ (ed.), *Le contrôle juridictionnel des lois... cit*., p. 285-300.

546 J. RIVERO, "Rapport de Synthèse" in L. FAVOREU (ed.), *Cours constitutionnelles européenes et droits fondamentaux*, Aix-en-Provence 1982, p. 519.

Thus, European continental countries adopted the review of the constitutionality of laws following a path different from that of the North American system, adopting the principle of judicial review for other reasons. According to what Louis Favoreu said, the European phenomenon was less in response to a problem of legal logic – that is, in the *Marbury v. Madison* tradition, that a law contrary to the constitution could not be applied – than to a political logic. It was more:

> "the fear of oppression by a parliamentary majority, which was decisive in the change in the position of the continental European countries regarding the review of the constitutionality of laws".[547]

This political logic of judicial review can also be found in the fact that the myth of representativeness of the general will as expressed by those elected, has broken down in many countries, particularly because the legislative body is frequently made up of men chosen by the political parties, and who represent these parties, not being really, in fact, representatives of the general will.

Anyway, the idea that certain number of fundamental values should be established beyond the reach of a circumstantial or temporary majority is what led, in one way or another, to the transfer of the traditional sacredness of the law to the constitution.

Thus, it was, after World War II, that the European continental countries "rediscovered the constitution as a text of juridical character"[548] or rather, when they discovered the true fundamental nature of the constitution as a higher and supreme law, applicable to all state organs and

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547 L. FAVOREU, Le contrôle juridictionnel…, *doc. cit.*, p. 22.

548 L. FAVOREU, Le contrôle juridictionnel…, *doc.cit.*, p. 23.

enforceable by the courts. In the words of Mauro Cappelletti, what is new in modern constitutionalism:

> "Is the serious attempt to conceive the constitution not as a mere guideline of a political, moral, or philosophical nature, but as a real law, itself a positive and binding law although of a superior, more permanent nature than ordinary positive legislation."[549]

Obviously, this positive and superior law was to apply to all the organs of the State, especially the Parliament and the Government. In this sense, judicial review of the constitutionality of state acts is the ultimate consequence of the consolidation of the Rule of Law where the state organs are not sovereign, are subject to limits imposed by a constitution having the force of a superior law, and in particular, when the legislator is limited in his legislative action and there is judicial control over the "legality of laws."

Paul Duez stressed the argument almost a hundred years ago in an article published in the *Mélanges Hariou* when he wrote:

> "Modern Public Law establishes as an axiom that Governments are not sovereign and that, in particular, the Parliament is limited in its legislative action by superior legal rules that it could not infringe; Acts of Parliament are submitted to the law, and no Act of Parliament can be contrary to the law."[550]

This is the principle accepted today in France, but certainly was not the one accepted in that country sixty years ago when Duez wrote his essay and when the principle of the sovereignty of the National Assembly was still in

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549 M. CAPPELLETTI, *doc. cit*., p. 20.

550 P. DUEZ, "Le contrôle juridictionnel de la constitutionalité des lois en France", *Mélanges Hauriou*, Paris 1929, p. 214.

force. That is why this article is of historical importance in France. In effect, Duez, by establishing the principle of the limitation of all state organs by a constitution as a superior rule, added:

> "But it is not sufficient to proclaim such a principle: it must be organized, and practical and effective measures must be adopted to ensure it."[551]

Subsequently, he referred to the very important French system of judicial control related to public administration and to administrative action, through the *recours pour excès de pouvoir*; nevertheless, he said: "The spirit of legality requires that a similar control be established in relation to legislative action,"[552]

And concluded by saying that,

> "There is not a real organized democracy, and a Legal state (*État de Droit*), except only where this control of legality of laws (Acts of Parliament) exists and functions."[553]

The logic of Duez's statement in our perspective is certainly impeccable: No organ of the state can be considered sovereign; and all state organs, particularly, the legislator in its actions are submitted to limits established in superior rules, embodied in a constitution.

Therefore, acts of Parliament must always be submitted to the law and cannot be contrary to the law. Consequently, the spirit of legality imposes the existence and functioning not only of a control of legality of administrative acts, but also of a control of the legality of laws, as acts of Parliament.

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551 *Idem*, p. 214.

552 *Idem*, p. 215.

553 *Ibid*. p. 215.

Only in countries where this control exists, are there truly organized democracies and *État de Droit*.

Therefore, this judicial control of the "legality of laws" is, precisely, the judicial control of the constitutionality of legislation and of other state acts issued in direct execution of the constitution, in relation to which legality means "constitutionality."

Duez's thesis, in any case, was accepted in France fifty years later, by the Constitutional Council in France when it declared, in the well-known Nationalizations decision of 16 January 1982, that:

> "Considering that if article 34 of the constitution places "the nationalization of companies and their transfer from the public to the private sector," in the sphere of the statute, that disposition as well as the one that assigns the role of determining the fundamental principles of the right to property to the statute, does not excuse the legislator, when exercising its powers, from the respect of the principles and rules of constitutional value that are imposed upon all state organs."[554]

Louis Favoreu, when referring to this decision of the Constitutional Council qualified it as a "fundamental affirmation of the complete realization of the *État de droit* in France," comparing it to the previous situation in which the legislator "in fact escaped, if not legally, from the submission to a superior rule."[555]

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554 See in L. FAVOREU and L. PHILIP, *Les grandes décisions du Conseil Constitutionnel*, Paris 1984, p. 527. See also L. FAVOREU, "Les décisions du Conseil Constitutionnel dans l'affaire des nationalisations", *Revue du droit public et de la science politique en France et à l'étranger*, 1962, p. 400.

555 L. FAVOREU, "Les décisions du Conseil Constitutionnel…", *doc. cit*., p. 400.

Therefore, the supremacy of the constitution over Parliament marked the end of Parliamentary absolutism,[556] transformed the old concept of parliamentary sovereignty and led the way to constitutional review in France through the Constitutional Council, even though in a limited way and, previously, in a more complete way in other countries in continental Europe such as Austria, Germany and Italy.

Another factor that contributed to the appearance of mechanisms for judicial review of the constitutionality of laws was the transformation of the very notion of "law" in the sense of an act of Parliament or statute. In fact, statutes – the work of the legislator, once the expression of the general will in the tradition of the nineteenth century – came to be seen, with the evolution of parliamentary systems, as acts adopted by both the parliamentary majority and the government, through a system of connecting vessels, through the political parties. This way, the statutes are not necessarily the expression of the general will, approved by a solid and mythical majority, but, as Jean Rivero said, they are "no more than the expression of the governmental will approved by a solidary majority."[557] Moreover, with the evolution of the tasks of the state, the law has tended to become a more technical product, whose content as a result, frequently even escapes the effective control of Parliament, since it is the technocrats within the administration who draw it up and settle its real content, without the actual participation of members of Parliament. Therefore, judicial review is an effective tool to control the constitutionality of such acts of Parliament or statutes that are the expression of governmental will, rather than the expression of the general will.

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556 J. RIVERO "Fin d'un absolutism", *Pouvoirs*, 13, Paris.1980, pp. 5-15.

557 J. RIVERO "Rapport de Synthèse", *doc. cit*, p. 519.

Anyway, the supremacy of the constitution and its enforceable character over the legislative body has led to the adoption of judicial rather than political guarantees of the constitution, the latter being proven ineffective, as shown by the French example of the Conservative Senates (*Sénat Conservateur*) of the 1799 and 1852 Constitutions. Constitutions commonly established a distribution of state powers among the various state organs, and basically, assigned fundamental powers to the legislative body, which used to be considered unable to do wrong, as the expression of the general will. Therefore, politically speaking, its self-control is really an illusion.

But constitutions also establish fundamental rights of individuals and minorities even against majoritarian will; hence, as Cappelletti correctly said, "no effective system of review can be entrusted to the electorate or to persons and organs dependent on and strictly accountable to, the majority's will"[558] that is to say to the representative legislator itself. Therefore, contrary to the political systems of review of the constitutionality of legislation, the common trend of contemporary constitutionalism in constitutional systems with written constitutions is the existence of judicial means of protection of the constitution, through the assignment of effective powers of judicial control of the constitutionality of legislation to the courts, either ordinary or special constitutional courts.

It must be said, in fact, that in most contemporary countries, judicial review or constitutional justice, that is to say, the power to control the constitutionality of laws and protect fundamental rights, is in many countries constitutionally vested in the organs exercising the Judicial power. In these countries, it can be said that the constitu-

558 M. CAPPELLETTI, *doc. cit*, p. 23.

tional judge is the Judiciary. In other countries, on the other hand, particularly in continental Europe, the judicial authorities do not fully exercise constitutional justice, but this is conferred, in some cases, to constitutional bodies different and independent from the Judiciary, especially created for this purpose, in the form of Constitutional Courts, Tribunals or Councils. Therefore, in these countries, the constitutional judge is not always a judicial authority, but a constitutional body with jurisdictional functions that does not depend on the Judicial or any other branch of government.

Evidently, in both systems, the constitutional judge exercises a jurisdictional function, in the sense of declaring the law with the force of legal truth as an independent body within the State, from the organs of the legislative and executive powers. In both systems, constitutional justice is the most eloquent expression of the supremacy of the Constitution and its guarantee. The difference between them lies in the fact that in the first system, that is, in those countries in which the Judiciary is the constitutional judge, the jurisdictional guarantee of the supremacy of the Constitution is a judicial guarantee, while in the other systems it is only a jurisdictional guarantee, not a judicial one. Of course, in both cases, in order for judicial review or constitutional justice to be effective, the organs in charge of exercising it must be endowed with autonomy and independence.

According to the principles of modern constitutionalism that emerged from the American Revolution, the Judiciary must be considered as the branch of the State that has, par excellence, the function of being a constitutional judge, that is, the branch of the State that in accordance with the principle of the separation of powers must ensure the supremacy of the Constitution, both from an organic and dogmatic point of view; being therefore empowered to control the constitutionality of laws and protect the fundamental rights established in the Constitution.

