

# Foreword

*Pedro González-Trevijano*

*President of Rey Juan Carlos University*

Since the adoption of the Bologna Declaration in 1999, by which more than thirty countries pledged to establish a European Space of Higher Education, European universities have assumed the complex challenge of reform and interconnection with each other, establishing common objectives with regard to quality, compatibility of studies and degrees, and mobility of students and staff. In this way, the European idea of the university has been infused with new elements, or, at the very least, new elements have been specifically promoted, such as a necessary connection with the greater society and the idea that the university is an instrument to increase employment and the competitiveness of Europe.

Adapting to an increasingly international and interdependent environment has enriched the centuries-old European university tradition, in a process that European institutions have shepherded. Therein, a focus that is both pragmatic and mindful of Europe's academic tradition fosters not only the interrelation of studies, teachers and studies in the EU area but also between the EU and the rest of the world, as witnessed in the numerous collaboration and exchange programmes adopted within the framework of European education policies.

The Rey Juan Carlos University readily assumes this challenge, pushing for and supporting teaching and research endeavours which connect, in a stable framework of co-operation, members of our university with similar institutions in other parts of the world. The present publication, which as Rector and full professor of Constitutional Law it is my distinct pleasure to introduce, neatly fits into this context of co-operation. This work is the result of a research project supported by this university and by the regional government; this is a project that was begun in the *European Law Research Center* of Harvard University and has the aim of analysing one of the classical themes of Public Law – judicial control over public power – from a new and timely perspective that takes into account the cohabitation of the European legal tradition – in which we include the work of the Council of Europe – with the recent organisational plan created by the European Union. The research group, led by Professor Galera, is composed of twelve participating authors representing a variety of professional fields – academic and judicial – such as Public Law jurists from across Europe: Czech Republic, France, Germany, Hungary, Romania, Spain, Sweden and the United Kingdom.

To the entire research team, and to the publications service of the Council of Europe and the research service of Rey Juan Carlos University, I extend

sincere congratulations for their thorough and highly valuable work, which set its sights on interchange, collaboration and enrichment that could be achieved only by stepping across national boundaries. In any case, national boundaries are difficult to reconcile with a strict understanding of the role of the university, characterised since its beginnings by an unalienable vocation to universality. At its core, this universal vocation is underpinned by an idea close to the one known since Roman times, that is, the law of nations. According to Montesquieu in his work, *The Spirit of Laws*, “The law of nations is naturally founded on this principle: that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests.”

The guiding principle and main idea underlying this work identify “European Law” as a complex legal system, understood in its general sense as a unity made up of different interacting units. This conception is thus quite distinct from those not infrequent positions that associate the idea of “European Law” with European Union Law. What’s more, this work considers the European legal system to be a reality made up of two subsystems. The first is the European legal system, in which two elements are pre-eminent: national traditions and the “regional” European tradition, based on the legal tradition elaborated in the Council of Europe. Both elements are informed first and foremost by the other, but it is above all the legal construction of the Council of Europe that has created an identity of “European Law” that harmonises to some extent the national laws with respect to essential elements characteristic of the Rule of Law tradition. The second subsystem of the European legal system is born of the previous context and in its own way is made up of two distinct components. On one hand, European Union Law (which is imposed with most obvious effect on national laws and which nowadays involves law of a mainly economic nature) and, on the other hand, the acts and activities adopted in the framework of intergovernmental pillars, whose nature is much closer to policy and political acts than to legal norms.

The primary topics researched here are some of the characteristic elements of the European tradition of the Rule of Law: separation of powers, judicial independence, appealable actions and access to the courts, among others. These elements are analysed in each of the legal systems examined: national, Council of Europe, European Community and intergovernmental pillars. This analysis concluded that the “European legal system” – that is, national regulations and the doctrine of the Council of Europe – appears more compact and homogenous than the legal framework that has recently been adopted for these elements within the context of the European Union. The final part of the work elaborates a comparative perspective that underscores what has already been established, but still not remedied, namely, the existing deficient access to the European Court of Justice in Luxembourg, as well as the lesser known deficient judicial review of political and normative acts conforming

to the doctrine of “acts of government” elaborated by the European Court of Human Rights in Strasbourg.

On this evidence, the authors hold that in matters of human rights, the European Union adheres to the system of the Council of Europe, rather than develop its own system under the Charter of Fundamental Rights proclaimed at Nice. The author’s principal argument is that the Strasbourg Court’s interpretation of the Rome Convention of 1950 has “stretched” the convention’s original spirit to the point that the ECHR has exceeded its strict function as a protector of human rights and has become the essential reference of “European public order”. In this way, and from the broad concept of human rights found in the Rome Convention, the Strasbourg Court has delimited the content of the essential elements of the Rule of Law which are the object of this research (judicial independence, access to the courts, jurisdictional exemptions). This delimitation has led to a close harmonisation in European Law in this regard, much more because of the “*auctoritas*” of its pronouncements than by the “*potestas*” in the execution of its sentences.

For all of these reasons, from the articles included in this excellent body of work, the following two conclusions arise: a) that the eventual reduction of “European Law” into “European Union Law”, besides being dogmatically incorrect, necessarily means the reduction of the essential guarantees of our legal tradition; and, b) that such restriction is however understandable, if one considers the strikingly powerful instruments granted to European Union Law – primacy, direct effect,... – compared to the more modest tools invested in 1949 in the Council of Europe – international character and the absence of “executive power” over the rulings of the European Court of Human Rights.

This imbalance can explain why European Union Law, instead of simply coexisting with what is here called “European legal tradition”, has subordinated this tradition. Nevertheless, such a reduction is not such a bad thing in a context which now recognises that a “global Public Law” is emerging. In this regard, the European imprint can not be reduced to the elements normally used to characterise the experience of integration known as the European Union (freedom of movement, competition law, primacy...). Rather the process necessarily must comprehend the legal principles and values established by the Council of Europe on the basis of age-old European legal history. In short, it must make real the words of Victor Hugo in *Les Burgraves*: “There is today a European nationality, as there used to be, in times of Aeschylus, of Sophocles and of Euripides, a Greek nationality.”



**Part I**  
**Preliminary**



# Chapter 1

## Law as a limit to power – The origins of the rule of law in the European legal tradition

*B. Aguilera*

### 1.1. Power and law

Power and law are concepts that can be separated intellectually, but in fact, from the dawn of time, they have been intimately tied together in the human reality. By virtue of our birth we live in a society ruled by power, the force that imposes on us the law.

Aristotle (384-322), the first Western thinker who tried to explain society as a phenomenon, considered that living in society is an intrinsic part of human nature. He conceived man as a political animal (*zoon politikón*), one who lives “naturally” in society. And he thought that man, because of this natural sociability, tends to submit to power and follow the norms that essentially the law consists of. This reasoning, taken up by Thomas Aquinas (1225-1274), became one of the pillars of scholastic philosophy, at least until the crisis of the War of Religions brought in the 17th century the idea of a common “natural law” independent of personal convictions or beliefs.

Nevertheless, if it is true that power and law have been inextricably tied to the social phenomenon since the origins of humanity, it is no less true that historically law has tended to differentiate itself progressively from power. That differentiation has never been obvious or evident, because power and law are such complementary realities.

### 1.2. A first step: the appearance of written law

From an early stage in legal history it is possible to appreciate evidence of this process, by which law tends, if not to disengage from power – this would be impossible – at least become a distinct, differentiated reality. The first step was the appearance of written laws. In the history of all civilisations there is a moment when laws begin to be written down: in some cases by individuals – monarchs like Hammurabi (18th century BC) or the legendary King Habis in Iberian Tartessus (6th century BC), or wise law-givers like the Athenian Solon or the Spartan Lycurgus (7th and 6th centuries BC) – or in other cases as a result of political processes, as with the Law of the Twelve

Tables (450 BC), written by a legislative committee. Indeed, the political aim of the Law of the Twelve Tables was to satisfy a plebeian demand: that the law should be known by all and not only by priests, who generally sprang from the patrician landholding class.

