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CONSTITUTIONAL SUPREMACY AND JUDICIAL REVIEW OF LEGALITY AND CONSTITUTIONALITY OF THE ACTS OF THE STATE AS MAIN INDICATORS OF THE RULE OF LAW

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I. THE IDEA OF THE CONSTITUTION AND ITS SUPREMACY

1. Constitutionalism

The first of the principles of the Rule of Law or *État de droit* in Modern Constitutionalism[1] is the idea of Constitution, whose consolidation and development, from the beginning of the nineteenth century, led to the establishment of a system of norms of a higher level in a given legal order, comprehensively setting forth the basic rules related to the fundamental functions of the state, its different bodies and powers and their interrelations, and the fundamental rights and liberties of the citizens.

Thus, the constitutionalization of the state according to law started two hundred years ago with the introduction of written constitutions in the practice of politics. These written constitutions were conceived as formal documents containing the will of the people, considered as sovereign, regarding the political organization of a nation. Precisely because of this process, the organs of the state, including kings and parliament, were converted into such organs of the state, and the sovereignty was depersonalised, in general, and attributed to the people represented by those organs.

During the last two centuries, after the approval of the first of the written constitutions of modern times, the Constitution of the United States of America, in 1787, the practice of written constitutions has spread and written constitutions exist in almost every country in the world today with very few exceptions, among which, that of the United Kingdom.

Of course, the fact that in this country, and in a few others such as Israel or New Zealand, there is no "written constitution," does not mean that there is no Constitution at all. On the contrary, in these countries there exists a collection of rules, partially written, partially unwritten, that establishes, regulates and controls their government.[2] Hence, the constitutionalization of the state according to law has also taken place in constitutional systems that have no written Constitutions.

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

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1 A.R. BREWER-CARÍAS, *Principles of the Rule of Law. État de droit, Estado de derecho, Stato di diritto, Rechtsstaat). Historical Approach*, Miami 2023.

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

produced a system that responds to a political decision of society, adopted by the people, as a constituent power through a particular constituent assembly.

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

> "Every society in which the guarantee of rights is not assured, or the separation of powers not determined has no Constitution at all."[3]

Following this principle, the first written constitutions in modern times were the Constitutions of the former British Colonies of North America organized since 1776 as independent states, followed by the American Constitution of 1787. Accordingly, the United States was the first common law country to have parliamentary sovereignty replaced by the paramount law of a constitution given by the people, and its enforceable fundamental rights.[4] Notwithstanding, the idea of a higher and fundamental law established as a social contract had also English origins and antecedents in the process of colonization of North America.[5]

In fact the higher law background of the American Constitution,[6] can be traced back to the medieval doctrine of the supremacy of law, drawn from the pages of the works on the Laws of England, by the greatest English medieval lawyer, Bracton (1569), mainly interpreted by Sir Edward Coke.

This principle led to a reaction against the doctrine of the divine right of kings, based on the doctrine of divine origin of law upon which the basis of civil society is built, and on the principle that the law is supreme above king and people equally.[7]

2. Historical Origins

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

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

The *Magna Carta* was the result of a resistance movement by the privileged barons against the crown's policy during the reign of King John (1199–1216).[8] It was just one of the many general

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

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

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

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

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

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

charters established between the prince and his barons, guaranteeing them privileges in exchange for certain commitments on their part, which were created in feudal times.

Consequently, none of the trends belonging to modern constitutional law can be applied to these medieval relations. The *Magna Carta* was a *stabilimentum*, that is, an agreement or stipulation lacking any precise sense of political law. The fact that it was in writing is no argument in favor of a constitution, and its very name, *Magna Carta*, is not explained historically by the fact that it contained a fundamental law in the sense of modern constitutions; it was a popular description to distinguish it from the *Carta Foresta* or Chart of the Forest of 1217 relating to hunting rights.[9]

The original name of the Magna Carta was *Cartam Libertatis* or *Cartae Baronum*. It was only centuries later, during the Revolution, with the Parliament's struggle against the absolutism of the Stuarts, that the modern sense was attributed to it, making it the origin of a Liberal constitution. But, as Carl Smith pointed out, it would be a historical error to see, even if only by approximation, anything in it analogous to a modern liberal or democratic constitution.[10] Nevertheless, in medieval times, it was considered to be an unalterable, fundamental and perpetual[11] part of the enacted law, and was confirmed by different kings more than thirty times, thus being an important part of the progress of common laws.[12]

In the same English context, the first example of a modern written constitution is undoubtedly the *Instrument of Government* 1653, which was the result of the only real break that had occurred in English constitutional history and its political continuity.[13]

In effect, the Great Civil War, which started in 1642 and divided the country into Parliamentarians and Royalists, can be thought of as the final step in the long struggle between the parliament and the king. With its religious, economic, and political causes and mutual accusations of breaking and subverting the fundamental law,[14] it brought about the execution of King Charles I, the destruction of the whole system of central government and the assumption of the government of the country by the Long Parliament (1649-1660).

Charles I was tried and executed in January 1649, and soon afterwards the monarchy and the House of Lords were abolished and England was named a Commonwealth (*Commonwealth of England, Scotland and Ireland*) or free state, under the control of the Army and of Oliver Cromwell.[15] Parliament carried out the wishes of the army, except when setting a limit on its own powers and its own existence.

After long and futile negotiations, Cromwell finally dissolved Parliament by force in 1653. To take its place, he invited a number of proven Puritans to form an Assembly of Saints that shortly afterwards resigned their powers and gave back their authority to Cromwell. Then the Council of army officers produced a written constitution for the government, known as the *Instrument of Government* 1653,[16] which shows all the features of a constitution, as we understand it today.

The *Instrument of Government* made Oliver Cromwell "Lord Protector" of the Commonwealth of England, Scotland, and Ireland, which he had united under one government. It conferred executive powers upon the Protector, assisted by a Council of State containing both civilian and military members conceived as a body independent of both Protector and Parliament, that was to

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

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

11 Ch. H. MCILWAIN, The High Court of Parliament and its Suprema-cy, Yale 1910, p. 64–65.

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

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

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

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

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

be elected including representatives of Scotland, Ireland, and England.[17] However, when the Parliament met, not all its members accepted the "fundamentals" of the Protectorate Government and refused to accept the constitution under which it was assembled.

Eventually it was dissolved, mainly because it attempted to deprive Cromwell of sole control over the army; and Cromwell again found himself obliged to rule by means of the army.[18] This happened again and again, until his death in 1658. As Sir William Holdsworth said of Cromwell:

> "He was the only man who could control the army, and consequently, the only man who could have any chance of establishing civil, as opposed to, military government."[19]

Therefore, King Charles II was restored soon afterwards by a new Parliament under the terms of the Declaration of Breda 1660, which contained four principles or conditions: a general amnesty, liberty of conscience, security of property and payments of arrears to the army.[20] This Declaration was, indeed, not a constitution in the sense of the *Instrument of Government*, because, in fact, the Restoration meant a return to the old form of government, and no constitution was needed to that end. As K.C. Where said:

> "Those who speak of an unbroken line of development in the history of English government... have a good deal of truth on their side. There was a break and an attempt to make a fresh start with a constitution, but it failed, and the former order was restored."[21]

As we have said, the *Instrument of Government (*1653) and its modifications mainly through the Humble Petition and Advice[22] has been unanimously considered as the first written constitution in constitutional history of modern times. The immediate purpose of it was to establish a permanent and inviolable rule vis–à–vis the changing majority resolutions of Parliament. In all governments, Cromwell said, something fundamental is required, something like a Great Charter which is permanent and invariable or, if you wish, absolutely invulnerable. For example, the stipulation that Parliament can never declare itself to be a permanent corporation was, in Cromwell's opinion, one such fundamental principle.[23]

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

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

As Jennings has pointed out, that need arose in England in 1653, when the Parliament, having created an army to destroy the king, was destroyed by its own creation.[24] In this sense, the *Instrument of Government,* which made Cromwell *Lord Protector* and established a new legislature, was the first and only example of a written constitution in England. It only remained in force for a few years, and almost survived Cromwell himself.

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

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

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

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

20 *Ibid*, p. 165.

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

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

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

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

"Were the first attempt that Englishmen had made to construct a written constitution, and therefore they raised for the first time all the problems connected with its construction. Thus, we get the idea of a separation of powers as a safeguard against the tyranny both of a single person and a representative assembly; the idea of stating certain fundamental rights of the subject; and the idea of rendering these rights permanent, by denying validity to any legislation which attempted to affect them."[25]

3. The British Constitution

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

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

"If a constitution consists of institutions and not of the paper that describes them, the British Constitution has not been made, but has grown, and there is no paper."[26]

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

"The United Kingdom has its own form of constitutional law […]. Some of it is written, in the form of statutes, which have particular constitutional importance. Some of it is reflected in fundamental rules of law recognized by both Parliament and the courts.

These are established and well-recognized legal rules which govern the exercise of public power, and which distribute decision-making authority between different entities in the State and define the extent of their respective powers."[27]

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

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

In the first place, because of the absence of any formal distinction between constitutional and ordinary laws, which implies that in the absence of a written constitution, Parliament can, at any time, institute, by the ordinary method of law–making, reforms of a constitutional nature. Therefore, "the authority of Parliament to change the law is unlimited" and "since the sovereignty of Parliament is recognized by law, –said T.R.S. Allan, it would be contrary to the Rule of Law to deny full force to enactments which change existing law."[28]

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

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

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

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

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

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

"The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the Legislation of Parliament."[29]

In addition, regarding the courts, in the case *R. v. Jordan* in 1967, a Divisional Court stated clearly that, as Parliament was supreme, "there was no power in the courts to question the validity of an Act of Parliament."[30]

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

"The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution", adding, "no court of justice can inquire into the manner in which (an Act) was introduced into Parliament, what was done previously to its being introduced, or what passed in Parliament during the various stages of its progress through both Houses of Parliament," concluding precisely that: "The function of the Court is to co construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions."[31]

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

"What Statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the Court to say that a parliamentary enactment, the highest law in the country, is illegal."[32]

The fourth principle derived from the sovereignty of Parliament is that of the power of Parliament to prevail over judicial decisions themselves, since a bill could even be approved for the purpose of legalizing an illegal act or exempting somebody from the legal consequences of a committed act. This is why it is said that "the legal authority of Parliament is absolute, not limited."[33]

For instance, Parliament's term of office, according to one of the conventions, is five years, but this period might be extended. Parliament can also regulate succession to the Throne, exclude persons who are not members of a particular religion, limit royal prerogatives, change the state religion, in short, make any decision with no limitation whatsoever. The principle implies that any act of Parliament can always be revised and changed by a subsequent act, either expressly or, in the case of conflict, implicitly. Consequently, important acts of Parliament such as the *Habeas Corpus Act* 1679, the *Bill of Rights* 1689, the *Act of Settlement 1700*, the *Statute of Westminster* 1931 and even the *European Economic Communities Act* 1972 (as it happened with the withdrawal of the United Kingdom), can very well be revised by Parliament. No special majority is needed for this.[34]

Parliamentary sovereignty in this form, is without doubt, one of the most important features of the constitutional system of the United Kingdom, which contrasts, as mentioned in the *Brexit* case

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

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

31 *Idem*, p. 2-5.

32 *Idem*, p. 28. That is why, we think, George Winterton said that "the rule of law comes to mean rule of law as enacted by Parliament, and not the rule of the ancient common law," in "the British Grundnorm: Parliamentary Supremacy re–examined." *The Law Quarterly Review*, Vol. 92, 1976, p. 596.

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

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

(*Gina Miller et al. v the Secretary of State for Exiting the European Union*) on November 3, 2016 (followed by the Supreme Court of the United Kingdom's decision of January 24, 2017),[35] with the rest of the constitutional systems.

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

On the principle of the sovereignty of Parliament, and of the "supreme" character of its primary legislation, the High Court in such decision considered it as to be the primary rule of the United Kingdom's constitutional law, meaning that only Parliament can enact and change the laws, and that there are no laws above primary legislation, except the cases in which Parliament itself has expressly provided that this be otherwise; as was precisely the case of the European Community Act of 1972, in which case, considered as a "constitutional statute," precedence was granted to the law of the European Union over the acts of Parliament.[36]

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

This is undoubtedly an exception in the modern world, since most countries, even in the English-speaking world, have a written constitution represented by a formal document, protected, as a fundamental law, against any attempt by simple majorities to introduce reforms.[37]

However, not only are constitutional guarantees nonexistent in the United Kingdom, nor does it seem possible to create them, as H.W.R. Wade said, since, if an ordinary act of Parliament can reform any law, then it is impossible for Parliament itself to declare a law or statute to be non-reformable, or only reformable subject to certain conditions. In other words, Parliament cannot modify or destroy its own "continuing sovereignty" for the courts will always obey its commands.[38]

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

That is why no entrenched Bill of Rights can be adopted in the United Kingdom. The adoption of it would, of course, involve the exercise of judicial review by the courts, that is to say, the power of domestic courts to protect certain fundamental freedoms even against the legislature itself,[39] and that would be against the principle of the sovereignty of Parliament. However, this has undoubtedly changed since the ratification by the United Kingdom of the *European Declaration of Human Rights*, which became law in Great Britain; and remains so despite the separation of the United Kingdom from the European Union (Brexit).