It can be said that this is the principle in almost all the countries of the contemporary world that have been influenced by modern constitutionalism, without the deviations relating to the separation of powers emanating from the French Revolution. This is the reason why the general principle in the field of judicial review or control of the constitutionality of laws, except in European countries, is the attribution of the function of constitutional judge to the Judiciary. On the other hand, as regards the protection of constitutional rights and guarantees, in all countries of the contemporary world, it is the Judiciary, i.e. the judicial authority, which has the task of being the guardian of the freedoms and constitutional rights of the individual.[559]

On the other hand, it should be noted that when the judicial review is attributed to the Judiciary, it may be the task of all the judges or of some of them. In the first case, the system of judicial review is the diffuse system, the most widespread in the contemporary world; in the second case, the system of judicial review is the concentrated system, since the task of control is granted to a single judicial body, either the Supreme Court of the country or a Constitutional Court belonging to the Judiciary. In some countries, both systems of control even coexist.[560]

In any case, judicial review or jurisdictional control of the constitutionality of laws, that is, this power to control the conformity of acts of the State with the Constitution, especially legislative acts and those dictated in direct execution of the Constitution, as we have pointed out, can only occur in legal systems in which there is a written

559 Allan R. BREWER-CARÍAS, *Constitutional Protection of Human Rights in Latin America,* Cambridge University Press, New York 2009.

560 Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law,* Cambridge University Press, Cambridge 1989.

Constitution that imposes limits on the activities of the organs of the State and, in particular, of the Parliament, and where the separation of powers is guaranteed. Consequently, even in systems of judicial review, the power of the courts to control the constitutionality of the acts of the State is not necessarily a consequence of the existence of an autonomous and independent Judiciary, but of the legal limits imposed in a Constitution sanctioned as supreme law over the constituted organs of the State.

6. *Judicial review and constitutional limitations on state bodies*

As has been pointed out, in order for there to be judicial review system, it is not only necessary that there be a written Constitution, as the supreme norm that enshrines the fundamental values of a society, but also that this superior norm be established in a rigid and stable form, in the sense that it cannot be modified by ordinary legislation. In such a system, all the organs of the State are limited by the Constitution and are subject to it, so that their activities must be carried out in accordance with this supreme law.

This implies, of course, not only that the Administration and judges, as law enforcement organs, are subject to legality (Constitution and "legislation"), but also that the organs that create "legislation," especially legislative bodies, are also subject to the Constitution.

Of course, a written and rigid constitution, at the apex of a legal system, not only demands that all the acts issued by state organs in direct execution thereof should not violate the constitution but must also provide a guarantee to

prevent or sanction such violations.[561] Thus, the judicial review of constitutionality as the power of the judiciary to control the submission of state organs to the superior rule of the country.

However, in all legal systems with written and rigid Constitutions, as we have previously argued, that there is always a hierarchical system of legal norms and acts, so not all state acts have the same level of derivation in creating legal rules.[562] On the contrary, in the first place, there are acts that directly and immediately execute the constitution and that are subject to this superior rule alone, which are generically referred to as "legislation"; and second, there are also state acts that execute the constitution in an indirect way, being at the same time acts issued in direct and immediate execution of "legislation," thus directly subject to it. Among the former are, basically, the formal laws and other acts of Parliament, including the *interna corporis,* and acts of government issued in accordance with their constitutionally attributed powers, and among the latter, there are the administrative and the judicial acts.

In an *État de Droit* then, the guarantee of the rule of law must be established at those two levels of creation or derivation of legal rules by way of three judicial systems of control: first, the judicial review of constitutionality, established to control state acts issued in direct execution of the constitution; second, the judicial control of administrative action basically established regarding administra-

561 *Cf.* H. KELSEN, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)" *Revue du droit public et de la science politique en France et à 1'étranger*, T. XLV, 1928, p.197-257.

562 See, on the hierarchical system of the legal order, what has been said in *Part Four* of this book.

tive acts; and, concerning judicial acts issued by courts, the judicial control system is the third, established by systems of appeal or cassation.

Moreover, in the *État de droit,* which implies that fundamental rights and liberties are established in the constitution, judicial mechanisms of control must also be provided to protect and guarantee such rights against any act by the state that may violate them, and even against acts by individuals that may so affect them.

Judicial review, that is, the systems of jurisdictional control of constitutionality, have relevance with respect to the acts of the constitutional organs of the State, in which the rule of law becomes the "rule of the constitution" since they are acts that execute the constitution itself, directly and immediately.

In fact, among the acts subject to judicial review of constitutionality are the formal laws or acts of Parliament, and it is precisely because of this that judicial review of constitutionality is often identified with the judicial review of the constitutionality of legislation.[563] However, laws are not the only state acts issued in direct execution of the constitution and as an expression of constitutional powers. So too are other acts of Parliament, such as internal parliamentary rules of procedure and even other parliamentary acts that do not have the form of law and that are not normative, such as those established in the constitution regarding the relations between the Congress or Assembly and the other constitutional organs of the state. All these acts adopted by Parliament are subject to the constitution because they are issued by virtue of powers attributed directly in that fundamental text.

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563 See, for example, M. CAPPELLETTI, *Judicial Review in Contemporary World*, Indianapolis 1971, p. VII.

Thus, in an *État de droit* they must also be liable to judicial review of constitutionality.[564]

Apart from these acts of Parliament, however, the government, in an *État de droit*, also issues acts that directly execute the constitution, which have the same status as laws in the hierarchical legal system, and which, in some cases, even have the same force as formal laws.

In fact, in contemporary constitutional law, the government issues acts with the same force as the formal laws in a variety of forms, either as delegate legislation or by reason of powers established in the constitution itself. In these cases, they are executive acts with legislative content, and with the same ran, force, and power of derogation as the formal laws established in acts of Parliament. For this reason, such executive acts issued in direct execution of the constitution are not administrative acts but acts of government with normative and legislative content. Thus, they are also liable to judicial review of constitutionality.[565]

However, we have seen that the government also has powers established in the constitution to produce certain acts without any legislative interference, for instance when declaring a state of siege or the restriction of constitutional guarantees, when directing international relations or when vetoing an act of Parliament. All these acts, shaped by the continental European doctrine of administrative law, as "acts of government," are also subject to judicial review of constitutionality. It is true that in the traditional criteria of administrative law, such "acts of government" were developed to exclude them from judicial administrative control either because of their political content or motives or

564 *Cf.* H. KELSEN, *loc. cit*., p. 228.
565 *Idem*, p. 229.

because they were issued by the government in its relations with other constitutional bodies, particularly with Parliament.[566] Nevertheless, as we have seen, these acts are also subject to the constitution, and they are liable to be submitted to judicial review of constitutionality.[567]

Moreover, in contemporary legal systems, leaving aside problems arising from monist and dualist conceptions, international treaties and agreements are also subject to judicial review of constitutionality in the *État de droit,*[568] whether this be directly, or by review of the acts of Parliament or government that introduce them into domestic law, also by virtue of constitutional powers granted to those state organs. There are exceptions, however, as in the case of The Netherlands, where the Constitution excludes the control of constitutionality not only over laws, but also over treaties (art. 120); which, on the other hand, was mitigated by the provision in the Constitution on the control of conformity of all State acts, including laws, with respect to treaties of general and immediate application (article 94), such as those relating to human rights, which has given rise to an important system of control of the "conventionality" of laws, with effects similar to the control of constitutionality, but basically in the area of human rights.

In any case, what is general is that in legal systems with written Constitutions, all acts of the State dictated in execution of the Constitution are subject to jurisdictional control of constitutionality.

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566 See the classical work of P. DUEZ, *Les actes de gouvernement*, Paris 1953.

567 *Cf.* H. KELSEN, *loc. cit*., p. 230.

568 *Idem*, p. 231.

7. *The Variety of Judicial Review Systems*

It is evident, however, that in comparative law no single system for judicial review of constitutionality exists, but rather a very varied range of systems in which not even all the state acts mentioned can be subject to judicial review.

In fact, different criteria can be adopted for classifying the various systems of constitutional justice or judicial review of the constitutionality of state acts, particularly of legislation,[569] but all are related to a basic criterion referring to the state organs that can carry out constitutional justice functions.

In effect, judicial review of constitutionality can be exercised by all the courts of a given country (diffuse system) or only by the Supreme Court of the country or by a court especially created for that purpose (concentrated system).

Certainly, this classic distinction of the judicial review systems in the contemporary world, between the concentrated systems of judicial review and the diffuse systems of judicial review,[570] has developed and has changed, and

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569 See, in general, M. CAPPELLETTI, *op.cit.,* p. 45 and M. CAPPELLETI and J.C. ADAMS, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard Law Review*, 79, 6, April 1966, p. 1207.

570 See, generally, Mauro CAPPELLETTI, *Judicial Review in Contemporary World*, Bobbs-Merrill, Indianapolis 1971, p. 45; Mauro Cappelletti and J. C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard Law Review* 79, Nº 6, April 1966, p. 1207; Mauro CAPPELLETTI, "El control judicial de la constitucionalidad de las leyes en el derecho comparado," in *Revista de la Facultad de Derecho de México* 61, 1966, p. 28; Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Al-

is difficult to apply in many cases clearly and sharply.[571] That is why nowadays, in almost all democratic countries, a convergence of principles and solutions on matters of judicial review has progressively occurred,[572] to the point that it is possible to say that there are no means or solutions that apply exclusively in one or another system.[573]

Nonetheless, this fact, in my opinion, does not deprive the distinction of its basic sense.

In effect, and in spite of criticisms of the concentrated–diffuse distinction,[574] the distinction remains very useful,

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lan R. BREWER-CARÍAS, *Études de droit pubic comparé*, Bruylant, Brussels 2000, pp. 653 ff.

571 See, e.g., Lucio PEGORARO, "Clasificaciones y modelos de justicia constitucional en la dinámica de los ordenamientos," *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 2, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 131 ff.; Alfonse CELOTTO, "La justicia constitucional en el mundo: Formas y modalidades," *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 1, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 3 ff.

572 See, e.g., Francisco FERNÁNDEZ SEGADO, La justicia constitucional ante el siglo XXI. La progresiva convergencia de los sistemas americano y europeo–kelseniano, Librería Bonomo Editrice, Bologna 2003, pp. 40 ff.

573 On the effort to establish a new basis for new distinctions, see Louis FAVOREU, *Les cours constitutionnelles*, Presses Universitaires de France, 1986; Michel FROMONT, *La justice constitutionnelle dans le monde*, Dalloz, Paris 1996; D. ROUSSEAU, *La justice constitutionnelle en Europe*, Montchrestien, Paris 1998.