Today it is still an essential principle that laws must be publicly known; and cannot be applied until they are made public – either orally, like municipal by-laws that an officer of the local council shouts out after warning the village with a bugle call, or written in an official gazette to which every country assigns the essential function of publishing laws.<sup>1</sup>

### 1.3. The law of God as a limit to power

The second means by which the Western legal tradition tried to impose limits on power came from the realm of religion. Soon after the Spanish-born emperor Theodosius I, by the Edict of Thessalonica (380), made Christianity the official religion, the Roman Empire faced the problem of the relationship between the civil and religious powers.<sup>2</sup>

According to the Christian conception, the submission of humans to a social structure dominated by power is the consequence of original sin. The Bible myth – as found in the first book of the Pentateuch, Genesis – tells us that the man and the woman were expelled from Paradise for disobeying God's law. This idea led the first interpreters of the Bible, the church fathers (Patristic Exegesis), to distinguish between a state of nature (*status naturae*) or “state of grace”, coinciding with Paradise, and a later social state (*status societatis*) derived from original sin. In the former, women and men lived in peace without the need to submit to social power or laws; in the latter, they began to fight each other, and the existence of authority and law became necessary. The law needed to be set down in rules that have restricted man ever since freedom derived from the “state of nature” disappeared.

This concept of the social state as punishment from God assumed that, in the final analysis, the Roman emperors of the Dominate<sup>3</sup> who wielded power

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1. Article 2.1 of the Spanish Civil Code expressly establishes that norms will not take effect until their publication (“Laws will take effect twenty days after their full publication in the Official State Gazette, if no other dispositions are contained therein”) in the *Boletín Oficial del Estado*; after three hundred and forty-seven years on paper, from 1 January 2009, this is published only electronically, apart from a few printed copies for the archive; each Autonomous Community also has its own official publication, as does the European Union.

2. When followers of the Pharisees, showing Jesus a coin, asked him if tributes should be paid to Caesar, “He said to them, ‘Whose image and inscription is this?’ They said to him, ‘Caesar’s’. And he said to them, ‘Render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s.’” Matthew 22: 20-21.

3. From the time of Augustus until the end of the 3rd century, Rome had a *princeps* at the head of political power, but from Diocletian (r. 284-305) he became a *dominus* (“lord, owner”), which therefore is the logical term for the governors of the early Dominate. The shift in terminology



should submit to the power of divine will. This explains why the relationship between the Roman emperors and the Church, the voice of the official religion, was troubled from the very start (*Cesaropapism*). The Roman emperors were able to preserve their independence politically in the face of ecclesiastical pressure, but they could not prevent the Church from developing its own law, canon law, with its own norms (conciliar canons and papal decretals) and its own jurisdiction, alongside Roman civil law.

At the fall of the Western Roman Empire (476), the Catholic Church finally prevailed by Christianising some of the Germanic kings, a process that began at the end of the 4th century. The kings succumbed to the pressure of bishops set up as representatives of the Roman majority. Some years after the fall of Rome, at the time of the Frankish king Clovis (r. 481-511), the invaders started feeling obliged to abandon the Arrian “heresy” in favour of the majority Catholic belief. From that time the Church, through its bishops, began to participate more or less openly in civil government. The best known case occurred in Visigothic Spain, where, after the conversion of Reccared (589), the Church became a crucial pillar of the state, as demonstrated by the council’s meetings in the capital of Toledo, which adopted far-reaching legal measures that went beyond the religious sphere. That the Visigoth kings found their power limited by the Church is evident in the work of Isidore of Seville, who wrote that “the laws oblige the prince” and “it is just that the prince obeys his own laws”. This was because royal power is of divine origin and kings are the vicars of God. In fact, Isidore believed that kings deserve their name when they act justly (*recte igitur faciendo, regis nomen tenetur*); otherwise they will lose their royal position (*Rex eris si recte facies, si non facies non eris*).<sup>4</sup>

Christian influence in government was consolidated in the mid-8th century when the Papal States were created, by an agreement between the Frankish King Pepin the Short and Pope Stephen II. When popes became secular rulers, the Church tended to separate itself from civil power. The evolution was especially notable after the reform begun by Gregory VII (r. 1073-1085), which brought the papacy into direct confrontation with the emperors. It was the famous Conflict of Investitures from which the pontiffs emerged victorious. In fact, between the pontificate of Innocent III (r. 1198-1216) and that of Boniface VIII (r. 1294-1303), the popes established themselves as the supreme rulers of Western Christianity (pontifical theocracy) and came to legitimise the power of kings and emperors through the rite of coronation and could

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for the position of chief among the citizenry is extraordinarily relevant from the perspective of Roman constitutional history.

4. Isidore of Seville, *Etimologías*, BAC, Madrid, 2004; English edn: S. Barney et al., *The Etymologies of Isidore of Seville*, Cambridge UP, 2006. See also: Pérez de Urbel, Justo, *San Isidoro de Sevilla. Su vida, su obra y su tiempo*, León: Ed. Isidoriana, 1995; Fontaine, Jacques, *Isidore de Séville: genèse et originalité de la culture hispanique au temps des Wisigoths*, Brepols, Turnhout, 2000 (Spanish edn: *Isidoro de Sevilla: génesis y originalidad de la cultura hispánica en tiempos de los visigodos*, Madrid: Encuentro, 2002).

delegitimise them through “excommunication”, a punishment that freed their subjects from the duty of obedience.

The civil power of the pontiffs began to decline when Philip IV of France (r. 1285-1314) asserted his independence from the papacy. After the captivity of the papacy in Avignon and the Western Schism, papal power found itself under siege. The crisis reached its peak with the Protestant Reformation, instigated by Luther (1483-1546). It may be noted that, whereas in 1493, after Columbus’ discovery, Pope Alexander VI could distribute the New World between the Spaniards and Portuguese, just a year later, in the Treaty of Tordesillas (1494), the limits of Castilian and Portuguese expansion were defined by an international treaty between the two crowns, without papal intervention. This was, however, no obstacle for eminent thinkers of the School of Salamanca to study the legitimacy of the Spanish dominion over the Indies and its inhabitants in light of canonical laws (Doctrine of the Just Titles).

Nevertheless, the popes could do nothing to halt the laicisation of European societies. Henry VIII of England – excommunicated in 1533 by Clement VII for divorcing Catherine of Aragon, youngest daughter of the Spanish Catholic kings, and then marrying Ann Boleyn – was the first monarch who dared to break with the Roman Church and raise himself as head of a national church. The triumph of Protestantism threw Europe into religious conflicts like the French Wars of Religion (1562-1598); the Thirty Years War (1618-1648) spread the fight to almost all Europe.

## 1.4. Iusnaturalism and the first secular justifications of political power and law

These continual religious conflicts tore apart the religious unity of Europe. When God ceased to be the essential foundation of society, another explanation had to be found to justify the submission of men to power and law.<sup>5</sup> A new current of thought grew up that explained social submission as the result of universal, natural legal principles – that is, rules whose validity was independent of religious beliefs or political authorities. This was the “natural law” or “iusnaturalism”, first formulated clearly by the Dutch legal thinker Hugo Grotius (1583-1645),<sup>6</sup> though its antecedents can be found in Spain, in

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5. The direct impact of the religious conflicts on the legal field has been brilliantly studied by Roelker N. L. in his work *The Parliament of Paris and the religious reformations of the sixteenth century*, Berkeley/Los Angeles/London: University of California Press, 1997.