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

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

37 *Idem*, p. 28.

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

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

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

> "Parliament may remodel the British constitution, prolong its own life, legislate ex–post facto, legalize illegalities, provide for individual cases, interfere with contracts and authorize the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Commonwealth, introduce communism or socialism, or individualism or fascism, entirely without legal restriction."[40]

That is to say, that as there is no written or rigid constitution in the United Kingdom, Parliament is not limited by any text or superior fundamental rule. Therefore, there is no possibility of exercising any kind of judicial control over the conformity of Parliamentary acts with a higher law, which means in our perspective that the principle of the Rule of Law is not applicable to Parliament.[41]

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

Holmes' famous statement that "Parliament can do everything but make a woman a man and a man a woman",[42] although not entirely impossible nowadays, is no more than an exaggeration tending to mean that Parliament has no legally entrenched limits upon its actions, because of the absence of a written and rigid constitution. However, this does not mean that there could be arbitrariness in the exercise of Parliamentary Powers and that, in certain aspects, in political practice, there are absolutely no limits over Parliaments.

First, there are some Acts of Parliament that can be considered at least from the perspective of constitutional law, as "constituent documents" limiting parliamentary action. In this respect, J.D.B. Mitchell qualified as "constituent documents" the *Acts of Union* of 1707 and the *Ireland Act* of 1800, even though the limitations imposed by them upon Parliament –he said–, are established "in such a way that any infringement of them is improbable."[43] He also mentions as limits upon Parliament, those established by convention, that is to say, habits of thought that are the product of Parliamentary life. Like that related to the "doctrine of mandate" which states that a government that has lost general support in the country should not force major legislation through Parliament shortly before an election, even though such legislation may have been in its electoral program.[44]

There are, moreover, limits in political practice, imposed by Parliament itself, that undoubtedly bind other Parliaments in such a way that Parliament cannot reverse what a previous Parliament had done. For instance, one cannot imagine that Parliament could reverse the *Statute of Westminster* 1931, which limits the power of Parliament to legislate over a dominion without its

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

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

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

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

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

consent;[45] nor can one imagine that Parliament could reverse the acts granting independence to the dominions or territories overseas and thus try to take away their independence.[46]

In the same context, discussions took place, concerning the primacy of European community law in relation to domestic statutes, both before and after the *European Communities Act* 1972 was passed. In accordance with that Act, Community law, up to the United Kingdom's withdrawal from the European Union in 2020, had primacy over domestic law, and therefore, Parliament could not enact future acts that conflicted with Community Law, unless it amended the European Community Act itself. While the United Kingdom remained a member of the Community, in was difficult in practice, for Parliament, to exercise its legislative power through acts contradicting the application of Community Law.[47]

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

As J.M. Snee in 1955:

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

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

> "Parliament is sovereign; it can make any laws. It could ordain that all blue–eyed babies shall be destroyed at birth; but it has been recognized that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, these laws will be supported and can be enforced.
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> The English, of course, with an irritating but sublime confidence in their institutions are sure that no Parliament would so act."[48]

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

> "Judges, however, usually manage to get their own way: The House of Lords has been able to attain some of the same results which in the United States are achieved by the first ten

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

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

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

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

amendments. By a convenient fiction, it assumes that Parliament always intends that its statutes will accord with natural justice; no statute will therefore be constructed to be retrospective or to deprive a person of a fair hearing or to prevent freedom of speech unless Parliament has so provided in the most specific terms."[49]

4. The American Constitution (1787)

Apart from the important antecedent of the Cromwell's *Instrument of Government* of 1653, the modern practice of written constitutions actually began in the United States of America when the Colonies separated from England, declaring themselves independent States (1776), formulating their constitutions in writing. A Continental Congress in 1776 even invited all the Colonies of the Union to draw up their own Constitutions, as a political decision of the people.[50]

The movement towards independence from England began in the United States long before independence was finally declared in 1776, and the independent spirit developed through the colonial assemblies, which had grown in power and influence during the first half of the eighteenth century, by resolving many of the colonists' problems at a local level.[51] This assembly spirit was undoubtedly one of the main factors in the independent process. That is why the *Declaration and Resolves of the First Continental Congress*, October 14, 1774, bearing in mind that "assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances, resolved that 'the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts", had their own rights, among which was:

> "A right peaceably to assemble, to consider their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."[52]

Therefore, the process of separation of the English colonies in America from the mother country took place on the basis of two fundamental elements: the process towards independence of each one of the colonies, through their own representative governments; and the process towards the unity of the colonies, through the continental congresses. According to what was said by one of its principal protagonists, John Adams, "The Revolution and the Union developed gradually from 1770 to 1776."[53]

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

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

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

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

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

52 *Idem*, p. 287, 288.

53 Quoted by M. GARCÍA–PELAYO, *Derecho constitucional comparado*, Madrid 1957, p. 325.

"3rd That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.

4th. That the people of these colonies are not, and from their local circumstances, cannot be represented in the House of Commons in Great Britain.

5th. That the only representatives of the people of these colonies, are persons chosen therein by themselves; and that no taxes ever have been, or can be constitutionally imposed on them, by their respective legislatures."[54]

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

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

The main political element discussed in this Congress was the authority that the Colonies should concede to the Parliament, and on what grounds: either the law of nature, the British Constitution, or the American charters.[55] It was decided that the law of nature should be recognized as one of the foundations of the rights of the colonies, and therefore not only the common law. Thus, the Congress declared, as a Right of the inhabitants of the English Colonies in North America, in the same sense of the Resolutions of the *Stamp Act* Congress:

"That the foundation of English Liberty, and of all free government, is a right in the people to participate in their legislative council; and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their rights of representation can alone be preserved in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed..."[56]

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

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

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

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

"That these United Colonies are, and of right, ought to be, Free and Independent States; that they are absolved from all allegiance to the British Crown, and that all political connexion between them, and the state of Great Britain, is, and ought to be, totally dissolved."[57]

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

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

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

57 *Idem*, p. 317.

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

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

> "That all men are created equal; that they are endowed, by the Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles and organizing the powers in such form, as to them shall most likely effect their safety and happiness."[58]

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

Apart from the importance of this document for the United States, it is undoubtedly also of universal significance: its basic premise, as a syllogism, is constituted by all those acts of the Crown which, according to Locke, define tyranny, and the conclusion of the syllogism is obvious: by violating the pact uniting the King to his American subjects, he had lost all claim to their loyalty, and consequently, the Colonies became independent states.

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

> "That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general."[59]

Thus, the *Bill of Rights* and the *Constitution or Form of Government of Virginia* were adopted on June 12, 1776, and the other Constitutions of the States were adopted after the *Declaration of Independence*, in New Hampshire, New Jersey, South Carolina, Pennsylvania, Delaware, Maryland, North Carolina; in 1777 in Georgia, and New York; and in 1780, in Massachusetts. Connecticut and Rhode Island converted their former colonial Charters into their republican Constitutions. [60]

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

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58 *Idem*, p. 319.

59 *Idem*, p. 318. A.C. MCLAUGHLIN, *op. cit*., p. 107–108.

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

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

The idea of a Confederation or Union of Colonies was also formulated at the same time as the *Declaration of Independence*, thereby satisfying the need for a political union mainly derived out of the conduct of the war. Hence, the adoption by the Congress, on November 15, 1777, of the *Articles of Confederation*, is considered to be the First constitution.[61] It established a confederation and perpetual union between the States, the aim of which was the "common defence, the security of their Liberties and their mutual and general welfare"[62] in a system in which each state retained "its sovereignty, freedom and independence"[63] and any power, jurisdiction and right not expressly delegated to the United States in Congress.

The result was that the sole body of the Confederation was the Congress, in which each state had a vote. Consequently, the Confederation lacked direct taxation power, depended economically on the contributions of the States, had no executive body and only an embryonic form of judicial organization. Despite its weakness, the Confederation succeeded in carrying on the war for seven years until it won. Following the victory, the precariousness of the Confederation made it necessary to establish a greater power to achieve national integration, and a Federal Convention was called to meet, "for the sole and express purpose of revising the Articles of Confederation."[64]

This led, in 1787, to the adoption by the Congress of the Constitution of the United States that was the result of a series of general compromises[65] between the political and social components of the independent colonies, of which the following are the most outstanding:

In the first place, the compromise between Federalists and Antifederalists, which provided the Union with the necessary competences for its existence, while maintaining the autonomy of the Federate States. From this compromise emerged the form of the Federal state,[66] which appeared for the first time in constitutional history as a political organization of States, through a system of political decentralization or vertical distribution of powers. This compromise was one of the main contributions of the North American Constitution to modern constitutional law.

The second great compromise reflected in the constitution was, because of a long brewing confrontation, the compromise regarding representation between large and small States of the Union. That is, between a Congress in which the States would be represented in proportion to their population and a Congress with a confederate type of representation. The result was a bicameral system in which the House of Representatives was to be made up of a number of deputies proportional to the population of each state, whereas the Senate would comprise two representatives per state, regardless of its size, thus providing equality among the states.[67]

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

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

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

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

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

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

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

67 M. GARCÍA–PELAYO, *op. cit.*, p. 336; R.B. MORRIS, *loc. cit*., p. 10; A.C. MCLAUGHLIN, *op. cit.*, p. 179.

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

The middle ground solution led to the adoption of a clause impeding the Congress from making any decision prohibiting slave importation for twenty years, until the year 1808.[68]

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

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

In addition to these compromises of the Constitution of the United States, we must turn our attention to another two main contributions made by North America to constitutional law: First, constitutionalism itself, in the sense of the adoption of all those compromises of forms of government in a written constitution as fundamental law; and second, republicanism, as an ideology of the people against monarchy and hereditary aristocracies,[69] based on political representation according to the ideas expounded by Thomas Paine in his famous book *Common Sense*. *Addressed to the Inhabitants of America*, which initially appeared anonymously in Philadelphia in January 1776.[70]

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

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

> "An insult and an imposition on posterity. For all men being originally equal, no *one* by *birth* could have a right to set up his own family in perpetual preference to all others."[71]

Paine's proposal, which he then embodied in many of his later writings, was based on the simple idea that he outlined later in 1795, of what he called the primary division of the forms of government, which was: first, government by election of representatives; and second, government by hereditary succession. And it was this simple division what gave rise, precisely, to the revolution in the United States, which was followed by the Revolution in France, based, in Paine's words, on the conflict between "the representative system founded on the rights of the people; and

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

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

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

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

the hereditary system founded in usurpation,"[72] which was not only formed with monarchs of blood, but even established by dictators, citing none other than Maximillien Robespierre, who years later would be his persecutor - as was also of Francisco de Miranda[73] - in representation of the Convention in France. The world of monarchical government or usurpation was, for Paine, the opposite of the "representative system" which, in his opinion, was "the invention of the modern world."[74]

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

> "Monarchy and succession have laid (not this or that kingdom only) but the world, in blood and ashes. 'Tis a form of government which the word of God bears testimony against, and blood will attend it."[75]

We must place ourselves in 1776, at the height of the monarchical regime in the world, to grasp the transcendence of this diatribe, which Paine explained in the chapter on "the Monarchy and hereditary succession" – which in 1811 would be translated into Spanish by Manuel García de Sena.[76] To that chapter, however, Paine added another, perhaps the most important, referring precisely to the subject of North American independence, where he made "thoughts on the present state of American affairs." There, Paine posed directly, based on arguments derived from "the principles of nature and common sense,"[77] the necessary independence of the Colonies, dismantling the arguments that had been formulated in favor of the reconciliation with the Crown, explaining what could be expected if the Colonies separated or remained dependent on the Crown.

Paine analyzed each of the arguments that had been put forward for the Colonies to remain dependent, such as the economic progress they had achieved, the relationship between them through the metropolis, the common descent of the English, to ultimately conclude in the end, that "the authority of Great Britain over this continent is a form of government which sooner or later must have an end," [78] and that it was "repugnant to reason, to universal order of things, to former examples from the former ages, to suppose that this continent can longer remain subject to an external power."[79] Moreover, Paine added: "Reconciliation is and was a fallacious dream,"[80] considering it "very absurd in supposing a continent to be perpetually governed by an island," for "England to Europe, America to itself."[81]

In short, *Common Sense* was the means of expression of "the doctrine of separation and independence[82] of America, to which effect Paine in the book materially designed the manner in which the Colonies were to be organized, how they were to elect their Assemblies, and how to establish a Continental Congress for the new government, and the adoption of a Continental Charter or Charter of the United Colonies, responding to the principle that a "government of our

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

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

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

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

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

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

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

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

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

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

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

own is our natural right,"[83] The Republican proposal was, in short, that "in America the law is King. For as in absolute governments the King is Law, so in free countries the Law *ought* to be King; and there ought to be no other."[84] Paine concluded his manifesto, proposing that America adopt "an open and determined declaration of independence,"[85] further coining the phrase "United States of America"[86] to identify the new State.