574 See Francisco FERNÁNDEZ SEGADO, "La obsolescencia de la bipolaridad 'modelo Americano-modelo europeo-kelseniano' como criterio analítico del control de constitucionalidad y la búsqueda de una nueva tipología explicativa," in *La justicia constitucional: Una visión de derecho comparado*, Ed. Dykinson, Madrid 2009, vol. 1, pp. 129-220; Guillaume TUSSEAU, *Contre les "modèles" de justice constitutionnelle: Essai de critique méthodologique*, Bononia University Press, Universitá di Bologna, Bolo-

particularly for comparative law analysis, and it is not possible to consider it obsolete.[575] The basis of the distinction, which can always be considered valid, is established between, on the one hand, constitutional systems in which all courts are constitutional judges and have the power to review the constitutionality of legislation in decisions on particular cases and controversies, without such power necessarily being expressly established in the Constitution, and, on the other hand, constitutional systems in which a constitutional jurisdiction is established assigning its exercise to a constitutional court, tribunal or council or to the supreme or high court or tribunal of the country, as the

gna 2009 (bilingual French-Italian edition); Guillaume TUSSEAU, "Regard critique sur les outils méthodologiques du comparatisme. L'example des modèles de justice constitutionnelle," *IUSTEL: Revista General de Derecho Público Comparado*, Nº 4, Madrid, January 2009, pp. 1-34.

575 In fact, what can be considered obsolete is the distinction that derives from an erroneous denomination that has been given to the two systems, particularly by many in Europe, contrasting the so–called American and European systems. This ignores that the "European system," which cannot be reduced to the existence of a specialized Constitutional Court, was present in Latin America a few decades before its introduction in the Czechoslovak Constitution and that the "American system" is not at all endemic to countries with common law systems, having spread since the nineteenth century into countries with Roman law traditions. See Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Vicki C. JACKSON and Mark TUSHENT, *Comparative Constitutional Law*, 2nd ed., Foundation Press/Thomson West, New York 2006, pp. 465 ff., 485 ff. Also, as has been pointed out by Francisco RUBIO LLORENTE, it is impossible to talk about a European system, when within Europe there are more differences between the existing systems of judicial review than between any of them and the American system. See Francisco RUBIO LLORENTE, "Tendencias actuales de la jurisdicción constitucional en Europa," in *Manuel Fraga: Homenaje académico*, Fundación Canovas del Castillo, Madrid 1997, vol. 2, p. 1416.

only court with jurisdictional power to annul statutes contrary to the Constitution – such courts or the assignment of power to them must be expressly provided for in the Constitution. These are the basic grounds for the distinction that still exists in comparative law, even in countries where both systems function in parallel, as happens in many Latin American countries.[576]

It is in this sense that this book refers to the concentrated system and the diffuse system of judicial review.[577]

In the case of the diffuse system of judicial review, all the courts of a given country are empowered to judge the constitutionality of laws. This is the case in the United States of America, thus this system has been identified as the 'American system', because it was first adopted in the United States particularly after the famous *Marbury* v. *Madison* 1 Cranch 137 case decided by the Supreme Court in 1803. This system is followed in many countries with or without a common law tradition. This is the case, for example, in Argentina, Mexico, Greece, Australia, Canada, India, Japan, Sweden, Norway and Denmark. This system is also qualified as a diffuse system of judicial review of

576 As is, for instance, the case of Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Venezuela, as well as Portugal, and in a certain way Greece, and Canada. See Allan R. BREWER-CARÍAS, "La jurisdicción constitucional en América Latina," in Domingo GARCÍA BELAÚNDE and Francisco FERNÁNDEZ SEGADO (coords.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117-161.

577 See Allan R. BREWER-CARÍAS, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceeding*, Cambridge University Press, New York 2009, pp. 81 ff.

constitutionality,[578] because judicial control belongs to all the courts from the lowest level up to the Supreme Court of the country.

By contrast, there is the concentrated system of judicial review in which the power to control the constitutionality of legislation and other state organs issued in direct execution of the constitution is assigned to a single organ of the state, whether to its Supreme Court or to a special court created for that particular purpose. The latter case, is also referred to as the Austrian system because it was first established in Austria, in 1920, and was materialized through the creation of a special constitutional court established outside of the judicial branch of government with the power not only to declare the unconstitutionality of statutes that violate the Constitution, but also to annul them with *erga omnes* effects, that is, to expel them from the legal system. This concentrated system, incorrectly called the "European model," was initially followed in Germany, Italy, and Spain, and is nowadays followed in almost all democratic rule of law states in Europe. It is called a concentrated system of judicial review, as opposed to the diffuse system, because the power of control over the constitutionality of state acts is given only to one single constitutional body that can also be the Supreme Court of a given country or, as in the Austrian or "European model," to a specially created constitutional court or tribunal, that although it exercises judicial functions, in general, it is created by the constitution outside the ordinary judicial power, as a constitutional organ different to the Supreme Court of the country.

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578 M. CAPPELLETTI, "El control judicial de la constitucionalidad de las leyes en el derecho comparado," in *Revista de la Facultad de Derecho de México*, 61, 1966, p. 28.

In other words, the so-called "European model" refers to the concentrated system of judicial review when the constitutional jurisdiction is assigned to a special constitutional court. However, other countries without special constitutional courts also follow the concentrated system of judicial review by assigning the constitutional jurisdiction to existing supreme courts. In this sense, the concentrated system of judicial review has been adopted in Brazil, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. Only in Bolivia, Colombia, Chile, Guatemala, Peru, and Ecuador is the constitutional jurisdiction assigned to special constitutional courts or tribunals. In the other countries, it is exercised by the existing supreme courts. Only in Bolivia, Costa Rica, Chile, Ecuador, El Salvador, Honduras, Panama, Paraguay, and Uruguay does the system remain exclusively concentrated. In the other countries, it has been mixed with the diffuse system, functioning in parallel.[579]

Concerning the judicial organs that can exercise the power of controlling the constitutionality of laws, other countries have adopted a mixture of the aforementioned diffuse and concentrate systems, in the sense of allowing both types of control at the same time. Such is the case in Colombia and Venezuela where all courts are entitled to judge the constitutionality of laws and therefore decide autonomously on their inapplicability in a given process, and the Supreme Court has the power to declare the un-

[579] See Allan R. BREWER–CARÍAS, Judicial Review in Comparative Law, Cambridge University Press, Cambridge 1989; and Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceeding, Cambridge University Press, New York 2009.

constitutionality of laws in an objective process. One can say that these countries have a diffuse and concentrated parallel system of judicial review at one and the same time, perhaps the most complete in comparative law.[580]

However, other distinctions can be observed regarding the so-called concentrated systems of judicial review, in which the power of control is given to the Supreme Court or to a Constitutional Court.

In the first place, in relation to the moment at which control of the constitutionality of laws is performed, which may be prior to the formal enactment of the law, as was initially the case in France, or the judicial control of the constitutionality of laws which can be exercised by the court after the law has come into effect, as is the case in Germany and Italy.

In this respect, other countries have established both possibilities, as is the case of Spain, Portugal and Venezuela. In the latter, a law sanctioned by Congress prior to its enactment, can be placed by the president of the Republic before the Supreme Court to obtain a decision regarding its constitutionality, and the Supreme Court can judge the constitutionality of the law after it has been published and has come into legal effect.

Moreover, in relation to the concentrated systems of judicial review, two other types of control can be distinguished regarding the manner in which this review is required, either incidentally or through an objective action. In the first place, the constitutional question is not considered justiciable unless it is closely and directly related to a

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580 See Allan R. BREWER–CARÍAS, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela,* Universidad Externado de Colombia y Pontificia Universidad Javeriana, Bogotá 1995.

particular process, in which the constitutionality of the concrete law is not normally necessary to the unique issue in the process. In this case, judicial control is incidental, and the Supreme Court or constitutional tribunal can only decide when it is required to do so by the ordinary court that has to decide the case. In this circumstance, it is the function of the ordinary courts, upon hearing a concrete case, to place the constitutional issue before the constitutional court.

Of course, the incidental nature of judicial review is essential to diffused control systems and, therefore, to all legal systems that follow the American model.

However, in the field of the concentrated system of judicial review, the control granted to the constitutional court can also be exercised through direct action where the constitutionality of the particular law is the only issue in the process, without reference or relation to a particular process.

In this latter case, another distinction can be made in relation to the *locus standi* to exercise the direct action of unconstitutionality: in most countries with a concentrated system of judicial review, only other organs of the state can place the direct action of constitutionality before the constitutional court, for instance, the head of government, or a number of representatives in Parliament.

Other systems of concentrated judicial review grant the action of constitutionality to individuals, whether requiring that the particular law affect a fundamental right of the individual, or by means of a popular action, in which case any citizen can request the constitutional court or Supreme Court to decide upon his claim concerning the constitutionality of a given law, without any particular requirement regarding his standing.

The principle, in any case, is the impossibility for constitutional courts or supreme courts to initiate judicial review processes *motu proprio*, that is, ex *officio*. The principle is that such control of constitutionality of State acts must be initiated at the request of a party, being an exception to the rule of standing the cases in which the Constitution of a country assigns to a constitutional court the power to issue rulings, for instance for the abstract interpretation of the Constitution, without the request of any specific party, whether an individual or a State entity.

This is the exceptional case, for instance, of the Constitutional Courts in Croatia and in Serbia. In Croatia, the Constitutional Court has cautiously avoided using this power, showing a considerable measure of deference, except in cases where an obviously unconstitutional act has unconstitutionally regulated the Constitutional Court itself.[581] In the case of Serbia, in contrast, the Constitutional Court has often initiated proceedings *ex officio* to assess the constitutionality of statutes, which in practice blurs the difference between requests for judicial review filed by authorities (initiatives) having the required standing. In addition, when the Court declines to start a procedure on an initiative, it usually states its opinion on the constitutionality of the challenged act. Only when it rejects an initiative for formal reasons does the court does not assess the constitutionality of the act in the reasoning of the decision.

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581 See Decision Nº U–I–39/2002, Official Gazette *Narodne novine*, Nº 10/2002; Sanja BARIĆ and Petar BAČIĆ, "Constitutional Courts as Positive Legislators, *Croatian National Report*," in Allan R. BREWER–CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2011, pp.407.

However, the court can, in any case, put the proceeding in motion independently, even when the initiative has been filed having formal inaccuracies.[582] In such cases, we consider that the Court must always follow elemental rules of due process calling and allowing any interested party to participate in the same.