6. This idea of natural law was expressed by Grotius in his two best-known works: *Mare liberum* (1609) and *De iure belli ac pacis* (1625). The first was a brief treatise in which he asserted the sea was the property of no one and so all nations could reap benefit from it. This dispute had an undeniable economic significance since it affected maritime mercantile traffic when Holland was a budding naval power. In fact, the thesis of Grotius was answered by John Selden, a partisan of English naval supremacy, in *Mare clausum* (1635). *De iure belli ac pacis* was the first

the neo-Thomism of the School of Salamanca, and specially in the works of Francisco de Vitoria (1486-1546), whom Grotius cites constantly.<sup>7</sup>

This idea of the existence of internationally valid laws, developed “naturally” and independently of the positive law applied by the nation-states, is what led Thomas Hobbes (1588-1679), a fervent believer, to reject the Aristotelian-Thomist theory of man’s natural sociability as the justification of power and law, and to inspire his own theory, also of Christian origin, that distinguishes between the state of nature or grace and the social state. From this arose the idea of the social pact as justification for Leviathan,<sup>8</sup> a term Hobbes used to refer to the power imposed on civil society. This social pact does not however constitute a limit to power, since once it is subscribed and accepted voluntarily by all men it becomes irreversible – Hobbes thought this was the only way of guaranteeing the social order and avoiding permanent chaos and war.

Despite the fact that Hobbes is generally considered a defender of Absolutism, the idea of the social pact was in itself revolutionary, to the extent that it supposed that the social state was reached as a consequence of an agreement between members of civil society. These persons renounced forever their liberty and accepted in perpetuity subjugation to Leviathan, as the price to pay for achieving social peace. Nevertheless, it is important to point out that initially the coactivity of power was voluntarily accepted. The next step was to convert the pact into a “social contract”. This idea was developed by authors like Locke, Montesquieu and Rousseau, whose thought established the basis of the liberal state model that triumphed in America, after 1776, and in Europe starting in 1789.<sup>9</sup> Generally speaking, for these thinkers the social pact was in reality a contract because it contained two limitations: first, there would be clauses exempt from subjugation to Leviathan, specifically the “fundamental rights” that remained outside the scope of the agreement and were thus “immune” to power; second, submission to power was not irreversible

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systematic treatise of international law, based on the ideas of Francisco de Vitoria and the School of Salamanca.

7. Francisco de Vitoria, of the Dominican order, studied in Paris and was professor of theology at the University of Salamanca where he gained a chair in 1526. His most famous writings concern the nature of political society and authority, more specifically the question of the Crown’s legal title of ownership over newly discovered Spanish domains in America. His main work on his topic was *De iure belli Hispanos in barbaros* (1532) and *Relectio de Indis* (1539); Madrid edition by CSIC, 2007. See also Puig Peña, F. “La influencia de Francisco de Vitoria en la obra de Hugo Grocio. Los principios del derecho internacional a la luz de la España del siglo XVI, Madrid: Tip. De Archivos, 1934 and Albert Marquez, Marta María, “El principio de la libertad de los mares en la *relectio de indis*: ¿Se enfrentó Francisco de Vitoria a los intereses españoles?” in *Derecho y opinión*, ISSN 1133-3278, No. 6, 1998, pp. 169-184.

8. Leviathan is a great sea monster created by God; it appears in the Old Testament, in Genesis 1: 21; also in Psalm 74: 13-14, Job 41 and Isaiah 27: 1. The term is an allusion to any aquatic creature of great size and in the Bible it is usually related to Satan. In modern Hebrew, *levyatan* simply means “whale”.

9. On the evolution of the Social Pact: Macpherson, C. B., *Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford/London: Oxford UP, 1st edn 1962; Spanish edn: Madrid: Trotta, 2005.

since the members of society could enter into a new pact or contract when the earlier agreement became inoperative.

## 1.5. Law versus power: feudalism and the origins of the laissez-faire state model

### 1.5.1. The medieval origins of the rule of law

This idea of the social pact was not entirely original. With our historical perspective, we can see now that, long before the idea was articulated by Hobbes and perfected by Locke, Montesquieu and Rousseau, political power in the Middle Ages also depended on a pact: the vassalage agreement. The possibility of finding the origin of the social pact in feudalism is generally overlooked because the French Revolution, in its zeal to overthrow absolute monarchy, erased feudal society, or at least what was left of it: its tripartite estates structure of nobility, clergy and citizenry. For this reason ever since, feudalism has had a clearly negative connotation in the Western legal tradition.

However, to the extent that we can distance ourselves from the mental framework of the ideas of 1789, it is clear that it was the feudal agreement that really dissolved the concept of the power of absolute monarchy developed in the Roman Empire, reaching its high point in the period of the Dominate during the fourth and fifth centuries. The disappearance of the sovereign–subject relationship and its replacement by pacts of a legal nature between lord and vassal resulted primarily in former subjects occupying the same legal level as the sovereign, who became *primus inter pares*. In fact, through the feudal agreement, the king assented to a relationship of a contractual nature with his vassals that attributed to him rights but also obligations.<sup>10</sup>

Feudalism profoundly transformed the concept of monarchy inherited from the Roman Empire, basically because in the new feudal monarchy the king was obliged to consider the opinion of his vassals when making important decisions. This participation of the vassals in general affairs began to be institutionalised through the *curia regis*, a sort of advisory council, whose origin perhaps can be found in the ancient Germanic *aula regia*. In this *curia*, the great nobles, barons and bishops talked and discussed general affairs of the realm with the king. English kings from 1066 spoke Norman French, and this is why meetings of the monarch with the barons became the parliament (based on the French judicial institution the *parlement*, from *parler*, “to

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10. On the details and constitutional consequences of the model of the Feudal Monarchy, the classic work is Petit-Dutaillis, Charles, *La monarchie féodale en France et en Angleterre, Xe-XIIIe siècle*, Paris: La Renaissance du Livre, 1933, new ed., Paris: Albin Michel, 1998. Also, from the Anglo-Saxon perspective, see Pocock, J. G. A., *The ancient constitution and the feudal law* (1st edn 1957), Cambridge: Cambridge University Press, 1987, 2nd edn.

talk”).<sup>11</sup> The English Parliament was almost from the beginning a political assembly, initially composed of barons and bishops, who were able to impose the Magna Carta on Lackland King John in 1215. This first constitutional text in Western history spelled out in writing a series of limitations on the Royal Prerogative that have been observed ever since by the long succession of English monarchs.<sup>12</sup>

Royalty would try to counteract the considerable influence of the nobility by the simple strategy of admitting representatives of the cities into the *curia regis*. This initiative was adopted for the first time in European constitutional history in the Spanish Kingdom of Leon in 1188, when Alfonso IX convoked the urban representatives, forming another court alongside the traditional court of nobles and bishops. This led to assemblies of the estates, called *cortes* (in plural because the king met with more than one curia, or *corte* in Spanish).<sup>13</sup> The pattern was repeated in other European kingdoms: representatives of English cities were incorporated in the parliament of Westminster at the end of the 13th century, and those of French cities into the Estates-General from 1302, when Philip IV the Fair called them to ensure his supremacy against Pope Boniface VIII.

In this way, little by little, the old *curia regis* was transformed in European kingdoms into an estates assembly, whose essential function was to approve the extraordinary subsidies the monarch needed (origin of today’s budgetary laws) and to give consent, with the monarch, to the most important legislative measures. Incorporating the cities into the estates assemblies was of the utmost importance because city members were designated or elected; thus they acted as representatives and were called deputies. This was another important advance on the road to legal control over monarchical power.<sup>14</sup>

11. Henry II Plantagenet (1154-1189) still used all his life primarily the French language. However, the French *parlements* were of a different nature, as they were not political councils but judicial courts.