All this was affirmed by Paine in January 1776, and it was precisely in accordance with these ideas that the republican regime was forged in North America, based on election and representation, that is, on a representative government, developed in each Colony, grouped together in a Continental Congress; a regime opposed to the system of hereditary monarchical government, Paine considering simply, as he repeated in 1795, that the latter had "no right to exist."[87]

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

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

Despite the colonial antecedents and the proposals made in the Convention, it did not contain a Bill of Rights, except for the right to representative government. It was the protests of the opponents of the new Federal system, led particularly by the antifederalists, during the ratification process that brought about the adoption of the First Ten Amendments to the Constitution, on the 15th of December 1791, containing the American *Bill of Rights*.[88]

5. The French Constitution (1791)

After the American Revolution, the process of constitutionalization of the Rule of Law continued with the French Revolution in 1789 that lead to the adoption of the third modern constitution in the world, the French one, dated September 3, 1791, the second being the Polish Constitution promulgated on the 3rd of May of the same year, 1791.[89]

The French Revolution (1789) took place two years after the approval of the American Constitution and thirteen years after the Declaration of Independence of the United States, developed as a social revolution aimed at liquidating the *Ancien Régime*, represented by an absolute and personal monarchy.[90] The problem here was not how to find a common denominator between thirteen independent states and build a new state from the remains of the English colonies,

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

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

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

86 See Michael FOOT, "Introduction," in Thomas PAINE, *Rights of Man*, Alfred Knopf, New York, 1994, p. xi; Christopher HITCHENS, *Thomas Paine, Rights of Man. A Biography*, Manjul Publishing House 2008, p. 36; and Craig NELSON, *Thomas Paine. Enlightenment, Revolution and the Birth of Modern Nation*, Penguin Books, 2007, p.8.

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

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

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

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

as was the case in the American constitutional process, but rather how to transform an over–centralized state constructed around the old French monarchy, where the State was the Monarch (*L'État c'est Moi*), into a new form of state in which the people, through the concept of the Nation, were to participate. A revolution was needed, and its first result was the weakening of the monarchy itself.

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

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

The Constitution of 1791 adopted a structure that later proved to be classical for the development of modern constitutional law and which has followed in some of the American States' constitutions. This structure established a clear distinction between a dogmatic part, containing individual rights and the limits and obligations of the state power, and an organic part, establishing the structure, attributions, and relations between the various state bodies.[91]

The Constitution began with the Declaration of the Rights of Man and of the Citizen, which had already been adopted by the Assembly on August 26, and approved by the King on the October 5, 1789. This text was inspired by the then recent Declarations issued by the American States emancipated from England, mainly the Virginia Bill of Rights (1776). However, this does not mean that the Declaration was not basically a French one, a pure work of rationalism, inspired directly by the thoughts of Rousseau and Montesquieu.[92]

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

That is why de Tocqueville compared the political Revolution of 1789 with a religious revolution, by saying that in the fashion of great religions, the political revolution established general rules, and adopted a message that spread abroad. This important aspect of the Declaration is related to the fact that the rights declared were natural rights of Man.[93]

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

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

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

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

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91 M. GARCÍA–PELAYO, *op. cit.*, p. 463.

92 J. RIVERO, *Les Libertés Publiques*, Vol. I, Paris 1973, p. 38–42.

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

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

> "There was a sovereign person who was the King. Another sovereign person had to be found to oppose him. The men of the Revolution have found that sovereign person in a moral person: the Nation. They have taken the Crown away from the King and have placed it on the head of the Nation."[94]

However, in revolutionary theory, the Nation was identified with what Sieyès called *le Tièrs (the Third)*, which in the revolutionary *État-Généraux* (Estates General), compared to the other two "estates" (the nobility and the clergy), was the lower state or the nation as a whole. *Qu'est–ce que le Tièrs-État?* Was the question posed by Emmanuel Sieyès in his book, and the answer he gave was *tout* (all), "the entire Nation."[95] The privileged strata was excluded from the concept of Nation, and then confined to the bourgeoisie.

The bourgeoisie, as stated by Sieyès, sought the "modest intention of having in the Estates-General or Assembly an influence equal to that of the privileged,"[96] but the real situation, and particularly because of its economic power and the reaction against privileges, led the bourgeoisie to obtain power, through the French Revolution, with popular support.[97]

The people, in fact, supported the Third Estate, that is, the bourgeoisie, because they had no alternative, in the sense that they could support neither the nobility nor the clergy, who represented the privileges.[98] The French Revolution, therefore, has been considered a Revolution of the bourgeoisie, for the bourgeoisie, and by the bourgeoisie,[99] and was basically an instrument against privileges and discrimination, and for seeking the equality of all men in the enjoyment of their rights.

Thus, the Declaration of Rights of Man and Citizen was qualified as being "the ideological expression of the triumph of the bourgeoisie."[100]

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

> "The source of all sovereignty is essentially in the nation; no body, no individual can exercise authority that does not proceed from it in plain terms."[101]

Therefore, after the Revolution, the basis of public authority in France ceased to be the divine right of the personal monarch and started to be the sovereignty of the Nation (*souveraineté nationale*), that was not to be exercised directly by the Nation, but through its representatives.[102]

Thus, the French Constitution although having a monarchical character, was also a representative constitution, since the Nation exercised its power through representatives, and it is precisely in the structure of representation that the social significance of the Revolution was

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

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

96 *Idem*, p. 135.

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

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

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

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

101 Art. 3.

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

specifically reflected, because, in according to the system of suffrage that was established, a large number of citizens was excluded from the electoral activity.[103]

Moreover, the French Constitution established another principle of modern public law, which was particularly developed in France, and which is summarized in the following statements: "There is no authority in France superior to that of the law"[104] and the law was considered "the expression of the general will."

This is an affirmation of the Rule of Law and of the idea that it is not men who command, but laws. Hence, the State bodies could demand obedience only insofar as they are an expression of the law, to the extent, said the Constitution, that the King himself "only reigns by law, and it is only in the name of the law that he can demand obedience."[105]

As aforementioned, the first Constitution of France of 1791, despite of the Revolution, continued to establish a monarchical government: the exercise of the executive power and a share, though very limited, of the legislative power was conferred upon the King. However, he was nothing more than the chief public official; he was considered a delegate of the Nation, subject to the sovereignty of the law. Consequently, the Monarch became for the first time a body of the State, and the ancient institution of divine right became a body of positive law. The King became king of the French people instead of king of France.[106]

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

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

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

The assembly, for its part, had no control over the executive, since the king's person was sacred and inviolable; ministers were only subject to criminal responsibility. However, the assembly had important executive attributions such as the appointment of principal officials, the surveillance of departmental administration, the declaration of war, the ratification of treaties, etc.[107]

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

> "Judiciary functions are and shall always be separate from administrative functions. Any interference by judges in the activities of the administrative bodies, or any summons issued to the administrators by the said judges, for reasons relating to their functions, shall constitute a breach of duty."[108]

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

> "The Courts are forbidden, under penalty of law, to take cognizance of administrative acts, whatever their nature."[109]

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

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

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

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

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

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

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

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

On the other hand, in the concept of Parliament and the law resulting from the French Revolution, any kind of control over the constitutionality of the laws in continental Europe was inconceivable, and this continued to be the case up to the beginning of the last century, when it was established in the Austrian Constitution (1920).[110] That is why, at the beginning of the functioning of the Constitutional Council in France according to the 1958 Constitution, the judicial review system established was a precarious direct *ex post* system of control of the constitutionality of laws (i.e. with respect to enacted laws); and, in other European countries, it was only in the twentieth century post-war periods, in the twenties and from the forties, when systems of jurisdictional control of the constitutionality of laws were established.

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

Consequently, the ways and means of control over the state were even more organized than the state itself.[111]

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

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

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

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

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

monarch, eliminated his absolutism, and completely took his place, which led to an increase in the power of the state itself.

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

After the American and French revolutions aimed at creating a republican federal state in the American case or to transform an absolute monarchical state into a representative one in the French case, the constitutionalization process of the Rule of Law was followed during the nineteenth century all over the world, mainly in Latin America and Europe.

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

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

Therefore, for example, in the most recent Latin American Constitutions, following the remote antecedent of the Federal Constitution of the States of Venezuela of 1811, the principle of constitutional supremacy has been expressly enshrined, as is the case of the Constitution of Colombia, which provides that "The Constitution is the norm of norms" and therefore "in any case of incompatibility between the Constitution and the Law or any other legal norm, the constitutional provisions shall apply" (Art. 4). Similarly, the 1999 Constitution of Venezuela established that "The Constitution is the supreme norm and the foundation of the legal order," to which "all persons and the organs exercising the Public Power" are subject. (Art. 7).[112] In addition, "to comply with and abide by" the Constitution (Art. 131) is one of the constitutional duties of citizens and officials.

But, of course, for a Constitution to be effectively the supreme law of a society, it must be the product of society itself, without impositions. Constitutions imposed by a political group on the rest of the members of society have, therefore, not only a precarious supremacy, but, in general, a duration limited to the presence in power of the group that imposed it.

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

All this implies that in the contemporary world, in relation to the Constitution, we can speak of the existence of a citizen's right to the Constitution and its supremacy.[113] That is to say, if the

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

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

Constitution is the product of a social pact formulated by the people, of mandatory observance by the governors and the governed, the people themselves, collectively, and also, all its members individually considered, have an essential right to have that Constitution respected, to have it maintained in conformity with the popular will that expresses it and to have it be supreme. From this derives the fundamental right of every citizen to the supremacy of the Constitution.[114]

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

> *"A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."*[115]

From this statement derives, in addition to the power of judges to control the constitutionality of laws, the essential postulate that the Constitution, as a product of the will of the people, must always prevail over the intention of those who govern. This is, precisely, the basis of the citizen's right: that the popular will expressed in the Constitution be respected by those who govern, who in their management cannot purport to make their will prevail over the popular will of the people expressed in the Constitution.

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

> *"It only supposes that* the power of the people is superior to both*; and that where the will of the legislature, declared in its statutes stands in* opposition to that of the people declared in the constitution*, the judges ought to be governed by the latter rather than the former."*[116]

Hamilton concluded by noting that:

> *"No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master;* that the representatives of the people are superior to the peoples themselves."[117]

What is most interesting to note in these propositions by Hamilton, apart from the power of the U.S. Supreme Court to declare that state and federal laws that are contrary to the Constitution are null and void,[118] which obviously had a fundamental impact on the development of constitutional justice systems as a materialization of the right to constitutional supremacy; it is the very idea explained above that since the Constitution is a manifestation of the will of the people, the main constitutional right of citizens is the right to the Constitution and its supremacy, that is, to respect for the will of the people as expressed in it.

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

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

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

116 *Idem*

117 *Idem*

118 See the comments on the leading cases *Vanhorne's Lessee v. Dorrance*, 1776 and *Masbury v. Madison*, 1803, in Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

Now, the fundamental consequence of the express enshrinement of this principle of constitutional supremacy in the Constitutions, such as the aforementioned example of Colombia and Venezuela, has been the provision, in the constitutional text itself, of a whole system designed to protect and guarantee this constitutional supremacy over the laws, based on the judicial review or control of their constitutionality, which is undoubtedly one of the fundamental pillars of contemporary constitutionalism and the Rule of Law.[119] All this has resulted in the express enshrinement of the constitutional right of citizens to the judicial protection of such supremacy, either through the systems of diffuse control of constitutionality exercised by all judges (Art. 4, Colombia; Art. 334, Venezuela) or through the concentrated control of the constitutionality of laws exercised by the Constitutional Jurisdiction, as is the case of the Colombian Constitutional Court (Art. 241) or the Constitutional Chamber of the Supreme Court of Justice in Venezuela (Art. 336).[120] In addition, the Constitutions provide for habeas corpus, habeas data, or *amparo* actions (actions for the protection of fundamental constitutional rights) (Arts. 30 and 86, Colombia; Art. 27, Venezuela).

Therefore, Modern constitutionalism, in our opinion, is based not only on the principle of the Constitution as the supreme norm, but also on the citizen's right to it and to its supremacy,[121] which, in accordance with the principle of the separation of powers, takes the form of a fundamental right to judicial protection of the supremacy of the Constitution, both with respect to the organic part of the Constitution and to its dogmatic part, for whose preservation a set of guarantees are established. This right also implies, as regards the organic part of the Constitution, the citizen's right to the separation of powers and the right to the territorial distribution of power or to the autonomy of the territorial political institutions; and, regarding the dogmatic part, the right to the effectiveness and enjoyment of constitutional rights through the guarantees established in the Constitution.