In any case, as we have seen, the basic division that we can establish regarding the various systems of judicial review depends, in our opinion, upon the concentrated or centralized or diffuse or decentralized character of judicial control of constitutionality, that is to say, when the power of control is given to all the courts of a given country or to one special constitutional court or to the Supreme Court of that country.

We have also said that some countries have even adopted both systems of judicial review that developed in parallel. Regarding this main classification, as we said, other criteria can be adopted to identify the various systems of judicial control of the constitutionality of laws: the incidental and the principal or objective action systems.

Furthermore, in relation to the main distinction between the diffuse and concentrated systems of judicial review, we can also distinguish other criteria for classifying the various systems, according to the legal effects given to the judicial decision of review.

582 See Boško TRIPKOVIĆ, **"**A Constitutional Court in Transition**:** Making Sense of Constitutional Adjudication in Post authoritarian Serbia," *Serbian National Report*, in Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2011, pp. 735 ff.

Within this scope, we can distinguish decisions with *in casu et inter partes* or *erga omnes* effects, that is to say, when the judicial decision has effects only within the parties in a concrete process, or when it has general effects applicable to everyone.

For instance, in the diffused systems of judicial review, according to the American system, the decision of the courts, in principle, only has effects for the parties of the process, which effects are closely related to the incidental nature of judicial review.

And in the concentrated system of judicial review, following the Austrian model, when the judicial decision is a consequence of the exercise of an objective action, the effects of such a decision are general, with *erga omnes* validity.

Thus, in the diffused systems of judicial review, a law declared unconstitutional with *inter partes* effects, in principle, is considered null and void, with no effect whatsoever. Therefore, in this case the decision, in principle, is retroactive in the sense that has *ex tunc*, or *pro pretaerito* consequences; that is to say, the law declared unconstitutional is considered never to have existed or never to have been valid. Thus, this decision, in principle, has "declarative" effects, in the sense that it declares the pre-existing nullity of the unconstitutional law.

In the concentrated systems of judicial review, on the contrary, a law declared unconstitutional, with *erga omnes* effect, in principle, is considered annullable. Therefore, in this case, the decision is prospective, in the sense that has *ex nunc*, *pro futuro* consequences, that is to say, the law declared unconstitutional is considered as having produced its effect until its annulation by the court, or until the moment determined by the court subsequent to the decision.

In this case, therefore, the decision has "constitutive" effects, in the sense that the law will become unconstitutional only after the decision has been made.

Nevertheless, this distinction related to the effects of the judicial decision regarding the unconstitutionality of a law is not absolute. On the one hand, if it is true that in the diffuse systems of judicial review the decision has *inter partes* effects, when the decision is adopted by the Supreme Court, as a consequence of the *stare decisis* doctrine, the practical effects of the decision, in fact, are general, in the sense that it binds all the lower courts of the country. Therefore, as soon as the Supreme Court has declared a law unconstitutional, no other court can apply it.

On the other hand, in concentrated systems of judicial review, when a judicial decision is adopted on an incidental issue of constitutionality, some constitutional systems have established that the effects of that decision only relate, in principle, to the particular process in which the constitutionality question was raised, and between the parties of that process, even though this is not the general rule.

In relation to the declarative or constitutive effects of the decision, or its retroactive or prospective effects, the absolute parallelism with the diffuse and concentrated systems has also disappeared.

In the diffuse systems of judicial review, even though the effects of the declarative decisions of unconstitutionality of the law are *ex tunc*, *pro pretaerito*, in practice, exceptions have been made in civil cases to allow for the invalidity of the law not to be retroactive. In the same manner, in the concentrated systems of judicial review, even though the effects of the constitutive judicial decisions of unconstitutionality of the law, are *ex nunc*, *pro futuro*, in practice, exceptions were needed to be made in criminal cases to allow for the invalidity of the law to be retroactive, thus benefitting the accused.

8. *The legitimacy of judicial review and the systems of distribution of public power.*

As we have pointed out above, it can be said that in modern constitutionalism, the Judiciary, which is supposedly the "least dangerous" of all state powers,[583] was given the power to defend the constitution and to control the constitutionality of legislation. This is the case in the United States and in many Latin American countries, where all judges and courts have the general power to act as constitutional judges as the obvious consequence of the principle of the supremacy of the constitution.

If the constitution is the supreme law of the land, in cases of conflict between a law and the constitution, the latter must prevail, and it is the duty of the judiciary to say which law is applicable in a particular case. As Justice William Paterson stated in *Vanhorne's Lessee* v. *Dorrance* (1795) more than two hundred years ago:

> "If a legislative act oppugns a constitutional principle, the former must give way, and be rejected, on the score of repugnance. I hold it to a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void."[584]

Or, as it was definitively stated by Chief Justice Marshall in *Marbury* v. *Madison* (1803):

> "Those who apply the rule to particular cases, must of necessity expound and interpret that rule... so, if a law be in opposition to the constitution... the court

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583 See A. BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Indianapolis 1962.

584 Vanhorne's Lessec v. Dorrance, 2 Dallas 304 (1795). See the text in S.I. KUTLER (ed.), *The Supreme Court and the Constitution. Readings in American Constitutional History*, NY 1984, p. 8.

> must determine which of these conflicting rules governs the case: This is the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution as superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."[585]

Thus, supremacy of the constitution and judicial review as the power of all judges to defend the constitution and control the constitutionality of legislation are essentially linked. That is why regarding the constitutions and laws of the federal states this was expressly established in the well known "supremacy clause" of Article VI, Section 2, of the American constitution, which states:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the constitution or laws of the state to the contrary notwithstanding."

This supremacy clause was extended to federal laws in *Marbury* v. *Madison* through a logical and rational interpretation and application of the principle of the supremacy of the constitution, and was expressly established in a general sense, as a positive rule in other countries.

In this sense, for instance, since 1910, Article 215 of the Colombian constitution established that:

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585 *Marbury* v. *Madison*, 1 Cranch 137 (1803). See the text in S.I. KUTLER (ed.), *op. cit.,* p. 29.

> "In all cases of incompatibility between the constitution and the law, the constitutional dispositions will preferably be applied."[586]

In a similar sense, since 1897, the Venezuelan Civil Procedural Code has also established in Article 20 that:

> "When a law in force whose application is required collides with any constitutional disposition, the courts will preferably apply the latter."[587]

In other cases, as in Europe, the jurisdictional function of the control of constitutionality has been attributed to special constitutional bodies or courts independent of the Judiciary.

In Europe, this was the main contribution of Hans Kelsen, with his own experience on the establishment and functioning of the Constitutional Court of Austria in 1920[588] (also established the same year as that of Czechoslovakia), according to Kelsen's own ideas,[589] outside of

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586 See in J. ORTEGA TORRES (ed.), *Constitución Política de Colombia*, Bogotá 1985, p. 130. The origin of this norm can be traced up to the Legislative act, Nº 3, Art. 40, 1910.

587 The text is the one of the 1985 Civil Procedural Code. With similar words it was adopted in article 10 of the 1897 and 1904 Codes, and article 7 of the 1916 Code.

588 See, generally, Charles EISENMANN, *La justice constitutionelle et la Haute Cour Constitutionelle d'Autriche* (reprint of the 1928 edition, with H. Kelsen's preface), Economica, Paris 1986; Konrad Lachmayer, *Austrian National Report*, p. 1.

589 Kelsen called constitutional justice his "most personal work." See Theo ÖHLINGER, "Hans Kelsen y el derecho constitucional federal austriaco: Una retrospectiva crítica," *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 5, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2006, p. 219.

the judicial branch of government, but with jurisdictional powers to annul statutes they deemed unconstitutional.[590]

The proposal was also based on the principle of constitutional supremacy and its main guarantee, that is, the nullity and the annullability of statutes and other State acts with similar rank, when they are contrary to the Constitution.

But, given the general fear regarding the Judiciary and the prevailing principle of the sovereignty of Parliaments, the system materialized through the creation of a special constitutional court established outside of the judicial branch of government with the power not only to declare the unconstitutionality of statutes that violate the Constitution, but also to annul them with *erga omnes* effects, that is, to expel them from the legal order.

Kelsen's initial arguments were developed to confront the problems that such powers of judicial review in the hands of a new constitutional organ different from the Legislator could arise in Europe regarding the principle of separation of powers and, in particular, its incidence on legislative functions.

Nevertheless, the system, by that time and without the need to create a separate constitutional court, was already in existence, with similar subs-tantive trends in some Latin American countries such as Colombia and Venezuela,

590 Hans KELSEN himself began to explain the functioning of the concentrated system in his very well-known article, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," in *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197-257. See also the Spanish text in Hans KELSEN, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001.

where the annulment powers regarding unconstitutional statutes had been granted since 1858 to supreme courts of justice.[591]

However, regarding the creation of the concentrated system in Europe, the basic thoughts of Kelsen on the matter were expressed in his article of 1928: "The Jurisdictional Guarantee of the Constitution (Constitutional Justice),"[592] in which he considered the general problem of the legitimacy of the concentrated system of judicial review. In particular, he analyzed the compatibility of the system with the principle of separation of powers, based on the fact that an organ of the State other than the Legislator could annul statutes without the decision to do so being considered an invasion of the Legislator's domain.

In this regard, after arguing that "to annul a statute [] is to establish a general norm, because the annulment of a statute has the same general character of its adoption," and

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591 On the origins of the Colombian and Venezuelan systems, see Allan R. BREWER-CARÍAS, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia, Pontificia Universidad Javeriana, Bogotá 1995.

592 See Hans KELSEN, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," in *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197-257. See also Hans KELSEN, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitutions," in *Journal of Politics* 4, Nº 2, Southern Political Science Association, May 1942, pp 183–200; "El control de la constitucionalidad de las leyes: Estudio comparado de las Constituciones Austríacas y Norteamericana," in *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 12, Editorial Porrúa, Mexico 2009, pp. 3-17; "Le contrôle de constitutionnalité des lois. Une étude comparative des Constitutions autrichienne et américaine," *Revue française de droit constitutionnel*, Nº 1, Presses Universitaires de France, Paris 1999, pp. 17-30.

after considering that to annul a statute is "the same as to adopt it but with a negative sign, and consequently, in itself, a legislative function," Kelsen considered that the court that has the power to annul statutes is, consequently, "an organ of the Legislative branch."[593] Nonetheless, Kelsen finished by affirming that, although the "activity of the constitutional jurisdiction" is an "activity of the Negative Legislator," this does not mean that the constitutional court exercises a "legislative function," because that would be characterized by the "free creation" of norms. The free creation of norms, however, does not exist in the case of the annulment of statutes, which is a "jurisdictional function" that can only be "essentially accomplished in application of the norms of the Constitution," that is, "absolutely determined in the Constitution."[594] His conclusion was that the constitutional jurisdiction accomplishes a "purely juridical mission, that of interpreting the Constitution," with the power to annul unconstitutional statutes as the principal guarantee of the supremacy of the Constitution.[595]

In any case, both with respect to the diffuse and the concentrated systems of judicial review, the fact is that of entrusting, particularly in Europe, the judicial review to state bodies that are not responsible to the people, to control the acts of those who, on the contrary, are politically responsible,[596] provoked in the past an endless discussion

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593 See Hans KELSEN, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 54.