12. See Clarke Holt, James, *Magna Carta and medieval government*, No. 68 in the series Studies presented to the International Commission for the History of Representative and Parliamentary Opinion (published in various works, 1955-1982), Hambledon, London, 1985, 2nd edn, Cambridge UP, 1992.

13. On this extremely interesting and important process in European constitutional history, see O’Callaghan, J. F., “The beginning of the cortes of Leon-Castile” in *American Historical Review*, ISSN 0002-8762, LXXIV (June 1969), pp. 1503-1537, and Procter, E. S., *Curia and Cortes in Leon and Castile, 1072-1295*, Cambridge/New York: Cambridge UP, 1980. Spanish translation, Madrid: Cátedra D. L., 1988.

14. For the constitutional history of early examples of the medieval state, see Below, Georg von, *Der deutsche Staat des Mittelalters: ein Grundris der deutschen Verfassungsgeschichte*, Leipzig: Quelle & Meyer, 1914. See also Hintze, O., *Historia de las formas políticas*, Madrid: Revista de Occidente, 1968 (English version in *The historical essays of Otto Hintze*, ed. Felix Gilbert with Robert M. Berdahl, New York: Oxford UP, 1975) and Fedou, René, *L’État au Moyen Age*, Paris: PUF, 1971 (Spanish translation Madrid: EDAF, 1977). On limits on royal power Blythe, J. M., *Ideal government and the mixed constitution in the Middle Ages*, Princeton NJ: Princeton UP, 1992 (French translation: *Le gouvernement idéal et la constitution mixte au moyen âge*, by Ménard,

Absolute monarchy, a model of state that also appeared for the first time in European history in Spain, specifically in Castile, at the end of the 14th century, was intrinsically quite incompatible with the idea of the king sharing power with the estates assemblies. In the end, during the 16th century the kings ended up imposing themselves on the estates assemblies in almost all of Europe, except in England and in the Hispanic kingdoms of the Crown of Aragon – where “pactism” (so called because government depended on the pact traditionally established between the king and the representatives of his realm) dominated the constitutional tradition until the early 18th century, when it was abolished by the *Nueva Planta* or “new (judicial) structure” decrees.<sup>15</sup>

### 1.5.2. From vassals to parliamentarians

The English experience had nevertheless a greater impact in the history of European public law, because the English Parliament ended up limiting more efficiently the king’s power. This was partly because the final defeat in the Hundred Years War had weakened the monarchy in front of a Parliament that, from the middle of the 14th century, was divided in two houses – Lords and Commons – unlike the tripartite state assemblies found in the other European kingdoms. The English arrangement gave the Commons, the representative house, half the parliamentary power. This is why, after the gap of the Tudor years, the Stuarts were impotent to maintain absolutism and the English Parliament was able to impose effective limitations on Royal Prerogative. This was consolidated after the two revolutions which, between 1642 and 1689, transformed forever the English system of public law. These political-constitutional events spread across Europe thanks to John Locke (1632-1704), who set the theoretical foundations for a new model of state based on legal limitations on political power.

Locke was not just a thinker and theorist. As doctor and secretary to Lord Shaftesbury, one of the owners of the colony of North Carolina, Locke had the opportunity of trying to put his ideas into practice in the Fundamental Constitutions for the Carolina territory.<sup>16</sup> Locke’s thought had also a great

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Jacques, Paris: Cerf, 2005), and Canning, Joseph, *A history of medieval political thought*, 300-1450, London/New York: Routledge, 1996.

15. For an overview of this transition, see Henshall, N., *The myth of absolutism. Change and continuity in early modern European monarchy*, London: Longman 1993. For the Spanish constitutional tradition, see *El pactismo en la Historia de España*, Madrid: Instituto de España, 1980. For relations between cities and the monarchy in Catalonia, the territory most inclined to “pactism” in the Crown of Aragon, see Sabaté I Curull, Flocel, “Municipio y monarquía en la Cataluña bajomedieval” in *Anales de la Universidad de Alicante. Historia Medieval*, No. 13 (2000-2002), ISSN 0212-2480, pp. 255-282.

16. Looking for a career, Locke moved in 1667 into Shaftesbury’s home at Exeter House in London, to serve as Lord Ashley’s personal physician and resumed his medical studies under the tutelage of Thomas Sydenham, who had a major effect on his thinking on natural philosophy. The *Fundamental Constitutions of Carolina* was adopted in March 1669 by the eight lords proprietor of

and decisive influence on the political education of one of the founding fathers of the United States, Thomas Jefferson (1743-1826), author of the Declaration of Independence and third president of the Federal Union from 1801 to 1809. Locke's most influential work, *Two Treatises of Government* (1690), displayed his political ideas.<sup>17</sup> He asserts that society is based on a contract, but this arises only to rectify lacks in the state of nature ("Civil government is the proper remedy for the inconveniences of the state of nature"). For this reason civil society (commonwealth) is born, with the essential function of guaranteeing the free exercise of basic human rights (natural rights), such as liberty, equality, life and property.

Locke's individualism was developed further by the Geneva-born Jean-Jacques Rousseau (1712-1778) in his work *The Social Contract* (1762), which clearly defines the principles of government based on a reversible contract of submission, from which are excluded some natural rights of men which are inviolable (fundamental rights). The idea of a law arising beyond the limits of the power of the state, which appears as a set of natural rights adapted to reality and to the needs of men, is also expressly detailed by Montesquieu (1689-1755) in his best known work, significantly titled "The Spirit of the Laws" (1748). Here, he offers a very broad concept of the word "law" ("Laws, in their most general signification, are the necessary relations arising from the nature of things") and distinguishes between laws made by men and pre-existing laws ("Before laws were made there were relations of possible justice"). As God gives the laws of religion, the philosophers give the moral laws, and legislators the political and civil laws.<sup>18</sup>

Law as conceived of by Locke, Montesquieu and Rousseau therefore clearly appears as a reality distinct from power because it precedes power – since power is based on the social contract – and because it is different from power. Political and civil laws are a manifestation of the natural order and for this reason they cannot be established in an arbitrary way by the authority.<sup>19</sup>

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the Province of Carolina, which included most of the land between modern Virginia and Florida. It replaced the *Charter of Carolina* and *Concessions and Agreements of the Lords Proprietors of the Province of Carolina* (1665). Unpopular with many of the early settlers and never ratified by the assembly, the *Fundamental Constitutions* were largely abandoned by 1700. They are usually attributed to John Locke, in collaboration with his patron Anthony Ashley-Cooper, 1st Earl of Shaftesbury, a leading lord proprietor with a long-standing interest in colonial affairs. There is some question about how far Locke, as Shaftesbury's secretary, was responsible for their final form, but the pair were probably the document's principal architects, with minor contributions from other proprietors. See Milton, J. R., "John Locke and the Fundamental Constitutions of Carolina" in *Locke Newsletter* (now *Locke Studies*) No. 21 (1990), pp. 111-133.

17. Locke, John, *Two Treatises of Government*, ed. Peter Laslett, Cambridge Texts in the History of Political Thought, Cambridge: Cambridge UP, 1989. For his legal ideas, see Brooks, Thom (ed.), *Locke and law*, Aldershot: Ashgate, 2007.

18. Montesquieu, *De l'Esprit des Loix*, 1st edn, 2 vols., Barillot et fils, Geneva, 1748 (I consulted the edition in *Œuvres complètes*, Paris: Seuil, 1964, pt 1, bk 1, No. 1, pp. 530-531). English translation by Thomas Nugent (1st edn 1752), Whitefish (Mont): Kessinger Publishing's Rare Reprints, 2005.

