

## PRINCIPLES OF THE RULE OF LAW STATE. Historical Backgrounds\*

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The concept of the Rule of Law referred to the State submitted to the law, as a concept equivalent to the French *État de droit*, the Italian *Stato di diritto*, the Spanish *Estado de derecho*, or the German *Rechtsstaat*,<sup>1</sup> had its origin in the basic ideas and principles generated by 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, provoking a radical change in the organization and functioning of the State.

It is a comprehensive concept that when referred to the contemporary Modern Constitutional State as a State subject to the law, nonetheless implies much more than the “principle of legality” or the “prevalence of the law,” being referred in a concurrent way, to the State in which it exists: *first*, a Constitution, as a supreme norm, being the State

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<sup>1</sup> 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-conference-report-1959.pdf](#) (icj2.wpenginepowered.com)); and into French as “*Le Principe de la légalité*” (See the Report *Le principe de la légalité dans une société libre*”, 1959; available at: [Rule-of-law-in-a-free-society-conference-report-1959-fra.pdf](#) (icj2.wpenginepowered.com))

organs subjected to it and in general to the principle of legality; *second*, a system of representative democratic government elected by the people, as sovereign; *third*, the declaration of fundamental rights and freedoms of citizens embodied in the Constitution, that all organs of the State must enforce and guarantee; *forth*, a system of limitation of the State power, through its distribution, separation or division, by which the public power is controlled as a guarantee of public freedoms; and *fifth*, a system of judicial or jurisdictional control of the constitutionality and legality of State acts in charge of autonomous and independent courts.

Our purpose in this essay is to analyze the historical background of the concept, departing from 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 former English colonies. They were located far away from the Metropolis and its sovereign Parliament, having, for more than a century developed independently of each other, by their own means and enjoying a certain autonomy; a trend that a few decade 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.

In the case of the French Revolution, it was not a question of the construction of 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 character; a trend that was followed in Spain in the Constitution of Cádiz of 1812 and in the rest of the European countries, even in some cases imposing republicanism.

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 serve as its foundation, and which have been those that have been developed during the last two centuries.

These principles and its backgrounds, as already mentioned, are the following.

***1. The principle of the Constitution as the supreme law and the submission of the State to legality.***

The first principle of the Rule of Law State, is that in a Constitution must exist as a written or unwritten political charter, emanation of popular sovereignty, with a rigid and permanent character, containing norms of higher rank, immutable in certain aspects. 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, in the Absolute State this idea of Constitution did not exist, 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 Constitution of 1787, followed by the France Constitution of 1791. The third modern, republican Constitution was adopted in Spanish America, in Venezuela in 1811. The third and fourth Constitutions in Modern history were the one sanctioned in Haiti of 1804, creating an Empire, and the Federal Constitution of the United Provinces of Venezuela sanctioned in 1811; being the fifth Constitution in the Modern world 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 the norms that make up the legal order or system of the country, located at different levels according to their sphere of validity, normally established in relation to the supreme law. Within the different sources of the legal order, in general the primacy of legislation has been accepted, regulating all the activities of the State, both executive and judicial branches. Being understood in this context by legislation, basically, 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 in addition 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 organs 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 organs, and particularly, those emanating from the legislative organ; being, as a consequence, all acts of State organs are subject to control.

## ***2. Popular sovereignty and democratic representation***

Secondly, from the American and the French Revolutions of the eighteenth century, a new political idea also emerged 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.

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 dictated their own Constitutions from 1776; 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 constituted another of the great contributions of these Revolutions.

Likewise, in Hispanic America, in particular 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 Captaincy General 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 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 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, also resulted the presidential and parliamentary systems of government.

The first, presidentialism, a product of the American Revolution; and the second, parliamentarism, as a system of government that dominated 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 as a form of government was first established in Venezuela, from 1811, initially as a tree head executive, and then, from 1819,

unipersonal; a system of government that was then followed in all Latin American countries.

### ***3. Declarations of fundamental rights.***

Thirdly, from the same two revolutions of the 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.

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 independence in 1776, were all preceded by extensive Declarations of Rights, which were 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, and was 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 identifies the rule of law, as a formal guarantee contained in constitutional texts, which ensure both its effective

enjoyment and the various means of judicial and political control to guarantee it.

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, product of the American and French Revolutions, is another characteristic of the rule of law.

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

*Fourth*, within the same line of limitation to 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.

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 assembled 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 they were added 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 Spanish-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, to guarantee freedoms and try to avoid possible abuses of one branch of power in relation to another. And within such separation, by the consecration of the necessary autonomy and independence of the Judicial Power, with its 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 also is characterized by the establishment of a system of territorial distribution of power which the one that originates political decentralization, and the extended exercise of democracy at the local levels of the State.

Thus, in contrast to the Absolute Monarchies organized on the basis of centralism, these revolutions gave rise to new forms of territorial organization that originated, on the one hand, federalism, particularly derived from the American Revolution with its essential bases of local

government; and on the other, 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 world, after the Revolutions, to have adopted in 1812 the municipal territorial organization that bequeathed 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 was 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, in the context of the separation of powers, the principle of control between the powers predominates, and in particular 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 progressively extended to all State acts including Parliament.

For this reason, the control of power was also implemented in relation to the acts of the legislative body itself, putting an end on the absolute parliamentarism, and also of the government, through the adoption of a system of judicial review or jurisdictional control of the

constitutionality of the laws and other acts of the State issued in direct execution of the Constitution, as a protection against the despotism of the Legislator and the 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 to exercise control over the constitutionality of the legislator and the government, Constitutional Jurisdiction emerged, made up of special Constitutional Courts or the Supreme Courts themselves.

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 it was its own will, so that there could be no higher body of normative to limit it, and according to which its decisions could be controlled.

### ***5. Judicial Review and the role of the Judiciary***

Sixth, the American and French Revolutions also disrupted the very idea of the Judiciary and its role, since justice would cease to be administered by the Monarch and would begin to be taught by independent officials, in the name of the Nation.

In addition, 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, as the supreme norm, derives the principle that it must have some control, as a guarantee of 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 resolving 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 trusted balance between the powers of the State, was adopted, even with the inclusion in the text of the Constitution itself of the principle of its objective guarantee, by declaring null and void laws that contradict constitutional norms.

Also in Hispanic America, since the XIX century, and in Europe, since the beginning of the XX 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 of 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 the 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 guaranty the supremacy of the Constitution.

In addition, 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 in general is assigned to special courts.

In France, however, after the revolution, given the revolutionary distrust of judges (*Parlements*), in the face of the absolute separation of powers, it would only be a hundred years after the French Revolution when the consolidation of administrative justice conducted by the Council of State took place. Although separated from the Judicial Power, the Council of State begin to control the Administration. In France, on the other hand, it was almost two hundred years later when a process of control of constitutionality of the laws began to consolidate, in charge of the Constitutional Council.

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