594 *Id.*, pp. 56–57. See Allan R. BREWER–CARÍAS, *Études de droit public comparé*, Bruylant, Brussels 2003, p. 682.

595 See Hans KELSEN, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 57.

596 M. CAPPELLETTI, "E1 formidable problema del control judicial y la contribución del análisis comparado", *Revista de estudios polí-*

of what Mauro Cappelletti called "the mighty problem of judicial review," that is to say, the discussion, now over, related to the legitimate or illegitimate power of judicial review given to courts or, from another angle, the democratic or non–democratic character of judicial review.[597]

Of course, the discussions had been developed either to justify the absence of judicial review in systems in which the sovereignty of Parliament prevails, or to criticize judicial review when judges have shown an outstanding activism in the adaptation of the constitution, in creating non-written constitutional rules or in attributing constitutional character to certain rules. In this context, judicial review has been considered illegitimate because it is believed that non-elected bodies must not control elected bodies of the state, and that non-elected state bodies must not determine which norm of the state is law, that is to say, which is constitutional or unconstitutional.

We think that this really is an abstract and Byzantine discussion, and that it will remain endless, mainly because it is orientated as if there were a problem of abstract legitimacy of judicial review that could be resolved in an abstract way, identifying democracy with sole representativeness.[598] The problems of judicial review or of the powers assigned to judges to control the constitutionality of legislation cannot be explained or criticized on the grounds of legitimacy or illegitimacy, considering the democratic principle solely as representativeness. Demo-

ticos, 13, Madrid 1980, p. 61-103 ("The Mighty Problem of Judicial Review and the contribution of comparative analysis", in *Southern California Law Review*, 1980, p. 409).

597 M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy*…, doc. cit, pp. 24-32.

598 See Allan R. BREWER–CARÍAS**,** Judicial Review in Comparative Law, cit., pp. 116 ss.

cracy goes beyond the framework of mere representation and elections because it is rather a political way of life and a system necessarily based on the principle of the separation of powers and the control of power, on political pluralism, and on the existence and guarantee of individual freedoms and the fundamental rights of human beings, which have primacy.[599] This is so, to the point that it can be said that a system of effective jurisdictional control of the constitutionality of laws is not viable in non-democratic regimes, especially because in such systems there can be no real independence and autonomy of judges.[600]

In other words, a Cappelletti said:

> "An efficient system of judicial review is totally incompatible with any antilibertarian, absolute, dictatorial regime, as is ample proven by historical experience and comparative study." [601]

Therefore, it is clear that there cannot be effective independence of judges, and it is "clear that judicial review cannot be practiced efficiently where the Judiciary has no guarantee of its independence."[602] In these systems, no

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599 See on the scope of democracy and of democratic regimes what was said in *Part Two* of this book.

600 See M. CAPPELLETTI, "Rapport Général", in L. FAVOREU and J. A. JOLOWICZ. (ed) *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents,* Paris 1986, p. 29.

601 M. CAPPELLETTI, Judicial Review of Legislation and its legitimacy…, loc. cit., p. 11.

602 J. CARPIZO and H. FIX–ZAMUDIO, The Necessity for and the Legitimacy of the Judicial Review of the Constitutionality of the Laws in Latin America, Recent Development, International Association of Legal Sciences. Uppsala Colloquium 1984 (mimeo), p. 22. Published in Spanish "La necesidad y la legitimidad de la revisión judicial en América Latina. Desarrollo reciente," Boletín mexicano de derecho comparado, 52, 1985, pp. 31-64. Also pu-

matter how many elections there may be, and no matter how many "representative" members the Parliament may have, there is no effective democracy, and in them, the constitutional judge subjected to power is rather an instrument for the consolidation of authoritarianism.

That is also, why in most European countries it has been noted that after periods of dictatorship, systems of judicial review of constitutionality were established, as was the case of Germany, Italy, Spain, and Portugal.[603]

From this, of course, it cannot be inferred that constitutional justice is only a system of new democracies, or of states whose democratic tradition is weaker and more fragile.[604]

Therefore, in a representative and democratic regime where the separation of powers and the control of power are guaranteed, the power attributed to judges or to certain independent and autonomous constitutional bodies to control the deviations of the legislative body and the infringements by the representative body of fundamental rights must be considered absolutely democratic and legitimate.[605]

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blished in L. FAVOREU and J.A. JOLOWICZ (ed.), Le contrôle juridictionnel des lois..., *cit*., pp. 119-151.

603 L. FAVOREU, *Le contrôle juridictionnel des lois et sa légitimité*..., *doc. cit*., p. 24. *Cf.* P. DE VEGA GARCÍA, "Jurisdicción Constitucional y Crisis de la Constitución", *Revista de estudios políticos*, 7, Madrid 1979, p. 108.

604 Como lo afirmó Francisco Rubio Llorente, "Seis tesis sobre la jurisdicción constitucional en Europa", in *Revista Española de Derecho Constitucional,* Nº 35, Madrid 1992, p. 12.

605 E.V. ROSTOW "The Democratic Character of Judicial Review", *Harvard Law Review*, 193, 1952, p. 193.

As Jean Rivero stated in his final report to the 1981 International Colloquium of Aix-en-Provence on the protection of fundamental rights by constitutional courts in Europe:

> "I think that the (judicial constitutional) control marks progress, in the sense that democracy is not only a way of attribution of power, but also a way of exercising it. And I think that all that reinforces the fundamental liberties of citizens goes along with the democratic sense."[606]

Along this same line of thought, Eduardo García de Enterría referring to constitutional liberties and fundamental rights as limits imposed on state powers, stated:

> "If the constitution established them, it is obvious that an occasional parliamentary majority who ignore or infringe them, is very far from being legitimate to do so based on the majoritarian argument and is rather revealing its abuse of power and its possible attempts at exclusion of minorities.
>
> The protective function of the Constitutional Tribunal confronting that abuse, annulling the legislative acts which make an attempt on the liberty of a few or all citizens, is the only effective instrument against infringement; there is no other possible alternative if one prefers to have an effective guarantee of liberty, that could make it more than simply rhetoric in a constitutional document."[607]

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606 J. RIVERO "Rapport de Synthèse", *loc. cit.*, p. 525–526. *Cf.* M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy*..., *doc. cit*, p. 32.

607 E. GARCÍA DE ENTERRÍA, *op. cit*., p. 190.

This was also the main reasoning put forward by Hans Kelsen in his very important article published in the French *Revue du Droit Public et de la Science Politique en France et a l'étrangèr* in 1928, when arguing against the majoritarian argument. He said:

> "If one sees the essence of democracy, not in the all-powerful majority, but in the constant compromises between the groups represented in Parliament by the majority and the minority, and consequently in the social peace, constitutional justice appears as a means particularly proper for the achievement of this idea. The simple threat of an action to be brought before the Constitutional Court can be an adequate instrument in the hands of the minorities for preventing unconstitutional violations of juridically protected interests by the majority, and consequently being able to oppose the majority dictatorship, which is not less dangerous to social peace than the minority one."[608]

However, democratic legitimacy of judicial review does not arise only through the judicial protection of fundamental rights, but also through the protection of the organic part of the constitution, that is to say, through the control of the systems of distribution of powers adopted in the constitution.

In this respect, we must point out that the problem of legitimacy has never been posed regarding the vertical distribution of state powers in the politically decentralized or federal systems; on the contrary, judicial review is essentially and closely related to federalism.[609]

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608 H. KELSEN, *loc. cit.*, p. 253.

609 W.J. WAGNER, *The Federal States and their Judiciary*, The Hague 1959, p. 85.

That is why the form of the state, and particularly federalism, as a vertical form of distribution of power, is among the most important political principles that have led to the establishment of the judicial review of legislation and upheld its justification in contemporary constitutional law.

Federalism requires the affirmation of a certain degree of supremacy for federal laws with regard to local, regional or state laws; and similarly with regard to the sphere of powers attributed to them, according to the system adopted for the vertical distribution of power. Thus, it is not by chance that those countries with federal form of state and with politically decentralized state organization were among the first to establish judicial review of the constitutionality of legislation.

This was the case during the nineteenth century, in the United States of America and in all the federal states of Latin America (Argentina, Brazil, Mexico and Venezuela), which established a system of judicial control of the constitutionality of laws and other acts of the State. It also happened in Europe, in Germany, which has a federal form of state, and in the decentralized forms of the Italian regional state and the Spanish Autonomous Communities state that established a system of jurisdictional control of the constitutionality of laws.

In all these cases, it is evident that the need for judicial review or the establishment of a constitutional court is justified by the demand for a constitutional body, which could settle conflicts of powers between the national and regional bodies. One of the fundamental tasks of the constitutional courts in Austria, Germany, Italy, and Spain and of the judicial control of constitutionality exercised by the Supreme Courts and Constitutional Courts in Latin America, is precisely the resolution of conflicts between the levels of the national state and the member states of

the Federation, or the political regions, or the Autonomous Communities, according to the country, and similarly, conflicts that may arise between the regions or states themselves, or between them and the national level. Thus, it is the political decentralization, both in the federal states and in the so-called regional states that has encouraged the appearance and consolidation of constitutional tribunals responsible precisely for the function of constitutional review of legislation in order to guarantee the constitutional balance of the state and the territorial bodies. That is why, in federal states, or in politically decentralized states, there are no doubts about the legitimacy of judicial review of constitutionality, and no debate has arisen on the matter, except to justify its existence and necessity.[610]

Therefore, the problems of legitimacy of judicial review of constitutionality are not referred to the guarantee of the constitution concerning federalism or political decentralization or to the guarantee of the fundamental rights of the individual. These constitute limitations on legislative power in reference to which judicial control is exercised without discussion.[611]

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610 In this sense, Hans KELSEN said in 1928 that "it is in Federal States where the constitutional justice acquired the most considerable importance. It is not excessive to affirm that the political idea of the Federal State is not entirely realized without the institution of a constitutional Tribunal", *loc. cit*., p. 24. *Cf.* L. FAVOREU, *Le contrôle juridistionnel des lois et sa légitimité*..., *doc. cit*., p. 35.