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

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

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

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

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

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

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

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

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

In some ways, as Sylvia Snowiss noted in her historical analysis of the origins of judicial review in North America, it can be said that it emerged as a substitute for revolution,[122] in the sense that if citizens, as a sovereign people, have the right to constitutional supremacy, any violation of the Constitution could lead to the revocation of the mandate of the representatives or their replacement by others, and a right to resistance or revolt could also be invoked, as defended by John Locke.[123]

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

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

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

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

This article constitutionally enshrines what modern political philosophy has described as civil disobedience,[124] which is one of the peaceful forms in which the aforementioned right of resistance is manifested, which had its historical origin in the aforementioned right to insurrection expressed by John Locke. Moreover, it has its remote constitutional antecedent in the French Constitution of 1793 in whose article 35, which was the last of the articles of the Declaration of the Rights of Man and Citizen that preceded it, established that "When the government violates the rights of the

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

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

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

people, insurrection is, for the people and for every portion of the people, the most sacred of rights and the most indispensable of duties."

This norm, which was typical of a revolutionary government such as that of the Reign of Terror, was undoubtedly anomalous and soon disappeared from the annals of constitutionalism. However, this has not prevented the appearance in some contemporary versions of Constitutions , which although they do not refer to the right to insurrection, enshrine the right to rebellion against governments of force, as is enshrined, for example, in Article 333 of the Venezuelan Constitution, which establishes the duty of "every citizen, whether or not vested with authority, to collaborate in the reestablishment of the effective validity of the Constitution," if the same should lose "its validity or cease to be observed by an act of force or because it is repealed by any means other than as provided for therein." This is the only case in which a pacifist Constitution, such as the Venezuelan Constitution of 1999, admits that there may be an act of force to react against a regime that by force has broken the Constitution.[125]

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

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

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

II. JUDICIAL REVIEW OF LEGALITY AND CONSTITUTIONALITY OF THE ACTS OF THE STATE

Derived from the principle of Constitutional Supremacy, among the other fundamental principles or indicators that characterize the Rule of Law in contemporary constitutional law, the most important common element among all is that it implies that the State is, above all, a State with limited powers in order to guarantee freedom, a limitation that is established through a system of distribution of power.

The Rule of Law, in this perspective, is also the contrary to the absolute state, and this limitation of powers is expressed in three sorts of state power distribution: in the *first place*, by a distinction between the powers of the state themselves and an area of liberties, freedoms and rights of citizens that are beyond the sphere of state action. In the *second place*, by a distinction in the state between constituent power, attributed to the people as sovereign electorate, which demonstrates its activity normally through a written constitution and the constituted powers, represented by the organs of the state, comprising the legislature, all submitted to the constituent powers will. Finally, in the *third place*, by a separation of powers within the constituted organs, in a vertical and horizontal way. In the vertical way, the separation of powers leads to a system of political decentralization throughout state organs at various territorial levels, including the federal form of the state. In the horizontal way, the separation of powers leads to the classical division between the legislative, executive and judicial organs, with their respective powers in a checks and balances system with established mutual interference and restraint.

The other main feature of the Rule of Law, besides the distribution and separation of powers, is that the state is submitted to the law, in the sense that all state organs are submitted to limits

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

imposed by the law. Therefore, the only body not submitted to legal limitations is the sovereign, identified in most States with the people as electoral body. This is, as we have said, the constituent power whose actions are normally reflected in a written constitution.

In relation to the state organs, however, the rule of law or the principle of legality implies their necessary submission to the law, varying the scope or ambit of legality, in relation to the level that the particular acts of those state organs have in the graduated or hierarchical system of rules of law that, in general, can be established in all legal systems. In this context, we have said that legality in relation to state organs means "legal order" and not just an act of the legislative organ.

Therefore, legality could just mean "constitutionality," or submission to the constitution, if a particular act is issued in direct execution of the constitution; or "legality" in a broader sense, as submission to the legal order, if a state act is issued in indirect execution of the constitution. Regarding the administration, this is the traditional meaning of legality.

Finally, apart from the principles of distribution of powers and of the submission of the state to the rule of law, we have also referred to the third main feature of the modern Rule of Law state, that of the establishment of an entrenched Bill of Rights, as a guarantee to individuals against state organs, normally in a written constitution.

These three main characteristics of the *État de droit*, in contemporary constitutional law, have been constitutionalized, in the sense that they have been formally established in a written and rigid constitution. Therefore, the *État de droit* implies that the principles of distribution and separation of powers, the subjection of the state organs to the rule of law, and the declaration of rights and liberties must all be embodied in a written constitution formulated in an entrenched way so as to be protected from changes introduced by the ordinary legislator.

However, all these principles of the Rule of Law and their establishment in a written and rigid constitution require some means of protection to guarantee the existence of the limits imposed on the state organs and on the enjoyment of individual rights. In this respect, the argument of John Marshall in the famous *Marbury v. Madison case* decided by the United States Supreme Court in 1803 was precise:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine
>
> the persons upon whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."[126]

Moreover, along the same line of reasoning we can ask to what purpose are state powers limited, to what purpose is the principle of legality established, to what purpose are fundamental rights and liberties formally declared, and to what purpose are all those principles committed to writing in a constitution considered as fundamental law, if there is no means for guaranteeing the existence and permanence of said limits, of the state organs' submission to legality and of the effective enjoyment of the citizens' rights and liberties?

Therefore, the Rule of Law, with all its characteristics, only exists if these means of protection of the Constitution and of legality are established, and if the judiciary is in charge of enforcing those means of protection.[127] Consequently, the courts in the Rule of Law state must ensure the effectiveness of the limits imposed on the state organs, their submission to the rule of the constitution and to the principle of legality, and the enjoyment of the fundamental rights and liberties of individuals.

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[126] *Marbury v. Madison*, 5.U.S. (1 Cranch) 137; (1803); 2 L, Ed 60 (1803). See the text in R.A. ROSSUM and G. A. TARR, *American Constitutional Law*. *Cases and Interpretation*, New York 1983, p. 70.

[127] See, in general, H. KELSEN, "La garantie juridictionnelle de la Constitution (La justice constitutionnelle)", *Revue du droit public et de la science politique en France et à l'étranger*, T. XLV, Paris 1928, p. 197-257.

Thus, there is no Rule of Law, if there is no power granted to the courts of the state to control the submission of the state organs to the rule of law.

Therefore, we can say that the basic element of the Rule of Law or state submitted to the rule of law or to the principle of legality is the existence of a system of judicial review, aimed at controlling that submission to the rule of law of all the state acts, particularly, of legislative, administrative, and even judicial acts. The two fundamental objectives of this system of judicial review are obviously: one, to ensure that all those acts of the state are adopted or issued in accordance with the law of the said state, and two, to ensure that state acts respect the fundamental rights and liberties of citizens.

Thus, we can distinguish two main judicial review systems in the contemporary Rule of Law: On the one hand, a system which seeks to control the conformity of all state acts to the law; and on the other hand, a system which seeks to guarantee the fundamental rights and liberties of individuals; both giving individuals, precisely, a fundamental right to accede to justice by means of judicial actions aimed at obtaining such control.

1. Judicial control of the conformity of State acts with the rule of law

As we said, the first of these systems of judicial review or control has the purpose of ensuring the effective submission of state acts to the rule of law or to the principle of legality. However, as we have seen, the sphere or confines of "legality" are certainly not the same for all state acts. In other words, "legality" does not mean the same for all acts of the state. Its meaning or the confines of legality for each of these acts, depends on the rank that the specific act holds in the legal order, particularly in relation to the constitution or to the supreme law of the land.

So, one distinction above all can be traced in legal systems with written constitutions, namely that between state acts that are issued in direct execution of the constitution, and acts that are issued in indirect execution of the constitution. This distinction between state acts leads, of course, to a distinction between the systems of judicial review or control that are laid down.

In effect, as we have studied, there are some state acts that are adopted in direct execution of the constitution, in the sense that they are acts that have their origin in powers granted directly in the constitution and to the state organ that produces them, and to which they must be submitted.[128] In relation to these acts, the system of judicial review has and can only have the purpose of ensuring that the said acts are issued or adopted in accordance to the constitution itself. In this case, as Hans Kelsen pointed out in 1928:

> "The guarantee of the constitution means guarantees of the regularity of the constitution's immediate subordinated rules, that is to say, essentially, guarantee of the constitutionality of laws."[129]

Therefore, with regard to those acts of the state, "legality" as we already know, is equivalent to "constitutionality," and judicial review or control of legality is also equivalent to judicial control or review of the constitutionality of such acts.

Of course, this distinction between acts issued in direct execution of the constitution and acts issued in indirect execution of the constitution, and consequently, the distinction between judicial control of constitutionality and the judicial control of legality only exists, in the strictest sense of the term, in those legal systems possessing a written constitution as a fundamental law constituting the superior source of the whole legal order. Therefore, in systems without a written constitution, and where acts of Parliament are the supreme law, this distinction cannot be made and a system of judicial review of constitutionality cannot exist.

On the contrary, this control of constitutionality in legal systems with written constitutions has been developed particularly in relation to legislative acts, especially to normative acts of

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[128] See, on the graduated and hierarchical system of the legal order, what has been said in *Part Four* of this book.

[129] H. KELSEN, *loc.cit*., p. 201.

Parliament. Hence, one usually speaks of judicial control of the constitutionality, of legislation or simply of "judicial review of the constitutionality of legislation."[130]

In effect, if Parliament, Congress or the National Assembly, as a representative of the sovereign people, is and must be the supreme interpreter of the law, and through the law, of the general will, it always does so in execution of constitutional rules, particularly in those cases where a written and rigid constitution exists, which cannot, therefore, be changed by the ordinary legislator. Consequently, the law, as an act of Parliament, is always submitted to the constitution, and when it exceeds the limits established by that constitution, the act of Parliament is unconstitutional and, therefore, liable to be annulled. As stated in the *Marbury* v. *Madison case* by the United States Supreme Court in 1803:

> "Certainly, all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void."[131]

Therefore, judicial review or control of the constitutionality of laws gives the courts the possibility of determining their unconstitutionality and deciding not to apply them, giving preference to the provisions of the Constitution, and in some cases allowing some special courts to declare the nullity of the law that has been deemed unconstitutional, with general effects.

It has been said that judicial review is the most distinctive feature of the North American constitutional system,[132] and we must add that, in fact, it is the most distinctive feature of almost all the constitutional systems in the world today.

All over the world, with or without similarities to the North American system of judicial review, the courts –special constitutional courts or ordinary courts– have the power to declare a law unconstitutional. Accordingly, they have the power to refuse to enforce it, because it is considered null or void, and in some cases, they have the power to declare the annulment of the said unconstitutional law.

As it is known, the system of the United Kingdom has been traditionally different; the lack of judicial review of legislation having been the classical feature that also distinguishes the British constitutional system. That is why, decades ago, D.G.T. Williams said:

> "Most British judges and the vast majority of British lawyers must have had little or no contact with the problems and workings of judicial review."[133]

This substantial difference between the constitutional systems of the United Kingdom and, in general, the other constitutional systems in the world, derived from a few but very important principles, unique to the British constitution, and influencing all of them. It is the principle of the sovereignty of Parliament, called by Dicey the "secret source of strength of the British constitution" or the "element of power which has been the true source of its life and growth."[134]

This principle, with all its importance in constitutional law in Great Britain, has been, at the same time, the most powerful obstacle to the judicial review of the constitutionality of legislation. It has implied that even if it is true that the courts in the United Kingdom are the ultimate guarantors of the rule of law, they are bound to apply to an Act of Parliament whatever view the judges could have taken of its morality or justice, or of its effects on important individual liberties or human right.[135] This has been so due to the absence of a written constitution in the modern constitutional form, with its entrenched declaration of fundamental rights and liberties.

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130 M. CAPPELLETTI, *Judicial Review in the Contemporary World*, Indianapolis 1971, p. VII.

131 *Marbury v. Madison*, 5.U.S. (1 Cranch), 137; (1803); 2 L, Ed. 60, (1803).

132 E.S. CORWIN, "Judicial Review," *Encyclopaedia of the Social Sciences*, Vol. VII–VIII, p. 457.

133 D.G.T. WILLIAMS, "The Constitution of the United Kingdom", *Cambridge Law Journal*, 31, (1) 1972–B, p. 277.

134 A.V. DICEY, *England's Case Against Home Rule* (3rd. ed. 1887), p. 168 quoted by D.G.T. WILLIAMS, *loc. cit*., p. 277.

135 T.R.S. ALLAN, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism", *Cambridge Law Journal*, 44, 1, 1985, p. 116.