19. As Catherine Larrere ("Montesquieu" in *Dictionnaire de philosophie politique*, 3rd edn, Paris: PUF, 2003, p. 529) points out, Montesquieu's main criticism of Hobbes is that, if law depends

The differentiation of law as something separate from power is no doubt the essential pillar on which the liberal state is supported. It is a laissez-faire model of state in which political power plays a limited role, because its function is restricted to maintaining order and guaranteeing the free development of individuals' basic rights. Politically it guarantees bourgeois access to power, weakening the power of absolute monarchy and the privileged classes traditionally represented on the clerical and noble estates. Thus, in the new regime, the bourgeoisie could control the state through a national representative assembly (Jacobinism) that was itself controlled, thanks to restricted suffrage that gave a vote only to those having adequate property and wealth, and a constitution that set the rules of political practice and the limits of state intervention.

### 1.5.3. Constitution v. law: the appearance of judicial review

It was still necessary to find a way of guaranteeing legal respect for the pact spelled out in the constitution, to arrest any political attempt to alter the constitutional regime. This was achieved in the United States of America, a nation born totally *ex novo* from a constitutional text; and, in the frame of the Federal Constitution of 1787, the Supreme Court adopted the principle of judicial review for the first time in the famous *Marbury v. Madison* case (1803).<sup>20</sup>

Judicial review is a system by which the principle of the supremacy of law – which is an expression of the people's will, because the legislative norm is dictated by a representative body such as parliament or Congress – finds itself supplanted by the supremacy of the Constitution. This supposes a limit to the tyranny of majorities and legally guarantees respect for minorities in the framework of the underlying constitutional pact. In this way, a new model

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on the will of the power, it can be changed at any moment (see *The Spirit of the Laws*: Book V, 10-14). The idea is expressed very clearly by Montesquieu himself: "the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs" (*De l'Esprit des Lois*, 1748, Book 1, chapter 3; 1964 edn, op. cit., p. 532).

20. For the important consequences of this decision for the constitutional model of the US Federal State, see Nelson, W. E., *Marbury v. Madison. The origins and legacy of judicial review*, Lawrence, KS: University Press of Kansas, 2000, and O'Neill, J., "Marbury v. Madison at 200: revisionist scholarship and the legitimacy of American judicial review", *Modern Law Review*, Vol. 65 (2002), pp. 792-802. See also [www.marshall.edu/pat/Journal/Volume2\\_1/Hartman\\_Richard\\_3.htm](http://www.marshall.edu/pat/Journal/Volume2_1/Hartman_Richard_3.htm).



of state arose, for which legal doctrine has coined the term “constitutional state of law”.

This model is based on two principles. First, to modify the constitution – or add to it – it is necessary to have a very sizeable majority, which obliges taking minority views into account. Second, if a law approved by the majority contradicts the constitution it may be declared unconstitutional, through the so-called constitutional control, a competence that in the United States is attributed to all judges. This check is thus “diffuse” and “incidental” because it comes into play in the course of a proceeding when a judge decides that in a particular case the applicable statute contradicts a superior statute at constitutional level. The judge may declare the law unconstitutional only in one specific case, because in another situation the same norm could be compatible with the constitution. However, if higher courts declare a law unconstitutional, their decision binds lower jurisdictional bodies. If the Supreme Court declares it unconstitutional, the ruling is *erga omnes* because of the principle of *stare decisis*. This has a retroactive effect, as *ex tunc* applies, since it is understood that the norm declared unconstitutional was inapplicable from the time it was passed.

By contrast, the liberal state model put in place by the French Revolution, consolidated by Napoleon and the most widely practised form of government in Europe after 1848, did not adopt this system of judicial review. The legal limits for controlling the executive power were not substantiated in the political sphere, thanks to the emergence of the administrative jurisdiction. This new, special jurisdiction had new, specially appointed judges, partisans of the new regime and thus predisposed to guarantee the jurisdictional application of the legal principles of the new state. The paradigmatic example is France, where the administrative jurisdiction was peeled away from the competences of the ordinary courts and inserted fully into that of the executive itself through the jurisdictional authority of the Council of State.<sup>21</sup>

## 1.6. The social question and its constitutional response: the total state

The liberal model described, based on the principle of limiting the power of the state through law, was shaken by the grave social conflict that accompanied the worker movement arising from the transforming changes in European societies brought on by the Industrial Revolution. This is what historians call the “social question”, posed by a new class known as the fourth estate, or simply as the proletariat because its members had no more patrimony than

21. For a solid comparison between the Anglo-American tradition and the continental European concept of the rule of law: Chesterman, S., “An international rule of law?” in *New York University Public Law and Legal Theory Working Papers*, New York University School of Law, Year 2008, Paper 70, pp. 5-10.

their own descendants.<sup>22</sup> This human group would acquire for the first time in 1848 a consciousness of themselves as a class thanks to Marx and Engels' *Communist Manifesto* ("Workers of the world, unite").<sup>23</sup>

From that time there appeared a new political philosophy based on the argument that the state ought to abandon the principle of laissez-faire and take action to prevent the exploitation of one human by another, which implied giving the lie to one of the basic individual rights on which the liberal state rested: property. Rousseau, in his *Discourse on the origin of inequality between men* (1755), had already pointed out that private property was at the root of social inequality. In the same vein, the French socialist Romantics, such as Count Saint Simon (1760-1825) and Charles Fourier (1772-1837), established the basis for economic authoritarianism, fought against inheritance and defended the state's acquisition of the "instruments of production" to achieve social justice. They based their ideas on the principle "to each according to his ability, to each ability according to its work". The movement became more radical with Pierre Proudhon (1809-1865), Louis Blanc (1811-1882) and above all Karl Marx (1818-1883).

After the publication of the *Communist Manifesto*, socialism acquired a decidedly political thrust and became an international movement directed at destroying the liberal state. To this end, the International Workingmen's Association (IWA), sometimes called the First International, was founded in London in 1864. However, the failure of the Paris Commune (March to May 1871) led Marx to renounce violence in the Hague Congress of 1872, from which he expelled Bakunin's anarchists. From that point onwards the socialist movement attempted to achieve control of the state by legal means, through elections (social democracy). This was the founding time of the first workers' parties, such as the German Social Democratic Party (1875), the Spanish Socialist Workers' Party (1879), the Italian Socialist Party (1892), the English Labour Party (1900), the Russian Socialist Revolutionary Party (1901) and the French Section of the Workers International (1905), the forerunner of today's French Socialist Party.

The socialist frontal attack on the Liberal State brought in constitutional history a new model of state in which political power became again exorbitantly influential. It is not an accident that Alexis de Tocqueville (1805-1859) proclaimed in the French Constituent Assembly of the Second Republic, on 12 September 1848, his "Discourse against the Right to Work", in which he rejected completely certain social rights as being directly incompatible with the individual rights that the liberal state was obliged to guarantee. In his

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22. From Latin *proletarius*, belonging to the lowest class of Roman citizens, the ones who contributed to the state only by having children (*proles*).

23. For a recent edition: Marx K. and Engels F., *The Communist Manifesto*, translated into English by Samuel Moore and Edward Aveling, Penguin Classics, 2003.

opinion, it amounted to a restoration of absolutist authoritarianism of the political class.