611 *Cf*. B.O. NWABUEZE, *Judicial Control of Legislative Action and its Legitimacy-Recent Developments*. African Regional Report. International Association of Legal Sciences. Uppsala Colloquium, 1984, (mimeo) p. 23. Also published in L. FAVOREU and J.A. JOLOWICZ (ed.), *Le contrôle juridictionnel des lois*..., *cit*., p. 193-222.

Nevertheless, the same cannot be said about the horizontal distribution or separation of powers. Even though it also imposes limitations on the legislative power, the acceptance of judicial review of the constitutionality of legislation has here prompted discussions over its legitimacy, based, particularly, on the notion of supremacy of Parliament over the other state powers. However, on the other hand, it has given fundamental arguments in favor of judicial review, precisely, as the counterweight's essential element, which should be established among the various state powers to guarantee the constitution.

In effect, the separation of powers as a consequence of the horizontal distribution of state powers among the state organs essentially requires an independent mechanism to guarantee the organic part of the constitution. This system of control is essential to the distribution of power, particularly between the legislative and the executive power. It is necessary to establish a third counterweight system between them to maintain the equilibrium that the constitution lays down. Thus, the powers granted to the judicial organs to control the constitutionality and legality of administrative actions, accepted without debate has been essentially related to the Rule of Law, as well as to control the constitutionality of legislation.

However, the tradition of the principles of Parliamentary supremacy on the one hand, and of separation of powers on the other, have been so powerful in Europe, that these have led to impeding ordinary judicial bodies from any possibility of judging the constitutionality of legislation. This was the reason for the creation in France of the Contentious Administrative Jurisdiction, independent of the Judiciary, and in general, in Europe, systems of jurisdictional control of constitutionality had been established, but taking the precaution of entrusting them to new constitutional bodies, distinct and separate from the Judiciary. In this manner, the need for judicial review of

legislation as a guarantee of the constitution has been adjusted to the principle of separation of powers that has traditionally considered any attempt to control the constitutionality of legislation an inadmissible intrusion by the judicial body in the sphere of the legislator.

It was this confrontation between the need for constitutional judicial review as a guarantee or means of protection of the constitution and the principle of separation of powers what led in Continental Europe to the creation of special constitutional bodies with the particular and special jurisdictional task of controlling the constitutionality of legislation, although not being part of the traditional structure of the Judiciary. Therefore, the solution to such confrontation has been resolved by creating new constitutional bodies (constitutional courts or tribunals) above the traditional horizontal separation of powers, – equally above the legislator, the executive and the courts – to ensure the supremacy of the constitution with respect to them all.

The "Austrian System" of judicial review or the "European model," as it has also been qualified,[612] is characterized by the fact that constitutional justice has been attributed to a constitutional body organized outside the ordinary judicial organization, that is to say, outside the ordinary courts, and hence not integrated within the general structure of the Judiciary. The members of the constitutional tribunal, court or council do not become so by way of a judicial career, but rather are appointed, basically by political bodies and, in particular, by the Parliament and the executive.

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612 M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy*..., p. 26; L. FAVOREU, "Actualité et légitimité du contrôle juridictionnel des lois en Europe occidental", *loc. cit*., p. 1149.

This system has given rise to a special constitutional organ, which, despite of not being integrated within the Judiciary, resolves legal controversies according to the law, and thus pursues a proper jurisdictional activity.

These constitutional courts, councils or tribunals have been considered the "supreme interpreters of the constitution," as the Spanish Constitutional Tribunal Organic law qualified it,[613] or as the "custodian of the constitution."[614] Eduardo García de Enterría, currently (1985) judge in the European Court of Human Rights, referring to the Spanish Constitutional Tribunal, qualified it as a "commissioner of the Constituent's power to sustain the constitution and to maintain all the constitutional organs in their strict quality of constituted powers,"[615] and the former president of the same Spanish Constitutional Tribunal, Manuel García Pelayo, considered it "as a constitutional organ, established and structured directly in the constitution", and that:

> "As regulator of the constitutionality of the state action, it is the one called upon to give full existence to the *Estado de derecho* and to ensure the validity of the distribution of powers established in the constitution, both essential components in our times of the true Constitutional state."[616]

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613 Art. 1. Ley Orgánica del Tribunal Constitucional, Oct. 1979, *Boletín Oficial del Estado*, Nº 239.

614 G. LEIBHOLZ, *Problemas fundamentales de la democracia*, Madrid 1971, p. 148.

615 E. GARCÍA DE ENTERRÍA, *op. cit*., p. 198.

616 E. GARCÍA PELAYO, "El Status del Tribunal Constitucional", in *Revista española de derecho constitucional*, 1, Madrid 1981, p. 15.

9. *The constitutional judge, the protection of fundamental rights and the control of conventionality*

On the other hand, it should be noted that the defense of the Constitution as an essential function of constitutional justice not only aims to guarantee the different modes of distribution of power among the constituted bodies of the State and thus the stability and political continuity of the State, but also has the function of guaranteeing fundamental individual rights and freedoms. This is undoubtedly another essential element of the rule of law and one of the weighty arguments used to defend the legitimacy of judicial review of the constitutionality of the acts of the State.

In effect, judicial review or judicial control of the constitutionality of legislation are bound up in the effective establishment of fundamental rights. Therefore, the need for the establishment of a system of judicial review also arises when there are entrenched declarations of fundamental rights and liberties linked with the constitutional values of a given society.[617]

Nevertheless, even though the idea of fundamental rights established in a constitution, as a superior and effective rule of law in an entrenched way, has historical antecedents in the American and French Revolutions, and had spread throughout all Hispanic American countries, it did not appear in Europe until after World War II. Therefore, the problem of establishing a system of judicial review, exception made of the Austrian and Czechoslovakian systems in the 1920's only arose in Europe after World War II, as a mean for defending the rights of man, precisely because these suffered the greatest violations in Europe. Here, once again, it is not by chance that it was in Italy

617 See on this what has been said in *Part Five* of this book.

and Germany when, for the first time in their constitutional texts, the validity of the rights of man and the need to organize mechanisms for their defense was affirmed, and among which, the review of constitutionality of legislation.

On the other end, the absence of entrenched fundamental rights of individuals with constitutional rank, as a limit on the legislator, is one of the main reasons for the absence of a system of judicial review of constitutionality, as happened in the United Kingdom. That is why D.G.T. Williams correctly pointed out:

> "The underlying problem either of an entrenched Bill of Rights or of an entrenched federal structure for the United Kingdom is judicial review," because "the adoption of a Bill of Rights would, of course, involve the exercise of judicial review by the English Courts," that is to say, the power of domestic courts, "to protect certain fundamental freedoms even against the legislative itself."[618]

However, to some extent this was achieved in the United Kingdom and in countries such as The Netherlands, which exclude judicial review of the constitutionality of laws by means of the review of the conformity of laws with the European Convention on Human Rights.

Anyway, what is true in constitutional systems with written constitutions is that, if the constitution purports to be a supreme, mandatory and enforceable law, the constitutional system must establish means for its defense and guarantee. On the contrary, as Hans Kelsen used to say:

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618 D.G.T. WILLIAMS, "The Constitution of the United Kingdom", *Cambridge Law Journal*, 31, 1972, pp. 278-279.

> "A constitution without guarantees against unconstitutional acts is not completely obligatory in its technical sense... A constitution in which unconstitutional acts and, particularly, unconstitutional laws, remain valid because their unconstitutionality cannot lead to their annulment, is more or less, equivalent from a juridical point of view, to a desire without mandatory force."[619]

The judicial guarantees of the constitution, that is to say, the power given to judges –ordinary judges or special constitutional courts– to declare the unconstitutionality of state acts issued in violation of the constitution, or to annul those acts with general effects is, therefore, an essential part of the Rule of Law. It is a power to ensure precisely, that all state organs are submitted to the rule of law and, therefore, that they will respect the limits imposed upon them by the constitution, according to the system[620] of distribution of state powers adopted and that they will respect the fundamental rights and liberties declared in the constitution itself.

On the other hand, as a result of the process of internationalization of the constitutionalization of human rights, which are now generally declared in international instruments, especially when these instruments establish international judicial bodies for their protection, what has come to be known as the "control of conventionality" has ac-

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619 H. KELSEN, "La garantie juridictionnelle de la Constitution (La justice constitutionnelle)", in *Revue du Droit public et de la Science politique en France et à l'étranger,* Paris 1928, p. 250.

620 As M. HIDEN said, "probably there are as many methods of securing the constitutionality of laws and regulations as there are countries with a written constitution," in "Constitutional Rights in the Legislative Process: the Finnish System of Advance Control of Legislation", in *Scandinavian Studies in Law*, 17, Stockholm 1973, p. 97.

quired enormous interest in the contemporary world.[621] As far as Latin America is concerned, it has been developing since the entry into force of the American Convention on Human Rights,[622] and, in general, in the democratic world when it comes to giving precedence in the internal order to international conventions ratified by the States.

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621 See Ernesto REY CANTOR, *Control de Convencionalidad de las Leyes y Derechos Humanos*, México, Editorial Porrúa-Instituto Mexicano de Derecho Procesal Constitucional, 2008; Juan Carlos HITTERS, "Control de constitucionalidad y control de convencionalidad. Comparación," in *Estudios Constitucionales*, Centro de Estudios Constitucionales de Chile, Universidad de Talca, Año 7, No. 2, 2009, pp. 109-128; Susana ALBANESE (Coordinadora), El control de convencionalidad, Buenos Aires, Ed. Ediar, 2008; Eduardo FERRER MAC-GREGOR, "El control difuso de convencionalidad en el Estado constitucional", in Héctor FIX-ZAMUDIO, and Diego VALADÉS (Coordinadores), *Formación y perspectiva del Estado mexicano,* México, El Colegio Nacional-UNAM, 2010, pp. 151-188; Eduardo FERRER MAC-GREGOR, "Interpretación conforme y control difuso de convencionalidad el nuevo paradigma para el juez mexicano," in *Derechos Humanos: Un nuevo modelo constitucional*, México, UNAM-IIJ, 2011, pp. 339-429; Carlos AYALA CORAO, *Del diálogo jurisprudencial al control de convencionalidad*, Editorial Jurídica venezolana, Caracas 2013, pp. 113 ff; and Jaime Orlando SANTOFIMIO and Allan R. BREWER-CARÍAS, *Control de convencionalidad y responsabilidad del Estado*, Universidad Externado de Colombia, Bogotá 2013; Allan R. BREWER-CARÍAS, *Control de Convencionalidad. Marco conceptual, antecedentes, derecho de amparo y derecho administrativo,* Biblioteca de Derecho Administrativo, Ediciones Olejnik, Buenos Aires, Santiago de Chile, Madrid 2019.