It will suffice at this point to quote the words of Lord Wilberforce in the House of Lords case of *Pickin* v. *British Railways Board* in 1974, in a conclusive way regarding the consequences of parliamentary sovereignty, and also concerning the traditional absence of judicial review of legislation. In that particular case, it was stated:

> "The idea.... that an Act of Parliament, public or private, or a provision in an Act of Parliament, could be declared invalid or ineffective in the courts on account of some irregularity in Parliamentary procedure, or on the ground that Parliament in passing it was misled, or on the ground that it was obtained by deception or fraud, has been decisively repudiated by authorities of the highest standing from 1842 onwards. The remedy for a Parliamentary wrong, if one has been committed, must be sought from Parliament, and cannot be gained from courts."[136]

This traditional and radical situation undoubtedly has changed in the past decades. It is true that the British Constitution is not a single and overarching written document like the constitutions of other contemporary democratic states.[137] Furthermore, it is not possible, in principle, to formally distinguish a constitutional statute from an ordinary statute. Nonetheless, the British Constitution undoubtedly exists, and it is possible to attach the label "constitutional" to some legal[138] and nonlegal rules,[139] called "conventions of the Constitution," which are considered binding rules of political morality and called the "common law constitution," as a set of legal principles and rules that have been laid down over time, typically by judges.[140]

It is possible, therefore, to identify a judicial process of controlling the subjection of statutes to these conventions, which can be called "constitutional review."[141] As it has been summarized by John Bell:

> "Britain has neither "specific constitutional or statutory provisions that empower constitutional judges, by means of interpreting the Constitution, to adopt obligatory decisions on constitutional matters" nor specific decisions on constitutional matters. But this would be too simplistic an approach. The nature of a common law constitution is that the basic "rules of recognition" (H. L. A. Hart) are not contained in statute, but are in the common law. The principles are rather like the "fundamental principles recognized by the laws of the Republic" in French law, which are not laid down by statute, but which are judicially identified, even if formally not created by judges. There do arise a number of issues on which ordinary judges have to make decisions which are binding and which could be characterized as constitutional."[142]

In this respect, regarding the conventions to the British Constitution, it is also possible to call this process of constitutional review – of course, in its own historical context – a judicial control of conventionality.

However, in other constitutional matters, given the evolution of the British Constitution after the creation of a Supreme Court in 2009, it is also possible to distinguish constitutional review

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136 A.C. 765 (1974)– See the text also in O. HOOD PHILLIPS, *Leading Cases in Constitutional and Administrative Law*, London 1979, pp. 1–6. See the comments in P. ALLOTT, "The Court and Parliament: Who whom?" *Cambridge Law Journal*, 38, 1, 1979, pp. 80–81.

137 See, on the British Constitution, what has been said in *Part One* of this book.

138 An example is the agreement reached by the Prime Ministers of the British Empire in 1931 for the U.K. Parliament to not legislate for Dominions without consent of their parliaments. See John BELL, "Constitutional Courts as positive Legislators. British National Report," in Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2010, pp. 803 ff.

139 One example is the Nolan principles (1995), which govern standards in public life and introduce a set of values governing the holders of a range of public offices. See John BELL, "Constitutional Courts as positive Legislators. British National Report," in *Idem*

140 *Idem*.

141 *Idem*.

142 *Idem*.

powers exercised by the courts. This is the case on matters of devolution, regarding the control of the validity of the legislation of the three devolved assemblies (Wales, Scotland, and Northern Ireland) that can be referred to the Supreme Court by the British Secretary of State, the British Attorney General, or the national Attorneys General (or equivalent), or by the national courts before which the issue is raised.[143]

In this regard, w one must refer to one recent decision in which the Supreme Court exercised judicial review, issued in November 2022, rejecting a proposal for a "Scottish Referendum Bill" containing a question of whether Scotland should "be an independent country." The Supreme Court considered it a "reserved matter" (not a devolution issue), contrary to the constitutional principles of the "Union of the Kingdoms of Scotland and England" (that is contrary to the integrity of the United Kingdom) and contrary to the "Parliament of the United Kingdom" (that is contrary to the sovereignty of the British Parliament).[144]

Another important case that must be mentioned regarding judicial review in the United Kingdom is the decision issued by the High Court of Justice *(Queen's Bench Division, Divisional Court*) of the United Kingdom, on November 3, 2016 (Case: *Gina Miller* et al. v the *Secretary of State for Exiting the European Union),* [145] to decide on the constitutional matter of whether, under the constitutional order of Great Britain, it was possible for the Government, in exercising the Crown's prerogative powers and without the intervention and prior decision of Parliament, to decide to serve notice on the European Union, under Article 50 of its Treaty, of the decision on the United Kingdom's withdrawal from said Union, pursuant to the people's recommendation expressed in the referendum of June 23, 2016.

To decide on the proposed constitutional matter, the High Court confirmed that in the United Kingdom, as a constitutional democracy, the bodies of the State are subordinated to the rule of law, wherefore the courts of the United Kingdom, as stated by the High Court itself, have a:

> "Constitutional duty fundamental to the rule of law in a democratic state to enforce the rules of constitutional law in the same way as the courts enforce other laws."

This statement by the High Court is without doubt one of the clearest acknowledgements by the British judicial bodies regarding the existence of a constitutional jurisdiction in the United Kingdom,[146] based on which the High Court, exercising its power of judicial review, confirmed that in order to decide on this specific case, it was precisely called upon to:

> "Apply the constitutional law of the United Kingdom to determine whether the Crown has prerogative powers to give notice under Article 50 of the Treaty on the European Union to trigger the process for withdrawal from the European Union."[147]

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143 *Idem.*, p. 2.

144 Case: Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act of 1998, Judgment given on November 23, 2022. Available at: https://www.supreme court.uk/cases/docs/uksc-2022-0098-judgment.pdf

145 *Idem*.

146 See Allan R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, New York 2011, p. 25.

147 The High Court decision was ratified by the Supreme Court of the United Kingdom in a judgment issued on February 24, 2016 (Case: *R (on the application of Miller an another) v Secretary of State for Exiting the European Union)* ([2017 UKSC 5) (UKSC 2016/0196). Available at: in: https://www.supremecourt.uk/cases /docs/ uksc-2016-0196-judgment.pdf See press information on the decision in https://www.supremecourt.uk/cases/docs/uksc-2016-0196-press-summary.pdf. See on this decision the comments in Allan R. BREWER-CARIAS, **"**The "Brexit" Case Before the Constitutional Judges of the United Kingdom: Comments regarding the Decision of the High Court of Justice of November 3, 2016, confirmed by the Supreme Court in Decision dated January 24, 2017," in *Revue européenne de droit public*, *European Review of Public Law*, ERPL/REDP, vol. 31, no 1, Spring/Printemps 2019, *European Group of Public Law* (*EGPL*), pp. 77-103.

All this set clear that the United Kingdom has a constitution as supreme rule that prevails over State decisions, and that the courts have judicial review powers over state decisions.[148]

This judicial review of the constitutionality of legislation, in other words, of laws and other legislative acts, requires at least three conditions for it to function in a given constitutional system. In the first place, it requires the existence of a constitution, generally a written one, conceived as a superior and fundamental law with clear supremacy over all other laws. Second, such a constitution must be of a "rigid" character, which implies that the amendments or reforms that may be introduced can only be put into practice by means of a particular and special process, preventing the ordinary legislator from doing so. And third, the establishment in that same written and rigid constitution, of the judicial means for guaranteeing the supremacy of the constitution over all other state acts, including legislative acts.

Judicial review of legislation as the power of courts to decide upon the constitutionality of legislation has been considered one of the main contributions of the North American constitutional system to the political and constitutional sciences.[149] However, the so–called "American system" of judicial review is not the only one that exists in present constitutional law. There is also the so-called "Austrian system" of judicial review, originally established in the 1920 Austrian Constitution and the mixed systems, mainly in Latin America, that have adopted the main feature of both the American and Austrian systems.

The main distinction between both systems of judicial review of legislation, the American and the Austrian, is based on the judicial organs that can exercise this power of constitutional control: [150] The "American system" entrusts that power of control to all the courts of a given country. It is for this reason that the system is considered a decentralized or diffused one. On the contrary, the "Austrian system" entrusts the power of control of the constitutionality of laws either to one existing court or to a special court, and it is therefore considered a centralized or concentrated control system.

In any case, in legal systems with judicial review of constitutionality, all acts of the legislature other than formal laws, which are also issued by Parliament in direct execution of the constitution, can likewise be submitted to judicial control of constitutionality. This is the case, for example, of internal regulations for the functioning of legislative bodies, and of parliamentary acts of specific effect, issued for the purpose of authorizing or approving some executive acts, like the appointment of some officials, or the adoption of some budget changes. All these acts, in written constitutional legal systems, are subject to and must be adopted according to the constitution, and therefore, can be judicially controlled to ensure their submission to the fundamental rules of the constitution.

Moreover, not only the acts of legislative bodies are subject to judicial control of constitutionality. In general, all acts of state bodies and organs issued in direct and immediate execution of the constitution are also subject to such control.

In particular, acts of government with or without the same force of formal law, issued by the head of state or by the government in direct execution of powers provided for directly in the constitution, and which due to the distribution of powers, cannot be regulated by Parliament, are also subject to judicial control of constitutionality.

In short, it is through this system of judicial review of the constitutionality of state acts that the effective submission of state organs to the constitution can be ensured when they execute it

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148 Something that had not been readily accepted some decades ago. See Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

149 J.A.C. GRANT, "El control jurisdiccional de la constitucionalidad de las leyes: una contribución de las Américas a la Ciencia Política", *Revista de la Facultad de Derecho de México*, 45, 1962, pp. 417–437.

150 See, in general, regarding judicial review: Allan R. BREWER-CARÍAS, *Judicial Review in Comparative Law. Course of Lectures, Cambridge 1985-1986*, Ediciones Olejnik, Santiago, Buenos Aires, Madrid 2021; *Judicial Review. Comparative Constitucional Law Essays, Lectures and Courses (1985-2011)*, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014, 1197 pp.; *Judicial Review in Comparative Law*, (Prólogo de J. A. Jolowicz), Cambridge Studies in International and Comparative Law. New Series, Cambridge University Press, Cambridge 1989, 406.

directly. Therefore, this is possible only in legal systems with written constitutions, where the courts have such powers of judicial review.

Consequently, when there is no written constitution, or when although this fundamental law exists, the courts do not have the power to control the constitutionality of legislative acts, the legal situation is very similar.

As J.D.B. Mitchell pointed out:

> "The mere fact of there being a written Constitution does not by itself necessarily mean that courts play any greater role in protecting individual rights or policing the Constitution.
>
> Where there is such a Constitution but courts do not possess the power to declare legislation unconstitutional, the only means by which the courts can protect the basic principles of that constitution from encroachment of erosions is by the restrictive interpretation of legislation. In such circumstances the position of the courts and the protection for fundamental constitutional principles do not differ materially from those which exist when there is no written Constitution."[151]

Therefore, the real difference between a legal system with a written constitution and one without a written constitution really lies in the powers granted to the courts to control the constitutionality of state acts. Mitchell also mentioned this in relation to the British constitutional system:

> "The real contrast with our own system is afforded by a system under which there is not only a written constitution but also a recognised power in the courts to declare legislation invalid as being unconstitutional."[152]

In any case, the control of the constitutionality of formal laws, or of any other state act issued in direct execution of the constitution, is only possible in those constitutional systems possessing a written constitution and, furthermore, where the constitution is rigid, that is, it cannot be changed through the channel of ordinary legislation.

The rules established in this type of constitution are, of course, applied directly, and the constitution itself occupies a pre–eminent rank in the hierarchy of the legal order. In this respect, it is precisely in the countries where the courts have been granted the power to control the constitutionality of the laws that the juridical–normative nature of the constitutions and their mandatory character is clearest. Likewise, it is in those countries that the principle of the hierarchical pre–eminence of the constitution in relation to the ordinary laws has its origin.

This first system of judicial review of constitutionality, particularly of legislation, is generally organized in two ways: by assigning the power to decide upon the unconstitutionality of laws to all the courts of the particular judicial order of a state, or by reserving that power to one judicial organ only, the Supreme Judicial Court of the country or to a special constitutional court or tribunal, giving rise to the distinction between the diffuse and concentrated systems of judicial review of constitutionality.

Apart from state acts adopted in direct execution of constitutional powers granted to state organs, such as the legislative acts and acts of government, there are other state acts adopted in direct execution of the "legislation", that is to say, the first level of constitutional execution, whose legality not only means submission to the constitution, but also to all the other rules of law comprised in the legal order. Therefore, in relation to those acts, particularly administrative and judicial acts, "legality" means submission to the legal order considered as a whole, and the rule of law must provide the means for judicial control or review to ensure the effective submission of the state organs to the rule of law when issuing such acts. This has led to the establishment of systems of judicial review of administrative actions and of judicial review of judicial decisions themselves in the modern Rule of law state.

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151 J.D.B. Mitchell, *Constitutional Law*, Edinburgh 1968, p. 13.

152 *Idem*, p. 13.

Regarding the judicial review of administrative action, or judicial control of administration, one can say that it is more developed in modern constitutional and administrative law, particularly as a result of the submission of administration to the principle of legality. So important has this system of judicial review been, that one can even say that judicial review of administrative action has given rise to the development of administrative law itself, not only in Continental European countries but also in common law countries. It is through the exercise by the courts of their inherent power to control the legality of administrative action, that the fundamental principles of administrative law have been developed, particularly during the last century.