Nevertheless, state interventionism advanced implacably after the triumph of Lenin and the Bolsheviks in the first congress of the Russian Socialist Revolutionary Party in 1902, setting in motion the events that would culminate in October 1917 with the victory of the Soviet revolution and the creation of the Communist International (Komintern) in 1919. This led the Western ruling classes to support the formation of workers' parties that proposed the application of a social programme, as a way to avoid the triumph of Bolshevism. The problem was that this initiative also swept Mussolini (1922) and Hitler (1933) into power. After the First World War an ominous period in the history of constitutional government unfolded. All-powerful states were allowed to flourish as a means to once and for all resolve the "social question". In this respect, the justification of this state totalitarianism given by Carl Schmitt (1914-1985) is most interesting. Although he eventually ended up losing Hitler's favour, Schmitt's ambition was to "legalise" the model of the German National Socialist state. It is quite surprising that, despite these antecedents, Carl Schmitt's works continue today to attract interest, essentially because they lucidly describe the features of the contemporary state in the post-liberal period that begins after 1918.<sup>24</sup>

For Schmitt, the limits imposed by the liberal model on the state allowed intermediate bodies to appear that then completely denaturalised the function of the state. This is why he considers it necessary to rediscover the direct relationship between the individual and the state, because during the 19th century "the old adversaries [of the state as defined by Hobbes], the indirect powers of the Church and interest groups had appeared under the modern figure of political parties, trade unions, associations, in a word: the powers of the society". Through parliament, they had appropriated the power to legislate and fortify the rule of law and believed that they had been able to tame Leviathan. Their work was made easier by a constitutional system whose fundamental scheme was a catalogue of individual liberties. The supposedly free private sphere

24. On Schmitt's influence, see Muller, Jan-Werner, *A dangerous mind: Carl Schmitt in post-war European thought*, Yale UP, New Haven, CT, 2003. The thinking of Carl Schmitt had an especially great impact in Spain. As detailed by Manuel García Pelayo, it was no doubt in the Spain of Franco's time (1939-1975) that the work of Schmitt had its most extensive diffusion and reception. See his "Epílogo" in the Spanish version of *Teoría de la Constitución*, Madrid: Alianza Editorial, 1982, p. 373. Schmitt's relationship with Spain was doubtless nourished by the marriage of his only daughter Ánima with a Spanish professor of legal history, Alfonso Otero Varela. For a general view of the influence of Schmitt in Spain, see López García, Jose Antonio, "La presencia de Carl Schmitt en España", *Revista de Estudios Políticos* (Nueva Época) No. 91 (January to March 1996), pp. 139-168. Francisco Sosa Wagner, professor of administrative law, has published new details on the relationship of Schmitt with Spain in *Carl Schmitt y Ernst Forsthoff: coincidencias y confidencias* Madrid: Marcial Pons, 2008. This is clear evidence of the interest that this German jurist continues to inspire in contemporary legal science.

(guaranteed by these liberties) ended up liberating the state to the private, that is, “the uncontrollable and invisible powers of society”.<sup>25</sup>

For this reason Schmitt was against the rule of law, because he understood the “law” to be at the mercy of private powers in society that had denaturalised the first function of the state as an instrument that protects civil society. Hence, Schmitt rejected the law in the liberal, Jacobin sense because in his opinion it had been converted into a way of putting “a hook into the nose of the Leviathan”.<sup>26</sup>

The theories of the total state fortunately fell apart after the defeat of Hitler in 1945, at least with respect to fascism and Nazism, since Soviet totalitarianism persevered until 1991. The good thing was that the totalitarian period convinced Western legal scholars that it was indispensable to return to a framework in which the state submitted to law, although among its functions by necessity would appear now the one of intervening in society to correct and limit social injustices.

## 1.7. The contemporary reappearance of the social pact and the resurgence of the rule of law

In the Western world, the collapse of fascist (1942) and Nazi totalitarianism (1945) was an indictment of the doctrines that had criticised the principles of the liberal state and the mechanisms to limit state power. For this reason, in the second half of the 20th century, eminent Western jurists threw themselves into defining a new model of state, one which, without renouncing its social aims, was compatible with the democratic system.<sup>27</sup> The most representative figure was without a doubt the Austrian jurist Hans Kelsen (1881-1973), founder of the Vienna School of Legal Theory. He propounded the “pure theory of law” (*Reine Rechtslehre*), which developed the “fundamental principles for the validity of law” (*Geltungsgrund der Rechtsnormen*).

The case of Kelsen is very interesting because in his younger years he had been a firm defender of the subjugation of law to state power. In fact, in the first stage of his career, the Austrian jurist fully identified law with the state. In particular, in his first work, entitled “Fundamental problems of the science of public law” (*Hauptprobleme der Staatsrechtslehre*), published in 1911 in the

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25. Schmitt, Carl, *The Leviathan in the state theory of Thomas Hobbes: meaning and failure of a political symbol* (1938), translated by George Schwab and Erna Hilfstein, foreword by Tracy B. Strong, University of Chicago Press, 2008. For a commentary on the text, see Baume, Sandrine, *Carl Schmitt, penseur de l'État*, Paris, Lausanne: Sciences Po., Les Presses, 2008, p. 58.

26. Schmitt, Carl, *The Leviathan* (1938). See S. Baume, op. cit., p. 55.

27. In this respect, see the very interesting pp. 155-173 on the “return to liberal understanding of Fundamental Rights” in Grimm, D., *Die Zukunft der Verfassung*, Frankfurt am Main: Suhrkamp, 1991. In Spanish: *Constitucionalismo y derechos fundamentales*, ed. Antonio López Pina, Trotta, Madrid, 2006.

Austro-Hungarian Empire, he considered the basis of a law should be found only in the mandate that made it fundamentally necessary, by virtue of what Kelsen called the principle of “imputation” (*Zurechnung*), according to which a given event (the illegal action) led necessarily to a specific reaction (the sanction). To the extent that for the young Kelsen law did not require any other justification than its simple legal recognition by the state, the legislator became the leading player in the legal world, to the clear detriment of the judges whose function was nothing more than the automatic application of the law.<sup>28</sup> In this period, Kelsen was profoundly influenced by the prevailing statism spread in Europe between 1870 and 1914, which was manifestly reinforced during the inter-war period (1914-1939) by the emergence of the Stalin, Hitler and Mussolini dictatorships. Under this doctrine, the legal system was whatever the state considered to be the law. European jurists in general, and those of the German-speaking area in particular, defended the need for a strong state and for this reason the law was irretrievably tied to the state.

The political events that culminated in the coming of Hitler’s Third Reich (1933-1945) led Kelsen – who fled the Nazi regime and took refuge first in Switzerland and then in the United States – to modify his thinking to the point of disengaging law from political power. This was the feeling that inspired his works “General doctrine of the state” (*Allgemeine Staatslehre*, 1925), the “Theory of pure law” (*Reine Rechtslehre*, 1934), a work rewritten in 1960, and, above all, the “General theory of law and state” (published in English in North America).<sup>29</sup> During this second period of his thinking, Kelsen formulated his well-known theory of logical structure, which, when applied to the general legal system, led to formulation of the principle of normative hierarchy. Kelsen structures legal order as an imaginary pyramid in which legal norms are supported one upon another, constituting an ascending step structure (*Stufenbau*) in whose upper vertex is located the “basic norm” (*Grundnorm*), characterised by being self-sufficient and therefore representing the final fundamental principle that sustains the validity of the whole legal system.<sup>30</sup>

Placed in historical perspective, the thinking of Kelsen is indisputably a rediscovery of the idea of the social pact, since the basic norm (*Grundnorm*) is the product of it. Agreed norms constitute the basis of the legitimacy of the legal order, like the rules that society agrees to submit to. The great novelty is that in this system the state stays in the background, since it once again depends on the law and is subject to law, which becomes the protagonist of the social pact. The law forms an independent category that justifies itself. Thus, law is

28. On this first scientific period of the young Kelsen, see Serra Jimenez, F., “Kelsen en Kakania (Cultura y Política en el joven Kelsen)”, *Boletín de la Facultad de Derecho de la UNED*, No. 1 (autumn 1992), ISSN: 1133-1259, pp. 211-227.

29. Kelsen, H., *General theory of law and state*, translated by Anders Wedberg, Cambridge, MA: Harvard University Press 1945. Reed. The Law Book Exchange Ltd. 2007.