622 See Karlos A. CASTILLA JUÁREZ, "El control de convencionalidad. Un nuevo debate en México a partir de la sentencia del caso *Radilla Pacheco*", in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, Mexico 2012, pp. 83-84

In Hispanic America, this control of conventionality, in addition to that exercised by the Inter-American Court of Human Rights in judging violations of the American Convention on Human Rights committed by the acts or omissions of the States, even ordering the States to correct the unconstitutionality, for example, by modifying the challenged State acts,[623] is that exercised by national judges or courts when they have judged the validity of the State's acts, comparing them not only with the respective Constitution of each State, but also with the list of human rights and obligations of the States contained in the American Convention, or when applying the binding decisions of the Inter-American Court of Human Rights, duly deciding on the annulment of the national norms or their disapplication in the specific case according to their competence.

However, in reality, almost forty years had to go by since the Convention was signed (1969) for the important conceptualization made in 2003 by Judge Sergio García Ramírez of the Inter-American Court of Human Rights to capture within its own contours the control that the Court itself and the national judges and courts had been exercising previously.

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623 See Eduardo FERRER MAC-GREGOR, "Voto razonado a la sentencia de la Corte Interamericana en el caso *Cabrera García y Montiel Flores vs. México* de 26 de noviembre de 2010" (Párr. 22), in http://www.corteidh.or.cr/docs/casos/articulos/seriec_220_esp.pdf. Also see: Eduardo FERRER MAC GREGOR, "Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano", in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, Mexico 2012, p. 132.

In this matter, therefore, what is really new has been, on the one hand, the fortunate coining of a term such as "conventionality control"[624] which Sergio García Ramírez proposed in his Reasoned Opinion on the judgment in the case of *Myrna Mack Chang v. Guatemala*, of November 25, 2003,[625] and, on the other hand, the clarification that this control of conventionality is carried out in two aspects, dimensions or manifestations: on the one hand, at an international level by the Inter-American Court, and, on the other hand, in the domestic order of the countries, by the national judges and courts.

These two aspects were identified by García Ramírez, distinguishing between "the original or external control of conventionality" exercised by the Inter-American Court, and the "internal control of conventionality" exercised by the national courts;[626] and by Eduardo Ferrer Mac Gregor,

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624 See Juan Carlos HITTERS, "Control de constitucionalidad y control de convencionalidad. Comparación," in *Estudios Constitucionales*, Centro de Estudios Constitucionales de Chile, Universidad de Talca, Año 7, Nº 2, 2009, pp. 109-128.

625 See Sergio GARCÍA RAMÍREZ, "Voto Concurrente Razonado a la sentencia en el caso *Myrna Mack Chang vs. Guatemala*, de 25 de noviembre de 2003," Serie C Nº 101, http:// www.corteidh.or.cr/docs/casos/articulos/seriec_101_esp. pdf. See also the comments in: Sergio GARCÍA RAMÍREZ, "El control judicial interno de convencionalidad," in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, México 2012, pp. 230 ss. See also the comments of Karlos A. CASTILLA JUÁREZ, "El control de convencionalidad. Un nuevo debate en México a partir de la sentencia del caso *Radilla Pacheco*," in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, México 2012, pp. 87 ff.

626 See Sergio GARCÍA RAMÍREZ, "El control judicial interno de convencionalidad," in Eduardo FERRER MAC GREGOR (Coordi-

distinguishing between the "concentrated control" of conventionality exercised by the Inter-American Court, at an international level, and the "diffuse control" of conventionality by national judges, at the domestic level.[627].

These two aspects, in fact, were detected by Judge García Ramírez himself in 2004, in another reasoned opinion, this time on the judgment of the Case of *Tibi vs. Ecuador* of December 7, 2004, when he made a comparison between the control of constitutionality and the control of conventionality, considering that the function of the Inter-American Court was similar to that of the constitutional courts when they judge the unconstitutionality of laws and other normative acts in accordance with the rules, principles and constitutional values; adding that the Court analyzes the acts of the States that come before it "in relation to the norms, principles and values of the treaties on which it bases its contentious jurisdiction" and that while the "constitutional courts control the 'constitutionality', the international human rights court rules on the 'conventionality' of those acts"."[628]

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nador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales)*, FUNDAp, Queretaro, México 2012, pp. 213.

627 See Eduardo FERRER MAC GREGOR, "Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano," in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, México 2012, p. 132.

628 See Sergio GARCÍA RAMÍREZ, "Voto razonado del Juez a la sentencia en el caso *Tibi Vs. Ecuador*, Sentencia de 7 de septiembre de 2004," Serie C Nº 114 (Párr. 3), in http://www. corteidh. or.cr/docs/casos/articulos/seriec_114_esp.pdf. See the comments on the two sorts of control of conventionality in Víctor BAZAN and Claudio NASH (Editores), *Justicia Constitucional y derechos Fundamentales. El Control de Convencionalidad 2011*, Centro

On the other hand, with respect to the control of constitutionality carried out by the domestic jurisdictional bodies, according to García Ramírez himself, these "seek to conform the activity of the public power – and, eventually, of other social agents – to the order that entails the rule of law in a democratic society," while "the inter-American court, on the other hand, seeks to conform that activity to the international order enshrined in the founding Convention of the Inter-American jurisdiction and accepted by the States parties thereto in the exercise of their sovereignty"."[629]

But, of course, the matter of control of conventionality is not exclusive of Latin American countries, being applied in all countries subjected to International Conventions. Some examples can be illustrative referred to the same sort of control of "conventionality" of statutes developed in all European countries where European Union law, and particularly the European Convention of Human Rights, have prevalence over national law.[630] In particular,

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de Derechos Humanos Universidad de Chile, Konrad Adenauer Stiftung, 2011, pp. 24, 59; and Víctor BAZÁN, "Estimulando sinergias: de diálogos jurisprudenciales y control de convencionalidad", in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, Mexico 2012, pp. 14 ss.

629 Sergio García Ramírez, "Voto razonado del Juez a la sentencia en el caso *Tibi vs. Ecuador*, Sentencia de 7 de septiembre de 2004," Serie C No. 114 (Párr. 4), in http://www.corteidh.or.cr/docs/ca-sos/articulos/seriec_114_esp.pdf.

630 In the case of Poland, as mentioned by Marek SAFJAN, "The national court, denying application of a national norm which is contradictory to the European law or interpreting creatively a national norm in the spirit of a European norm *de facto* applies in the legal system a new, earlier non–existent, norm, thus becoming in a way a positive legislator on the level of a specific case." See Marek Safjan, "The Constitutional Court as Positive Legisla-

the case of The Netherlands must be highlighted. There, as no judicial review of the constitutionality of statutes is allowed in the Constitution, judicial review has developed only as a control of the "conventionality" of such statutes to ensure their subjection to international conventions, specifically on matters regarding human rights.

In effect, according to article 120 of the Dutch Constitution, "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts," which means that judicial review of primary legislation is prohibited, the courts being banned not only from determining the unconstitutionality of statutes, but also from declaring them incompatible with the Kingdom Charter.[631]

Nonetheless, article 94 of the same Constitution establishes that "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions," thus

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tor. *Polish National Report*," in Allan R. BREWER-CARÍAS in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study,* Cambridge University Press, 2011, pp. 701 ff. Also in Slovakia, according to article 154c of the Constitution, the international treaties, particularly the European Convention of Human Rights, having precedence over laws, the courts (including the Constitutional Court) exercise control of conventionality, by giving preference to convention. See Ján SVÁK and Lucia BERDISOVÁ, "Constitutional Court of the Slovak Republic as Positive Legislator via application and interpretation of the Constitution. *Slovak National Report*," in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study, cit.,* pp. 767 ff.

631 See J. Uzman, T. BARKHUYSEN, and M. L. VAN EMMERIK, "The Dutch Supreme Court: A Reluctant Positive Legislator, *Dutch National Report*," in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study,* Cambridge University Press, 2011, pp. 645 ff.

leading to the very important development of the system of judicial review of "conventionality" of statutes, particularly on matters of human rights.

Thus, the Dutch system is referred to as a system of "constitutional fundamental rights review by the judiciary" or as "fundamental rights review of parliamentary legislation," that is, regarding the powers of the courts and particularly of the *Hoge Raad* (High Court) to review acts of Parliament for their compliance with convention rights if the treaty is ratified and insofar as the individual provisions are self-executing.[632] This means that, in The Netherlands, statutes can be reviewed by the courts for their consistency with the written provisions of international law, particularly the UN International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which has become the most important civil rights charter for The Netherlands.[633]

Such judicial review has also developed regarding European Union law, which also contains provisions on fundamental rights, in the sense that, because international treaties have precedence over national law, the courts must examine whether the national law is compatible with the law of the European Union and, if necessary, either construe national law consistently with European Union law or set it aside, if such an interpretation proves impossible under national constitutional law.[634]

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632 *Idem*.

633 *Idem.*

634 *Idem.*,

In Greece, although the Constitution has no explicit provision for the control of the conventionality of statutes, the courts have held that international treaties have supra legislative status (article 28.1 of the Constitution), which is sufficient basis to exercise control of conventionality if the treaty in question is self-executing, such as the European Convention on Human Rights.