Therefore, judicial review of administrative action is the power of the courts to decide upon the legality of the activities undertaken by the administrative organs of the state, in other words, to decide in relation to the submission of the activities of the executive organs of the state to the law or rather to the principle of legality. Law, understood in this context, means legal order, that is, not only the formal law, but also all the norms and rules that are comprised in the legal order, including, of course, the constitution itself.

There is a substantial difference regarding the organization of judicial review of administrative action, between the legal systems influenced by the European continental countries, mainly France, and the systems influenced by the Anglo–American common law countries. Judicial review in the Latin and German tradition is the power of special courts to decide on the legality of administrative action, when demanded through special judicial means, or actions granted to individuals with the necessary standing to bring an action to declare a particular administrative act void.

This led to the development *of* the *contentieux administrative* recourses in Continental Europe and Latin America that are to be decided by special judicial–administrative courts.[153]In some cases, these special courts were established completely separated from the ordinary courts, as is the case in France of the *jurisdiction contentieux administrative*. In other cases, the special judicial administrative courts are established within the ordinary judicial order, in the same manner as there are special courts on labor law, civil law or commercial law. In all these cases, not only are the remedies for judicial review, special ones, but the courts that are to exercise the review power, are also special.

By contrast with this situation, the common law tradition on judicial review generally implies that the ordinary courts of justice are the ones that exercise the power of judicial review of administrative action through the ordinary remedies established in common law and also used in private law, although it is certain that in more recent times special remedies of public law have been developed.

Nevertheless, all over the world, the most traditional and popular judicial control of the submission of the state to the rule of law has been the judicial review of administrative action.

However, the term Rule of Law or *État de droit* does not only imply the need for systems of judicial review of the constitutionality of legislation and acts of government, and the judicial review of administrative action, in other words, the judicial control of legislative and administrative action to ensure its conformity with the rule of law, but also the need for establishing a system of judicial control of judicial decisions themselves.

The courts are, in effect, typical "executive" bodies of the state. Consequently, all their activities in the application of the law must be submitted to the whole legal order, comprising the constitution, the formal laws and delegate legislation, and the regulations and other normative acts of the state organs. Consequently, in the *État de droit*, court decisions must be also subject to judicial control, which is normally implemented through two mechanisms.

On the one hand, the ordinary appeal systems that allow for control of the decisions of the inferior courts by the superior courts, within the hierarchy of the judicial system; and, on the other, the system of control of the legality of judicial decisions through extraordinary remedies, as

[153] See regarding the Hispanic American countries : Allan R. BREWER-CARÍAS, *La justicia administrativa en América Latina***,** Ediciones Olejnik, Buenos Aires, Santiago de Chile, Madrid 2019.

happens in continental law, for example with the *recours de cassation*, developed in the systems influenced by continental European procedural law.

By these means of control, Supreme Courts have the power to verify the legality of decisions made by inferior courts, and deciding upon them, considering the merits of the decision under appeal, or just controlling the legal aspects of the decision in the recourse of cassation. In this case, it is also a matter of control of the legality of state acts.

All these three systems of control of the submission of the state organs and acts to the rule of law, the control of the constitutionality of legislation, the judicial review of administrative action, and the judicial control of court decisions, are basically a question of formal control, which seeks to determine the conformity of state decisions with the superior rules contained in the legal order, applicable to the specific act. Of all three, the first one related to the control of the constitutionality of legislation, the protection of the constitution being its fundamental objective when its norms are executed directly by state organs.

2. Judicial guarantees of Fundamental Rights

Apart from these judicial systems of control of state acts to ensure their submission to the principle of legality or to the rule of law, there is another system of control of state actions aimed at the protection of fundamental rights and liberties generally established in the constitution and which is normally established in the constitution as a guarantee for the effective fulfilment of such rights and liberties.

We have seen, in effect, that the principle of distribution of powers in the legal state, expresses itself in various ways, among them, in a system of distribution of powers between, on the one hand, the sphere of the citizens and individuals to whom the constitution grants various fundamental rights and liberties that only be eliminated or restricted by the means established in the constitution; and, on the other hand, the powers of the state organs. This distribution of powers is normally established in a written constitution or in an entrenched Bill of Rights, so that encroachments on the sphere of fundamental rights and liberties by the state, or even by other individuals, are subject to judicial control or protection.

This judicial protection of fundamental rights, in the end, is also a protection of the constitution itself because such rights and liberties are established in the constitution, and therefore, all violations or infringements upon such rights and liberties are at the same time, violations of the constitution.

The Rule of Law has developed mechanisms to assure the protection of these fundamental rights and liberties and to avoid their violation mainly by public bodies, either by actions brought before the ordinary courts through ordinary actions or remedies, like the injunctions, or by special actions of protection brought before ordinary courts or before a special constitutional court, like the *amparo* proceeding. [154]

In fact, the judicial guarantee of constitutional rights can be achieved through the general procedural regulations that are established in order to enforce any kind of personal or proprietary rights and interests, as, for instance, is the case in the United States and in Europe; or it can also be achieved by means of a specific judicial proceeding established only and particularly for the protection of the rights declared in the constitution.

In the United States, in effect, following the British procedural law tradition, the protection of civil, constitutional and human rights has always been achieved through the general ordinary or extraordinary judicial means, and particularly, by means of the remedies established in Law or in Equity, the most important of said legal remedies being the damage remedies, the restitution

[154] See on the amparo proceeding in comparative law: Allan R. BREWER-CARÍAS, Constitutional protection of human rights in Latin America. A Comparative Study of the Amparo Proceedings, Cambridge University Press, New York 2008.

remedies and the declaratory remedies[155]; and the equitable remedies, the injunctions, in which the judicial resolution "does not come from established principles but simply derives from common sense and socially acceptable notions of fair play."[156] By means of these equitable remedies, a court of equity can adjudicate extraordinary relief to an aggrieved party, consisting of an order by the court commanding the defendant or the injuring party to do something or to refrain from doing something. They are called coercive remedies because they are backed by the contempt power, that is, the power of the court to directly sanction the disobedient defendant.

Both legal and equitable remedies are used for the protection of rights, so that there are no specific remedies conceived for the protection of constitutional rights. They are all remedies that may and are commonly and effectively used for the protection of all constitutional rights and legal rights in the sense of being based on statutes or contracts or that are derived from common law.[157]

Regarding the protection of civil or constitutional rights, the extra-ordinary coercive equitable remedies, particularly the writ of injunction, can be classified in the following four types:[158]

First, (i) the preventive injunctions, in the sense of avoiding harm, in which it is possible to distinguish the mandatory injunctions, like the writ of mandamus; the prohibitory injunctions, like the writ of prohibition, or the quia-timet injunctions;[159] (ii) the structural injunctions, developed by the courts after the *Brown v. Board of Education* case 347 U.S. 483 (1954); 349 U.S. 294 (1955), in which the Supreme Court declared the dual school system discriminatory, using injunction as an instrument of reform, by means of which the courts, in certain cases, undertake the supervision over institutional State policies and practices in order to prevent discrimination;[160] (iii) the restorative injunctions, also called reparative injunctions, devoted to correct past wrong situations;[161] (iv) the prophylactic injunctions, issued also to safeguard the plaintiff's rights, preventing future harm, by ordering certain behaviors from the defendant, other than the direct prohibition of future actions .[162]

The most important of all these injunctions, when referred to the protection of rights, are the preventive injunctions (whether mandatory or prohibitory), and the restorative ones; and within this context, the procedural institutions for the protection of constitutional rights that most resemble the Latin American *amparo* actions existing in the United States, are precisely the equitable remedies, particularly the injunctions.

Yet, other than the injunctions for the protection of freedoms and constitutional rights, particularly against government actions, the other extraordinary remedy in the United States – following the long British tradition – has been the writ of habeas corpus, the oldest judicial means for the protection of life and personal integrity, employed to bring a person before a court in order to prove or certify that he is alive and in good health, or to determine that his imprisonment is not illegal.

In conclusion, in countries like the United States, the protection of constitutional rights is assured by the general (ordinary or extraordinary) law and equitable remedies, particularly the injunctions that, of course, are also used to protect non-constitutional rights. Consequently, neither the constitution in the United States nor the legal system provide for specific judicial means

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155 See in William TABB and Elaine W. SHOBEN, *Remedies,* Thomson West, 2005, p. 13; and James M. FISCHER, *Understanding Remedies,* LexisNexis 2006.

156 See William M. TABB and Elaine W. SHOBEN, *Remedies, cit.* p. 13.

157 See in Owen M. FISS, *Injunctions, cit.* p. 8.

158 See William M. TABB and Elaine W. SHOBEN, *Remedies,* T *cit.* pp. 13 ff. and 86 ff.

159 See William M. TABB and Elaine W. SHOBEN, *Remedies, cit.* pp. 86 ff.

160 See Owen M. FISS, *The Civil Rights Injunctions*, Indiana University Press, 1978, pp. 4–5; and in Owen M. FISS, and Doug RENDELMAN, *Injunctions*, The Foundation Press, 1984, pp. 33–34. William M. TABB and Elaine W. SHOBEN, *Remedies*, *cit.* pp. 87–88.

161 See William M. TABB and Elaine W. SHOBEN, *cit.* pp. 86 ff.

162 *Idem*, pp. 86 ff.

designated for the protection of human rights, contrary to what happens in Latin America with the *amparo* action.

In Europe, in general, in a way similar to the preventive injunctions in the United States, the protection of human rights is also assured by general judicial means, and, in particular, by the extraordinary preliminary and urgent proceedings established in the Procedural Codes devised to prevent an irreparable injury from occurring, which can be issued before or during trial and before the court has the chance to decide on the merits on the case. Only in Austria, Germany, Spain and Switzerland can one find judicial means similar to the Latin American *amparo* recourse for the protection of fundamental rights.[163] In Spain, in addition to the recourse for *amparo* filed before the Constitutional Tribunal, fundamental rights can be immediately protected by the ordinary courts by means of the "*amparo judicial*."[164]

As stated, the courts in Europe generally protect rights by means of ordinary or extraordinary judicial procedures, such as the French *référé*, the Italian extraordinary urgent measures and the precautionary measures ("*misura precauzionale*") regulated in the Civil Procedure Codes, all of them conceived as procedural institutions used for the protection of individual rights, including constitutional rights.

Although the general trend regarding the protection of constitutional rights is achieved in Europe by means of general ordinary or extraordinary judicial procedures, in some countries, individual actions or *amparo* recourses as specific judicial means for the protection of fundamental rights have been established. This is the case in Austria, Germany, Spain and Switzerland, where a recourse for the protection of some constitutional rights has been regulated, particularly as a consequence of the adoption, under Hans Kelsen's influence, of the concentrated method of judicial review, resulting in the creation of Constitutional Courts or Constitutional Tribunals.[165] These courts were empowered not only to act as constitutional judges controlling the constitutionality of statutes, executive regulations and treaties, but also to grant constitutional protection to individuals against the violation of fundamental rights.

The process began in 1920, in Austria, by granting individuals the right to bring before the Constitutional Tribunal recourses or complaints (*Verfassungsbeschwerde*) against administrative acts when the claimant alleges that they infringe upon rights guaranteed in the constitution (Article 144).[166]

This was the origin of the development of a special judicial means for the protection of fundamental rights in Europe, although with a concentrated character that establishes the difference regarding Latin American *amparo* recourses that, except in Costa Rica, El Salvador and Nicaragua, are filed before all the first instance courts.

The Austrian model influenced the establishment of the other concentrated systems of judicial review in Europe. Such was the case, in 1931, of the Spanish Second Republic, where the constitution of that year (December 9, 1931) created a Tribunal of Constitutional Guarantees,[167] which had the exclusive powers to judge upon the constitutionality of statutes, and additionally, to protect fundamental rights by means of a recourse for constitutional protection called "*recurso de*

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163 See Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, Edit. Porrúa, México, 2006, pp. 761 ff.; 789 ff., and 835 ff.

164 See Encarna CARMONA CUENCA, "El recurso de *amparo* constitucional y el recurso de *amparo* judicial," in *Revista Iberoamericana de Derecho Procesal Constitucional*, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, n° 5, México, 2006, pp. 3–14.

165 See H. Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)," in *Revue du droit public et de la science politique en France et à l'étranger*, Paris, 1928, pp. 197–257.

166 See, in general, Norbert LÖSING, "El derecho de *amparo* en Austria," in Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, *cit.*, pp. 761–788.

167 See José Luis MELIÁN GIL, *El Tribunal de Garantías Constitucionales de la Segunda República Española*, Madrid, 1971, pp. 16–17, 53; P. CRUZ VILLALÓN, "Dos modos de regulación del control de constitucionalidad: Checoslovaquia (1920–1938) y España (1931–1936), in *Revista española de derecho constitucional*, 5, 1982, p. 118.

amparo." Some scholars have also found some influence of the Mexican *amparo*[168] on the Spanish one, which disappeared after the Spanish Civil War.