30. There is a more recent translation by Max Knight of Kelsen’s *Pure theory of law*, from the 2nd German edition, Berkeley, CA: University of California Press, 2002.

“pure”, according to the terminology coined by Kelsen, because it is separated or differentiated from the state and not at its mercy, as occurred in the times of absolute monarchies or in the 20th century during the totalitarian period.

## 1.8. The European reception of the constitutional rule-of-law model

As a result of the public law theories most in vogue in Europe after the French Revolution, establishing a legal procedure aiming to guarantee the constitutionality of laws created a conflict between the political and the legal. It was necessary to resolve the dilemma of how a norm approved by a body legitimised by citizens’ suffrage, such as a parliament, could be judged by an unelected institution like the courts of justice.

In Europe the solution to this contradiction, as Francisco Rubio Llorente recalls,<sup>31</sup> was the creation of a jurisdiction within the sphere of executive power called the “administrative contentious”. Affairs that involved activities of the state administration could not be examined by ordinary courts, but rather by special administrative judges. Hence, it was inconceivable that the ordinary jurisdiction could oversee the law, understood as a decision reached by the only elected power: the legislature.

Even in England the absence of a written constitution and the consolidation of the legislative hegemony of parliament (which can do all things but turn a woman into a man, and today even that) made it very difficult to apply the American principle of judicial review. Of course in continental Europe it was even more complex because of the consolidation of the monarchical principle since the times of Machiavelli and Bodin. This created such great inertia, even after 1789, that when monarchs grudgingly accepted the constitutional principle, they did so only partly, as García de Enterría states.<sup>32</sup> Therefore the constitution in this phase was no more than a list of limits against a pre-existing monarchical power or a simple formal code of the structure of the powers of state. So, the first liberal constitutions either did not contain rights and liberties or they were limited to recording excessively general formulations that in all cases needed later legislative development to be applied by the courts of justice.

It is true that monarchical power was eventually replaced by legislative power, in Jacobinism, but this did not reduce in the least its strength as authority. In fact, it increased political power in that it converted legislative norms into a political mandate imposed by the parliamentary majority. Law was thus

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31. Rubio Llorente, F., “Tendances actuelles de la Juridiction Constitutionnelle en Europe” in *Annuaire International de Justice Constitutionnelle*, XII, 1996, p. 13.

32. García De Enterría, E., *La constitución como norma y el Tribunal Constitucional*, 4th ed., Madrid: Thomson-Civitas, 2006.

subject to power, while judges were powerless to question it. Furthermore, judges were the product of the old regime where the post of judge in general was bought or depended on royal appointment. This was in clear contrast to what was occurring in the United States where judges were being elected and not designated by the state. This gave American judges an undeniable democratic support which continental European judges lacked. To this it must be added that in continental Europe, at the beginning of the 19th century, judges were the natural defenders of the monarchy and the aristocracy. So it was understandable that once the bourgeoisie had by revolution established the primacy of the National Assembly, it was not disposed to letting judges question legislative decisions. This led to reticence in the new model of the rule of law against a possible government of the judges and to a ferocious defence of the principle of absolute submission of the judiciary to the law.

For all these reasons, in continental Europe the model of the rule-of-law state that initially triumphed was substantially different from the American model of the constitutional rule of law. Indeed, the bourgeois oligarchs in Europe only considered the principle of judicial review to protect their constitutional system after the “social question” came to a head, when they discovered that a new social class (the fourth estate) was trying to occupy their place at the top of the political order. This may explain why attempts to establish constitutional control over the law coincided in some cases with broadening of the right to suffrage.<sup>33</sup>

The first serious attempts in continental Europe to establish the principle of constitutional control over law came to fruition after the First World War, when the triumph of the Soviet Revolution caused a major crisis in the liberal model of state.<sup>34</sup> One example is the 1919 Weimar Constitution, which included a Constitutional Court whose primary function was to rule on conflicts between the various constitutional powers and between the federal territorial units. However, the system failed because the principle of judicial review was still repugnant to the European public law tradition, owing to the abovementioned historical inertia. Hence, constitutional control followed a different path from that of the United States. The European model of the constitutional rule-of-law state, that defined from the point of view of legal dogma for the first time by Hans Kelsen, was the “concentrated constitutional jurisdiction”.

Kelsen was not its creator. In fact he only began to study the subject in 1928, and the Austrian Constitution of 1920 already included this system of constitutional jurisdiction. The mechanism was improved in the reform of 1929, inspired by the Czechoslovakian Constitutional Court. Kelsen was a member

33. Stjernquist, N., “Judicial review and the rule of law: comparing the United States and Sweden” in *Policy Studies Journal*, Vol. 19, 1990, pp. 106-115.

34. An aspect studied by Cruz Villalón, Pedro, in his classic work *La formación del sistema europeo de control de constitucionalidad, 1918-1939*, Madrid: Centro de Estudios Constitucionales, 1987.

of the Austrian Constitutional Court and, as he himself admitted, his doctrinal development owed much to his personal experience in that body. The idea then was not original, though Kelsen enjoys the merit of having been the first to formulate it as a legal dogma in a clear and operative way.

### **1.8.1. Concentrated constitutional jurisdiction versus judicial review**

In the original Kelsenian system, control over the constitutionality of norms was not in the hands of judges – servants of the state, who are not democratically elected – but rather belonged to a specific body created ad hoc: the Constitutional Court. Kelsen originally conceived this court not as a jurisdictional body but as an element of legislative power, which in his view was made up of two organs: parliament, which was charged with drafting norms (the positive legislator), and the Constitutional Court, whose function was to remove from the legal order laws that conflicted with the constitution (the negative legislator). For this reason the rulings of the Constitutional Court had the same effect as the law and its members were named by parliament. This court was not a jurisdictional body because it did not judge specific situations or facts, as ordinary courts do. Instead it limited itself to resolving questions of compatibility between two norms. Being a body of a legislative nature, its decisions were to apply *ex nunc*, that is, in the future, and not *ex tunc* with retroactive effects. Consequently, the problem of unconstitutionality did not lead to absolute nullity but rather to annulment. In this first Kelsenian system of concentrated constitutional jurisdiction, conceived of as ensuring the subjugation of judges to the law, the Constitutional Court was not able to revise a norm approved by the political power through the legislature.<sup>35</sup>

Kelsen's original system decisively influenced some European constitutions. Spain's was one of them, as shown by Cruz Villalón with respect to the Tribunal Constitucional Guarantees created by the 1931 Constitution of the Second Spanish Republic.<sup>36</sup>

The deficiencies of concentrated constitutional jurisdiction meant that in the first half of the 20th century judicial control over state actions continued to occur essentially by the administrative contentious route. In this regard the far-reaching Spanish reform of the Law of 5 April 1894 was significant because it opted for a return to judicialism, unlike the laws promulgated by the conservative General Narváez in 1845 which regulated review essentially through the administrative route. Judicialism was solidified by the Law

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35. Kelsen himself expressly criticised the American experience with judicial review on this point in his classic article "Judicial review of legislation: a comparative study of the Austrian and the American Constitution" in *Journal of Politics*, ISSN 0022-3816, Cambridge UP, Vol. 4, No. 2 (1942), pp. 183-200.

36. For a comparison of the Austrian and Czechoslovakian systems, see P. Cruz Villalón, *La formación del sistema europeo de control de constitucionalidad*, op. cit., pp. 341-419.



of 5 April 1904, a norm that signified the integration of the administrative contentious jurisdiction into the Supreme Court.<sup>37</sup>

### 1.8.2. The European approach to judicial review

After the Second World War, once the totalitarian period had ended, at least in most of Western Europe, a review was made of the system of control over the actions of political power. It is quite understandable that at that time the constitutionalists turned their attention to the United States' system of judicial review. The Kelsenian system did not disappear formally because the principle of "concentration" was maintained, instead of the American "diffusion", and only one specialised body, the Constitutional Court, had the authority to declare unconstitutionality.