In the same sense of the control of constitutionality, if Greek courts find that a statutory provision is inconsistent with international law, that provision cannot be applied in the pending case. However, unconventional legislation remains in effect and thus, can be applied in a future occasion.[635]

On the other hand, it must be said that one of the important developments in the United Kingdom on matters of constitutional review or more precisely on matters of control of conventionality happened before the withdrawal from the European Union (Brexit) in 2020, regarding the compatibility of British statutes with European Union law. One example was the matter decided on the compatibility of a British statute concerning the limits for fishing with European Union law, which was raised and decided by the lowest tier of criminal law courts, the Magistrates' Court.[636]

In addition, the question concerning the compatibility of British law with EU law could also be raised before the British courts, and if the matter did not give rise to a serious

635 See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, "Constitutional Courts as Positive Legislator." *Greek National Report*, in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study,* Cambridge University Press, 2011, pp. 539 ff.

636 See John BELL, "Constitutional Courts as Positive Legislator". *British National Report*, *in Idem.*, pp. 803 ff.

difficulty in interpretation, the courts could have applied European law directly and refuse to apply a British statute.[637]

Compatibility with EU law, in this sense, was the only area in which British judges had the power to strike down legislation of Parliament, an approach that was definitively adopted after the European Court of Justice specifically stated that the British courts ought not to apply a British act of Parliament that was incompatible with European legislation.[638]

In any case, the court's decision in those cases did not annul an act of Parliament. As expressed by John Bell:

> "The Government has to decide whether to propose an amendment of the law to bring it into line with the Convention or to take other action to maintain the incompatibility, e.g. by registering a formal Derogation from the Convention.
>
> This is the nearest that English judges come to a constitutional review."[639]

As Lord Bingham highlighted in the case A (FC) v. Secretary of State for the Home Department:

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637 Case 283/81, *Srl CILFIT v. Minister of Health*, [1982] ECR 3415. See John BELL, "Constitutional Courts as Positive Legislator." *British National Report*, *Idem,* (footnote 14).

638 See R v. Secretary of State for Transport, ex parte Factortame Ltd., [1990] 2 AC 85; R v. Secretary of State for Transport, ex parte Factortame Ltd (Nº 2), [1991] 1 AC 603; R v. Secretary of State for Employment, ex parte Equal Opportunities Commission, [1995] 1 AC 1. See John BELL, "Constitutional Courts as Positive Legislator." British National Report, in Idem pp. 803 ff. (footnotes 15-16).

639 See John BELL, "Constitutional Courts as Positive Legislator." *British National Report*, *Idem* pp. 803 ff.

> "The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible, the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament."[640]

This case of the House of Lords was issued to decide the challenge filed by a number of individuals regarding their detention without trial on the basis of them being a danger to national security, according to the Antiterrorism, Crime, and Security Act of 2001. The House of Lords declared the corresponding provision incompatible with articles 5 and 14 of the European Convention.

10. *The constitutional judge as guardian of the Constitution, and the problem of the guardian's control*

The Constitutional Judge, as was expressed by Eduardo García de Enterría when referring to the Spanish Constitutional Tribunal, can be considered as "the commissioner of the constituent power, responsible for defending the Constitution and ensuring that all constitutional bodies retain their strict quality of constituted powers."[641]

In fact, if the Constitutions are effective legal norms, which prevail in the political process, in the social and economic life of the country, and support the validity of the entire legal order,[642] then the institutional solution to

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640 See [2004] HL 56. See John BELL, "Constitutional Courts as Positive Legislator. *British National Report*, *Idem* (footnote 25).

641 See E. GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal constitucional*, Madrid 1985, p. 198.

642 *Idem*, pp. 33, 39, 66, 71, 177 and 187.

preserve their validity and freedom lies precisely in establishing these commissioners of the constituent power as guardians of the Constitution, whose mission is to ensure that all the organs of the State abide by it; having also the obligation to respect the fundamental text, being submitted to its regulations, not being allowed to change it.

That is to say, as such guardian of the Constitution, and as it happens in any State under the rule of law, the submission of the constitutional court to the Constitution is an absolutely implicit preposition and not subject to discussion, since it would be inconceivable that the constitutional judge could violate the Constitution that he is called to apply and guarantee. This could be violated by the other branches of government, but not by the guardian of the Constitution.

However, to ensure that this does not happen, an additional guarantee is established in all legal systems, and that is that the constitutional court must enjoy absolute independence and autonomy from all branches of government.

In particular, because a constitutional court subject to the will of power, instead of being the guardian of the Constitution becomes the most egregious instrument of authoritarianism.

Therefore, the best system of judicial review in the hands of a judge subjected to power is a dead letter for individuals and an instrument to defraud the Constitution.

That is why that in order to guarantee this autonomy and independence, all Constitutions where judicial review systems have been established have provided, among other aspects, mechanisms to ensure the election of the members or magistrates of the courts, in order to neutralize undesirable political influences in a democracy. The aim is to ensure, through the selection of its members, that the powers attributed to constitutional courts, which has no one to control them, are not distorted and abused.

In any case, in this field of constitutional courts, *Quis custodies ipso custodiam?* always has to be asked, even if there is no answer.[643]

That is why, George Jellinek said that the only real guarantee of the guardian of the Constitution ultimately lies in its "moral conscience;"[644] and Alexis de Tocqueville was so precise in observing when he analyzed the U.S. federal Constitution that:

> "The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven judges. Without their active co-operation, the Constitution would be a dead letter…
>
> The Federal judges must not only be good citizens, and men possessing that information and integrity which are indispensable to magistrates, but they must be statesmen – politicians, not unread in the signs of the times, not afraid to brave the obstacles which can be subdued, nor slow to turn aside such encroaching elements as may threaten the supremacy of the Union and the obedience which is due to the laws.

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643 See Jorge CARPIZO, El Tribunal Constitucional y sus límites, Grijley Ed., Lima 2009, pp. 44, 47, 51; Allan R. BREWER-CARÍAS, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación," in *Revista de Derecho Público,* No. 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7-27; and in *VIII Congreso Nacional de derecho Constitucional*, Perú, Fondo Editorial 2005, Arequipa Bar Association, Arequipa, Arequipa, September 2005, pp. 463-489.

644 See George JELLINEK, *Ein Verfassungsgerichtshof fur Österreich*, Alfred Holder, Wien 1885, quoted by Francisco FERNÁNDEZ SEGADO, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, No. 12, 2008, Madrid 2008, p. 196.

> The President, who exercises a limited power, may err without causing great mischief in the State. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originates may cause it to retract its decision by changing its members.
>
> But if the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war."[645]

This is particularly important to bear in mind in democratic regimes, where the temptation of constitutional courts to become legislators and even constituent powers undermines the principle of the separation of powers, since they would perform state functions without being subject to any control by the people or other state organs. In other words, the uncontrolled usurpation by the constitutional judge of normative powers "could transform the guardian of the Constitution into a sovereign."[646]

And the truth is that, unfortunately, in many countries, because of the political regime developed or because of the condition of the members of the constitutional courts, these important instruments designed to guarantee the supremacy of the Constitution, to ensure the protection and respect of fundamental rights and to ensure the function-

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645 See Alexis DE TOCQUEVILLE, *Democracy in America*, Chapter VIII "The Federal Constitution," of the translation by Henry Reeve, revised and corrected in 1899, at https://www.marxists.org/reference/archive/de-tocqueville/democracy-america/ch08. htm. See also the reference in Jorge CARPIZO, *El Tribunal Constitucional y sus límites,* Grijley Ed., Lima 2009, pp. 46-48.

646 See Francisco FERNÁNDEZ SEGADO, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional,* Centro de Estudios Políticos y Constitucionales, Nº 12, 2008, Madrid 2008, p. 161.

ing of the democratic system, have sometimes become one of the most diabolical instruments of authoritarianism, legitimizing the actions of the other branches of government contrary to the Constitution,[647] and in some cases, on their own initiative, as faithful servants of those who hold power, thus configuring what could be called the "pathology" of judicial review.[648]

This affection occurs precisely when the constitutional courts assume the functions of the legislator or proceed to mutate[649] the Constitution in an illegitimate and fraudulent manner,[650] conforming a complete picture of "un" constitutional justice.

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647 See Néstor Pedro SAGÜES, La interpretación judicial de la Constitución, LexisNexis, Buenos Aires 2006, p. 31.

648 See Allan R. BREWER-CARÍAS, *La patología de la Justicia Constitucional*, Third edition, Editorial Jurídica Venezolana, Caracas 2014.

649 A constitutional mutation occurs when the content of a constitutional norm is modified in such a way that even though it preserves its content, it receives a different meaning. See Salvador O. NAVA GOMAR, "Interpretación, mutación y reforma de la Constitución. Tres extractos," in Eduardo FERRER MAC-GREGOR (coordinator), *Interpretación Constitucional*, Tomo II, Ed. Porrúa, Universidad Nacional Autónoma de México, Mexico 2005, pp. 804 ff. See, in general, on the subject Konrad HESSE, "Límites a la mutación constitucional", *in Escritos de derecho constitucional,* Centro de Estudios Constitucionales, Madrid 1992. See, for example, on the case of Venezuela, Allan R. BREWER-CARÍAS, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *Revista de Administración Pública,* No. 180, Centro de Estudios Políticos y Constitucionales, Madrid 2009, pp. 383-418.

650 See Néstor Pedro SAGÜES, *La interpretación judicial de la Constitución*, Buenos Aires 2006, pp. 56-59, 80-81, 165 ss. See in this regard: Venezuela, Allan R. BREWER-CARÍAS, *La Constitución de plastilina y vandalismo constitucional. La ilegítima mutación*

In such a situation, no doubt, all the advantages of constitutional justice as a guarantee of the supremacy of the Constitution vanish, and constitutional justice becomes the most lethal political instrument for the unpunished violation of the Constitution, the destruction of the rule of law, and the dismantling of democracy.[651]

de la Constitución por el Juez Constitucional al servicio del autoritarismo, Editorial Jurídica Venezolana, Caracas 2022.

651 See for example, also on the case of Venezuela, Allan R. BREWER-CARÍAS, *The Collapse of the Rule of Law and the Struggle for Democracy in Venezuela. Lectures and Essays (2015-2020),* Editorial Jurídica Venezolana International, Miami Dade College, 2020; "La demolición del Estado de derecho y la destrucción de la democracia en Venezuela (1999-2009)," in José Reynoso NÚÑEZ AND Herminio SÁNCHEZ DE LA BARQUERA and ARROYO (Coordinators), *La democracia en su contexto. Estudios en homenaje a Dieter Nohlen en su septuagésimo aniversario,* Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México*,* México 2009, pp. 477-517.