After World War II, also following the Austrian model, the 1949 Constitution of Germany created a Federal Constitutional Tribunal (FCT) as the "supreme guardian of the Constitution,"[169] empowered to decide in a concentrated way, not only regarding the abstract and particular control of constitutionality of statutes, but also the constitutional complaints for the protection of a fundamental right. This *Verfassungsbeschwerde*, complaint or recourse can be brought before the Federal Constitutional Tribunal against judicial decisions considered to have violated the rights and freedoms of a person by reason of the application of a statute that is alleged to be unconstitutional (Article 93, 1, 4,a, FCT Law).[170]

Finally, more recently, the current 1978 Spanish Constitution by recreating the Constitutional Tribunal has also established a concentrated method of judicial review,[171] and, in addition to its power to decide, the "recourse of unconstitutionality against laws and normative acts with force of law" (Article 161, 1, a Constitution), it has also been empowered to decide the *recurso de amparo* for the protection of constitutional rights. These recourses can be directly brought by individuals before the Constitutional Tribunal when they deem that their constitutional rights and liberties have been violated by administrative acts, juridical decisions or by simple factual actions by public entities or officials (Article 161, 1, b, Constitution; Article 41, 2 Organic Law 2/1979),[172] and only when the ordinary judicial means for the protection of fundamental rights have been exhausted (Article 43,1 Organic Law 2/1979). Consequently, the recourse for *amparo*, in general, results in a direct action against judicial acts[173] and can only indirectly lead to the judicial review of legislation when the particular state act that is challenged by it is based on a statute that is deemed to be unconstitutional (Article 55, 2 Organic Law 2/1979).[174] The Organic Law of the Constitutional Tribunal was reformed in 2007 (Law 6/2007), imposing the need for the plaintiff to allege and prove the "special constitutional importance" that justifies filing the recourse and the Constitutional Tribunal's decision (Articles 49, 2 and 50, 1, b).[175]

In Switzerland, a limited diffuse and concentrated system of judicial review was first established in the 1874 Constitution, but regarding constitutional rights, the 1999 Constitution also established the jurisdiction of the Federal Tribunal to decide cases of constitutional complaints that the individuals may file in cases of the impairment of constitutional rights (Article 189,1,a).[176] This public law recourse before the Swiss Federal Tribunal is essentially of a subsidiary nature,

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168 See Eduardo FERRER MAC-GREGOR, *La acción constitucional de amparo en México y España, Estudio de Derecho Comparado*, *cit.*, p. 27.

169 See G. MÜLLER, "El Tribunal Constitucional Federal de la República Federal de Alemania," in *Revista de la Comisión Internacional de Juristas*, Vol. VI, Ginebra, 1965, p. 216; F. SAINZ MORENO, "Tribunal Constitucional Federal alemán," in *Boletín de Jurisprudencia Constitucional*, Cortes Generales, 8, Madrid, 1981, p. 606.

170 See, in general, Peter Häberle, "El recurso de *amparo* en el sistema de jurisdicción constitucional de la República Federal Alemana," in Héctor FIX-Zamudio and Eduardo FERRER MAC-GREGOR, *El derecho* de *amparo en el mundo*, *cit.*, pp. 695–760.

171 See P. BON, F. MODERNE and Y. RODRÍGUEZ, *La justice constitutionnelle en Espagne*, Paris 1982, p. 41.

172 This recourse for the protection of fundamental rights can only be exercised against administrative or judicial acts, as well as against other acts without force of law produced by the legislative authorities. Article 42, Organic Law 2/1979.

173 See Louis FAVOREU, "Actualité et légitimité du Contrôle juridictionnel des lois en Europe occidentale," in *Revue du droit public et de la science politique en France et à 1'étranger*, Paris, 1984 (5), pp. 1155–1156.

174 See, in general, Francisco FERNÁNDEZ SEGADO, "El recurso de *amparo* en España," in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *El derecho de amparo en el mundo*, *cit.*, pp. 789–834.

175 See Francisco FERNÁNDEZ SEGADO, *La reforma del régimen jurídico-procesal del recurso de amparo*, Ed. Dykinson, Madrid, 2008, pp. 86 ff.

176 See E. ZELLWEGER, "El Tribunal Federal suizo en calidad de Tribunal Constitucional," in *Revista de la Comisión Internacional de Juristas*, Vol. VII (1), 1966, p. 119. See, in general, Joaquín Brage Camazano, "La Staatsrechtliche Beschwerde o recurso constitucional de *amparo* en Suiza," in Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, *cit.*, pp. 835–857.

that is, it is only admissible when the alleged violation of the right cannot be brought before any other judicial authority through other legal means established either under federal or cantonal law (Article 84, 2, Law of Judiciary Organization). Consequently, the action cannot be admitted unless all existing cantonal remedies have been exhausted, except in cases of violation of freedom of establishment, the prohibition of double taxation in fiscal matters, the citizen's right to appear before his "natural" judge, and the right to legal aid (Article 86, 2, Law of Judiciary Organization), which can be brought before the Federal Tribunal in a principal way.

A few general trends can be identified in all these European *amparo* recourses, in contrast with the Latin American institution: first, it is conceived as a concentrated judicial means for the protection of fundamental rights against State actions, by assigning to a single Constitutional Tribunal the power to decide upon them; second, particularly in Germany and Spain, it is established to protect certain constitutional rights listed in the constitutions as "fundamental" rights, more or less equivalent to civil or individual rights; and third, except in Switzerland, it is conceived as an action to be filed only against the State.

In contrast, one important feature of the Latin American system for the protection of constitutional rights, is that, in addition to the common and general judicial guarantees of such rights, the constitutions establish a specific judicial action, recourse or remedy for their guarantee called the *amparo* proceeding, perhaps one of the most Latin American constitutional law institutions. [177] This *amparo* action or recourse can be exercised before all courts except in some countries where it has to be filed before the Supreme Court (Costa Rica, El Salvador and Nicaragua). In general, and also with some exceptions (Brazil, El Salvador, Mexico, Nicaragua, Panama), it can also be exercised not only against State acts, but also against individuals, and in addition, in general, it can be exercised for the protection of all constitutional rights, including social and economic ones.

This proceeding initially introduced in Mexico as the *juicio de amparo* (1857), spread during the nineteenth and twentieth centuries throughout all of Latin America, receiving various names, always meaning the same, as follows: *Amparo* (Guatemala); *Acción de amparo* (Argentina, Ecuador, Honduras, Paraguay, Uruguay, Venezuela); *Acción de tutela* (Colombia); *Juicio de amparo* (Mexico); *Proceso de amparo* (El Salvador, Peru); *Recurso de amparo* (Bolivia, Costa Rica, Dominican Republic, Nicaragua, Panama); *Recurso de protección* (Chile) or *Mandado de segurança* and *mandado de injunçao* (Brazil);[178] conceived as a judicial proceeding initiated by means of an action or a recourse filed by a party, which ends with a judicial order or writ.

In the Guatemalan, Mexican and Venezuelan constitutions, the *amparo* action also includes the protection of personal liberty or freedom (*habeas corpus*), which contrasts with the constitutional regulations in all other countries, whose constitutions have set forth, in addition to the *amparo* action, a different recourse of habeas corpus for the specific protection of personal freedom and integrity.

In recent times, some constitutions have also provided for a recourse called of *habeas data* (Argentina, Brazil, Ecuador, Paraguay, Peru, Venezuela), whereby any person can file a suit in order to request information regarding the content of the data referred to itself, contained in public or private registries or data banks, and in case of false, inaccurate or discriminatory information, to seek suppression, rectification, confidentiality and updating thereof.

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[177] See Allan R. BREWER-CARÍAS, "The *Amparo* as an Instrument of a *Ius Constitutionale Commune,"* in Armin VON BOGDANDY, Eduardo FERRER MAD-GREGOR, Mariela MORALES ANTONIAZZI, Flávia PIOVESAN and Ximena SOLEY (Editrors), *Transformative Constitutionalism In Latin America. The Emergence Of A New Ius Commune,* Oxford University Press 2017, pp. 171-190.

[178] See, in general, Allan R. BREWER-CARÍAS, *El amparo a los derechos y garantías constitucionales (una aproximación comparativa)*, Caracas, 1993; *El proceso de amparo en el derecho constitucional comparado de América Latina,* (Edición mexicana), Ed. Porrúa, México, 2016; (Edición Peruana), Ed. Gaceta Jurídica, Lima 2016. See, also, Eduardo FERRER MAC-GREGOR, "Breves notas sobre el amparo latinoamericano (desde el derecho procesal constitucional comparado)," in Héctor FIX-ZAMUDIO and Eduardo FERRER MAC-GREGOR, *El derecho de amparo en el mundo*, *cit*. pp. 3–39.

3. The normative character of the Constitution

In the contemporary world, the most characteristic sign of the Rule of Law or of the State subject to the law, in addition to the existence of a system of judicial review or control of the conformity of administrative acts with the law through the traditional contentious-administrative control is, as aforementioned, the existence of a system of control of the constitutionality of laws and other State acts of similar rank through the system of judicial review or constitutional justice.[179] Hence, Jean Rivero's appropriate affirmation, particularly in France, that the last step in the construction of the *État de droit* is that the Legislator himself is subject to a higher norm, the Constitution.[180]

This principle, which today can be considered elementary, having had its roots in American constitutionalism,[181] was only consolidated in continental Europe a few decades ago, with the adoption of the notion of a rigid Constitution, the principle of its supremacy, the guarantee of the nullity of State acts that violate it, the constitutional enshrinement of fundamental rights, and the consideration of the Constitution as a rule of positive law directly applicable to citizens.[182] That is why its acceptance was even described towards the end of the twentieth century, as the product of a "revolution,"[183] because it was only in the last decades of that century that European countries started to "rediscover."[184]

Now, constitutional justice, that is, the possibility of judicial control of the constitutionality of laws and other state acts, derives precisely from this idea of the Constitution as a fundamental and supreme norm, which must prevail over any other norm or state act; this implies the power of judges or certain constitutional organs exercising jurisdictional functions, to control the constitutionality of state acts, including laws, even declaring them null and void when they are contrary to the Constitution. This was the great and principal contribution of the American Revolution to modern constitutionalism, and its progressive development has been the foundation of the systems of constitutional justice in the contemporary world.

As Manuel García Pelayo put it at the time:

> "That the constitution, as a fundamental positive norm, links all the public powers, including Parliament, and, consequently, the law cannot be contrary to constitutional precepts, to those principles which arise or are to be inferred from them, and to the values which it aspires to put into practice. This, –he concluded–, is the essence of the *Estado de Derecho."*[185]

That is to say, as Mauro Cappelletti also pointed out at the time, the Constitution conceived "not as a mere guideline of a political, moral, or philosophical nature, but as a real law, itself a

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179 See Allan R. BREWER-CARÍAS, "La justicia constitucional como garantía de la Constitución," in Armin VON BOGDANDY, Eduardo FERRER MAC-GREGOR and Mariela MORALES ANTONIAZZI (Coord.), *La Justicia Constitucional y su Internacionalización. ¿Hacia un Ius Constitutionale Commune en América Latina?* Instituto de Investigaciones Jurídicas, Instituto Iberoamericano de Derecho Constitucional, Max Planck Institut Für Ausländisches Öffentliches Rechts Und Völkerrecht, Universidad Nacional Autónoma de México, México 2010, Tomo I, pp. 25-62. Also published in *Revista de Derecho Público*, Nº 9-10, Asociación Costarricense de Derecho Administrativo, San José, Costa Rica 2010, pp. 9-28.

180 See Jean RIVERO in "Rapport de Synthèse", in L. FAVOREU (ed.), *Cours constitutionnelles européennes et droits fundamentaux*, Paris, 1982, p. 519. Also P. LUCAS MURILLO DE LA CUEVA, qualified judicial review as "the culmination of the construction of the *Estado de derecho*," in "El Examen de la Constitucionalidad de las Leyes y la Soberanía Parlamentaria", in *Revista de Estudios Políticos,* Nº 7, Madrid 1979, p. 200.

181 See, in particular, A. HAMILTON, *The Federalist* (ed. B. F. Wright), Cambridge Mass. 1961, *letter* Nº 78, pp. 491–493. See the comments of Alexis DE TOCQUEVILLE, *Democracy in America* (ed. J. P. Mayer and M. Lerner), London 1968, vol. I, p. 120.

182 Eduardo GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal Constitucional*, Madrid 1981.

183 See J. RIVERO, "Rapport de Synthèse", in L. FAVOREU (ed.), *Cours constitutionnelles européennes et droits fundamentaux*, Paris 1982, p. 520.

184 See Louis FAVOREU, "Actualité et légitimité du contrôle juridictionnel des lois en Europe Occidentale," in *Revue du Droit Public et de la Science Politique en France et á l'étranger,* Paris 1984, p. 1.176.