Nevertheless, the new constitutional courts in Europe were radically different from those existing before the Second World War, because they stopped being legislative organs and became more judicial institutions. The fact that the constitutional court became a true jurisdiction, constituted, as Francisco Rubio Llorente states, an authentic "revolution" in European legal tradition.<sup>38</sup> This was essentially because the new constitutional jurisdiction altered the division of powers, entailing the appearance of a new front in the creation of law: constitutional jurisprudence. This new field meant the introduction in countries with a continental legal tradition (civil law) of the Anglo-Saxon principle of *stare decisis* into the jurisdictional area.<sup>39</sup> Thus, the new constitutional jurisdiction was not limited to comparing abstract norms. It also delved profoundly into matters when there were violations of norms, specifically in the case of fundamental rights, by examining appeals for legal protection.

### 1.8.3. The constitutional rule of law as European public law principle

This joint evolution of legal systems towards what we could call common European public law is seen in the process of European integration initiated in the middle years of the 20th century with the Treaty of Paris (1950), which

37. The full judicialisation of the administrative contentious process did not occur, paradoxically, until the Franco period with the López Rodo Law of 27 December 1956.

38. "The introduction of constitutional jurisdiction in Europe has not been the product of evolution but rather of revolution." Rubio Llorente, F., "La ley como garantía de los derechos del ciudadano" in *La forma del poder: estudios sobre la Constitución*, Madrid: Centro de Estudios Constitucionales, 1993, p. 507.

39. Rubio Llorente, F., "La Jurisdicción constitucional como forma de creación del derecho", *Revista Española de Derecho Constitucional*, ISSN 0211-5743, Year 8, No. 22, 1988, pp. 9-52 and more recently in "Divide et obtempera? Una reflexión desde España sobre el modelo europeo de convergencia de jurisdicciones en la protección de los Derechos" in the *REDC*, Year 23, No. 67, January to April 2003.

created the European Coal and Steel Community (ECSC). Today there is no doubt that European integration since 1950 has deepened the tendency to establish a system of judicial control over public power.

The history of European public law we have illustrated here shows that jurisdictional control was first instituted in some states by the administrative contentious route, which did not directly infringe on political power. Today, in European legal integration, jurisdictional protection against abuse of power is beginning to be effective via the administrative route, although this is less consolidated internally in member states.<sup>40</sup>

Nonetheless, the establishment of the principle of control of constitutionality of laws is far from consolidated at the level of Community law.<sup>41</sup> Of course, the exception of the European Court of Human Rights in Strasbourg must be mentioned, in spite of the fact that its rulings are not binding. This lack of coercive power is the result of Europe not being a united state (yet) in the area of constitutional law. However, it is undeniable that a common European constitutional legal order is beginning to exist *in fieri*. As Peter Häberle points out, it is necessary to look into the deepest reserves of the legal culture of each of the constitutional states to bring to light common factors, areas of agreement and familiarity, going beyond mere legal positivity. This is possible because the national states belong to a common type of “constitutional state”. Recognising that the European national states have analogous systems “permits each state to follow its own path and simultaneously find itself immersed in the common European context”.<sup>42</sup> On the same lines, Albrecht Weber considers that the rule of law has become a common European constitutional principle, particularly in such essential aspects as the supremacy of the constitution, the submission of public authorities to the law and the right to judicial protection.<sup>43</sup>

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40. See Aguilera Barchet, “Preliminary Study” in Susana Galera Rodrigo, *Sistema Europeo de Justicia Administrativa*, Madrid: Instituto de Estudios Jurídicos Internacionales and Dykinson S. L., 2005, especially pp. 49-62.

41. “If judicial control becomes widespread on the American continent, either in its original form or subject to different degrees of ‘rationalisation’, its adoption on the European continent has always been marginal and in all cases, hardly representative”: Cruz Villalón, P., *La formación del sistema europeo de control de constitucionalidad*, op. cit., p. 32.

42. Häberle, Peter, “Derecho constitucional común europeo”, translation by Emilio Mikunda Franco, in *Revista de Estudios Políticos* (Nueva Época), No. 79, January-March 1993, pp. 12, 13. Also in Perez Luño (ed.), *Derechos humanos y constitucionalismo ante el tercer milenio*. Madrid: Marcial Pons, 1996. Nevertheless it is significant that the author assumes an essentially legalistic conception. According to him, the DCCE should arise from two routes, “the legal-political path of legislation” and the “exegesis of jurisprudence”. This signifies that, for him, judges still do not have the right to create law, only to interpret it. In this case the diversity of the states impedes greatly advances in this field, as in some cases, like Germany or Spain, the constitutional courts have a wide margin of action; in others, like France, the Constitutional Council can only act under the framework of previous control.

43. Weber, A., “El principio de Estado de Derecho como principio constitucional común europeo” in *Revista Española de Derecho Constitucional*, Year 28, No. 84, 2008, particularly pp. 48-53.

In the sphere of “constitutionalisation” of the model of the state based on law, however, as Marian Ahumada Ruiz points out, until now European constitutional courts have not tried to guarantee the effectiveness of constitutional precepts themselves, but instead have kept their interventions limited to the political level with the objective of consolidating the system of constitutional democracy through the route of constructing and spreading a “constitutional culture”.<sup>44</sup> This explains the relative politicising of the constitutional courts, which affects very directly the objectivity of their function. It “seems all too clear that when the exercise of the action of unconstitutionality is left to the discretion of bodies with a political nature, these tend to exercise it according to political criteria and strategies”.<sup>45</sup> It is interesting also to see how Manuel Aragón stresses that the European model should be considered as a transitional model, destined to progressively move towards a model of diffuse control more like judicial review, while preserving some unique characteristics from the old Kelsenian concentrated model.<sup>46</sup>

On this same matter, H el ene Gaudin forthrightly defends the transformation of the justice system in the European community into a super-constitutional tribunal. It is seen as the necessary consequence of the ever clearer change in the nature of the community legal order, which occurred first in the arena of international law and which is now spreading to national law.<sup>47</sup>

As shown in this work, it has become increasingly necessary to study the undeniable influence that Community law has had in the formation of European public law. And equally important is analysing the ways in which concepts are diverging, as a result of that influence – especially considering the perspective of the long history of relations between power and law forged in the peculiar destiny of our long European legal tradition.

44. “In this sense, constitutional doctrine, above all in its beginnings, is less the result of the requirements of the constitutional text than of the effort to define the consequences of the compromise acquired by the community that bases itself on a democratic constitution”: Ahumada Ruiz, Marian, *La jurisdicci on constitucional en Europa*, Cizar Menor (Navarre): Thomson Civitas 2005, p. 304.

45. *Ibid.*, p. 308.

46. Arag on Reyes, M., “La aplicaci on judicial de la Constituci on. Algunas consideraciones sobre la Justicia Constitucional” in *Estudios de Derecho Constitucional*. Madrid: Centro de Estudios Pol ticos y Constitucionales, 1998, pp. 130-135.

47. “La qualification de la Cour de Justice comme juridiction constitutionnelle rel eve de l’hypoth ese d’une mutation pour ne pas dire d’une transmutation, c’est- a-dire d’un changement de nature de l’ordre juridique communautaire. C’est le passage d’un droit international   un droit de type interne”: Gaudin, H el ene, “The Community judicial system – La Cour de Justice, juridiction constitutionnelle?” in *Revue des affaires europ ennes. Law and European Affairs*, ISSN 1152-9172, No. 3, 2000, p. 218.