185 M. GARCÍA PELAYO, "El Status del Tribunal Constitucional", *Revista española de derecho constitucional*, 1, Madrid 1981, p. 18.

positive and binding law, although of a superior, more permanent nature than ordinary positive legislation."[186]

Therefore, constitution are normative realities and not the occasional political commitment of political groups, changeable at any moment when the balance between them is modified. In this sense, as Eduardo García de Enterría pointed out five decades ago at the beginning of the democratic process in Spain, in the contemporary world, constitutions are effective juridical norms which overrule the whole political process, the social and economic life of the country, and give validity to the whole legal order.[187]

In this sense, constitution, as a supreme real and effective norm, must contain rules applicable directly to state organs and to individuals.

This concept, although novel in the practice of democratic Spain, was the concept adopted in the United States of America from the beginnings of constitutionalism, and which since the nineteenth century was followed in Latin American countries. It was also the concept adopted in Europe after the French Revolution, and after being abandoned during the nineteenth century, it was rediscovered during the twentieth century, particularly after World War II.

That is, in relation to the state, constitution today has the same fundamental character that it had in the origins of constitutionalism in North America, and that was later changed in Europe during the course of the nineteenth century.

The constitution was originally a fundamental law limiting state organs, and it declared the fundamental rights of individuals, as a political pact given by the people themselves and, therefore, directly applicable by the courts. The adoption of this concept in Continental Europe by the French Revolution was later modified by the monarchical principle, which turned the concept of the constitution into a formal and abstract code of the political system, given by the monarch, and not to be applied by the courts. The constitution, in this context, had no norm directly applicable to individuals who were only ruled by the formal laws, and even though it contained an organic part, the absence of means of judicial review brought about the loss of its normative character.

In the European continental legal systems, the concept of the constitution has changed particularly after World War II and is again closer to its original conception as a higher law with norms applicable to state organs and to individuals, judged by the courts, and not only good intentions. In this sense, we can consider valid the terms of the American Supreme Court's decision in *Trop.* v. *Dulles*, 1958, in which stated the following in relation to the normative character of the constitution:

> "The provisions of the constitution are not time–worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation. They are rules of government. When the constitutionality of an act of Congress is challenged in this Court, we must apply those rules.
>
> If we do not, the words of the constitution become little more than good advice."[188]

The normative character of the constitution, relating to state organs and to individuals, and its enforcement by the Courts, has also brought about a change in the so–called "programmatic norms" of the constitution, which have been considered as norms directly applicable only to the legislator.[189]

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186 M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy. Recent Development. General Report. International Association of Legal Sciences*, Uppsala 1984, (mineo), p. 20; also published as the "Rapport Général" in L. FAVOREU and J.A. JOLOWICZ (ed.). *Le contrôle juridictionnel des lois. Légitimité, effectivité et développement récents*, Paris 1986, pp. 285–300.

187 E. GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal Constitucional*, Madrid 1985, pp. 33, 39, 66, 71, 177, 187.

188 356 US 86 (1958).

189 E. GARCIA DE ENTERRIA, op. cit., p. 37, 69. Cf. P. BISCARETTI DI RUFFIA and S. ROZMARYN, La Constitution comme loi fondamentale dans les Etats de l'Europe occidentale et dans les Etats socialistes, Torino 1966, p. 39.

In effect, it is current to find in modern constitutions, even in the context of social and economic rights, norms that, in fact, are formulated as a political guideline directed to the legislator. This has led to the consideration that those constitutional norms were not directly applicable to individuals until the legislator itself had adopted formal laws in accordance with the "program" established in the constitution. Therefore, only laws issued for its legal development were to be applied by the courts.

On the contrary, the normative character of the constitution as a fundamental trend of contemporary constitutionalism tends to overcome this programmatic character attributed to certain constitutional norms and seek their enforcement by the courts as norms directly applicable to individuals, so as not to consider them as those pieces of "good advice" referred by Chief Justice Warren to in the *Trop v. Dulles case* (US. 1958).

Therefore, those "programmatic norms" or provisions of state aims must be also enforceable by the courts as principles that must guide the actions of the state.

This is true even in France, where in the traditional constitutional system after the 1875 Constitutional Laws, due to the exclusion of the declaration of rights from the text of the constitution,[190] its provisions were considered not to be directly applicable to individuals.

However, after important decisions of the Constitutional Council adopted in the seventies of the last century, the *bloc de la constitutionalité*[191] was enlarged to include the Declaration of Rights of Man and Citizens of 1789, the Preambles of the 1946 and 1958 Constitutions, and the fundamental principles recognized by the laws of the Republic.[192] This led Jean Rivero to say, with regard to the creation of the law by the constitutional judge, that with the decisions of the Constitutional Council, based on "the constitution and particularly on its Preamble", a "revolution" has taken place. He wrote:

> "In a single blow, the 1789 Declaration, the 1946 Preamble, the fundamental principles recognized by the laws of the Republic, have been integrated into the French constitution, even if the Constituent did not want it. The French Constitution, has doubled its volume through the single will of the Constitutional Council."[193]

The Constitution thus configured in a State under the Rule of Law, must in any case, and above all, be endowed with supremacy in relation to any other legal norm or any act emanating from the State, which implies that the acts of Parliament and of absolutely all the other organs of the State cannot violate the norms of the Constitution nor the constitutional principles deriving from them.

It must not be forgotten that contemporary constitutions contain, at the same time, an organic part and a dogmatic part; the former referring to the organization of the State, the distribution and separation of the Public Power and the mechanisms relating to its functioning; the latter, to the fundamental rights and the limitations imposed on the organs of the State for the respect and prevalence thereof. Therefore, the pre-eminence of the Constitution not means only the strict observance of the rules and procedures established in the Constitution to regulate the functioning of the organs of the State, but also the respect for the fundamental rights of the citizens, declared or implicit in the Constitution.

Of course, all this implies,, for example, with regard to the Parliament, not only the obligation to respect the constitutional rules governing the separation of powers and avoid usurping the powers of the Executive and the Judiciary, but also the need to act in accordance with the procedures for the drafting of laws provided for in the Constitution, which in no event may violate

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190 J. RIVERO, *Les libertés publiques*, Vol. 1, Paris 1973, p. 70.

191 L. FAVOREU, "Le principe de constitutionalité. Essai de définition d'après la jurisprudence du Conseil constitutionnel", in *Recueil d'études en 1'honneur de Charles Eisenmann*, Paris 1977, p. 33.

192 L. FAVOREU, *Le contrôle juridictionnel des lois et sa légitimité*. Développements *récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala 1984, (mineo), p. 8; also published in L. FAVOREU and J.A. JOLOWICZ, *op. cit*., pp. 17–68.

193 J. RIVERO, "Rapport de Synthèse" in L. FAVOREU (ed.), *Cours constitutionnelles européenes et droits fundamentaux,* Aix–en–Provence 1982, p. 520.

the fundamental rights guaranteed by the Constitution. The same applies to the actions of the other organs of the State, particularly the Executive and the courts themselves, including the Constitutional Courts, which, as guarantors of the Constitution, are, above all, subject to it.

The submission to the supremacy of the Constitution by all the organs of the State, on the other hand, not only implies submission to the rules of an organic and procedural nature, but also to those of a substantive nature. For this reason, a law may be unconstitutional not only due to defects in the procedure for the formation of the laws that affect its elaboration, but also for substantive reasons, when its content is contrary to the norms or principles set forth in the Constitution, including those related to fundamental rights or derived from them. Therefore, the unconstitutionality of State's acts may be of form or of substance.[194]

4. Constitutional supremacy and its guarantees

Of course, like all normative supremacy, in order to be effective, it needs to be guaranteed, that is to say, it needs to be endowed with the necessary legal guarantees, which, in the case of the Constitution as supreme norm, turn out to be the culmination of the construction of the rule of law. Among them is precisely the system of constitutional justice or judicial review, conceived precisely by Hans Kelsen in the first decades of the last century, as the jurisdictional guarantee par excellence of the principle of constitutional supremacy.[195]

And, indeed, the supremacy of the Constitution would be imperfect and inoperative from the legal point of view, if the necessary guarantees were not established to protect it against unconstitutional acts of the State or any breach of the constitutional order, that is, the means to protect both its organic part, including constitutional processes and procedures; and the dogmatic part that refers to fundamental rights.

In general, and historically, two types of guarantees of the supremacy of the Constitution have been distinguished: political and jurisdictional. The former is generally attributed to the supreme political representative bodies of the State, and was the one that existed, in general, in legal systems where an extreme interpretation of both the principle of the separation of powers and the principle of the unity of the State's power was imposed. In the first case, this was traditionally the situation in France until the creation of the Constitutional Council, where the National Assembly was the only branch of the State with the power to oversee the constitutionality of laws. In the second case, it was the system that was adopted in almost all the former socialist countries of Eastern Europe, and which still exists in the American continent in Cuba, where only the supreme political representative body can exercise control over the constitutionality of laws.

In France, in fact, as aforesaid, the principle of the supremacy of the law as the expression of the general will, led to considering it simply unthinkable that Parliament could ever commit an error with respect to the constitution. The enemy of the constitution, in the liberal framework of the last century, was really the executive –the monarch– who was tempted to put his individual will before that of the people, as expressed in Parliament. Thus, the possibility that Parliament could be in error or act mistakenly was not conceivable.

In effect, it was Jacobinism, based on the absolute representative principle of the general will, which led to the dogma of parliamentary sovereignty in France. According to this principle, all power over the Assembly was resolutely proscribed and, of course, the judiciary power was a simple executive instrument of the laws passed by the Assembly, with absolutely no liberty even to interpret the laws. Thus, the well-known figure of the *référé législatif* according to which judges

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194 See H. KELSEN, "La garantie juridictionnelle de la Constitution (La justice constitutionnelle)", in *Revue du Droit public et de la Science politique en France et à l'étranger,* Paris 1928, p. 202.

195 Idem., p. 214. See Allan R. BREWER–CARÍAS, "La Justicia Constitucional", in *Revista Jurídica del Perú*, Nº 3, 1995, Trujillo, Perú, pp. 121 a 160; "Control de la constitucionalidad. La justicia constitucional," in *El Derecho Público de finales de Siglo. Una perspectiva iberoamericana***,** Fundación BBV, Editorial Civitas, Madrid 1996, pp. 517–570; *Instituciones Políticas y Constitucionales, Tomo VI: La Justicia Constitucional*, Universidad Católica del Táchira– Editorial Jurídica Venezolana, Caracas, San Cristóbal, 1996, 21 ss.; *La Justicia Constitucional. Procesos y procedimientos constitucionales*, UNAM, México 2007.

were obliged to consult the National Assembly when they had doubts about the interpretation of a Statute.[196]

This limitation was based on the purest tradition of the thoughts of Montesquieu, who considered the national judges, "... as no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor";[197] this was expressly established in the well-known Statute of August 16-24, 1790 referred to the judiciary organization. Article 10 of this law regulated the separation between legislative and judicial powers, by saying that, "the courts could not take part directly or indirectly in the exercise of legislative power, neither prevent nor suspend the execution of acts of the legislative body..." adding in article 12 that the Courts "could not make regulations, but they must always address themselves to the legislative body when they think it necessary to interpret a Statute or to make a new one."[198]

The *référé législatif* then was the instrument of the legislative body for interpreting the laws, which could not even be done by the judges." Thus, Robespierre said that the word "jurisprudence" should be eliminated from the French language, adding:

> "In a State that has a Constitution, a legislation, the jurisprudence of the courts is nothing other than the law...if an authority other than the legislator could interpret the laws, it would elevate its will above that of the legislator."[199]

Therefore, it was precisely this Jacobin principle of the assembly, a product of the French Revolution, which maintained the negation of the legitimacy of the courts to be able to annul the normative products of the assembly for a long time; and in the United Kingdom it is precisely the same principle of the sovereignty of Parliament, a product of the glorious Revolution of 1688, which actually prevents the courts from controlling the constitutionality of legislation. According to this principle, the judges must apply laws and, of course, interpret them, but they are not to control them because the acts of the legislative body are the expression of the sovereign will of the people.

In this traditional framework of the separation of powers, a system of judicial review of the constitutionality of laws was considered a violation of the principle of parliamentary sovereignty, based on the pre–eminence of the legislative power over other state powers. This was because Parliament was constituted by the representatives of the people who, as such, in the representative democratic state represented the sovereign. Through this approach, any intervention by a constitutional body to limit the autonomy of the supreme representative organ of the state was considered inadmissible, and therefore, legislation could only be controlled by that supreme representative organ.

In any case, this principle of popular sovereignty expressed in modern constitutions today as the basic dogma of the democratic Rule of Law, is a political principle that refers to the constituent power of the state, represented in all the constituted bodies of the state, and not to the power of one or other of the constituted bodies that exercise public power. It thus cannot lead to a discussion about the relative sovereignty of the constituted state bodies, since all the bodies of the state are the product of the sovereign and are its representatives. Thus, it makes no sense today to preach the sovereignty of Parliament, to reject a mechanism that guarantees the constitution to which Parliament is also subject.

To stress this reasoning in another way, one must not forget that in presidential and Parliamentary democratic systems, the president of the republic or the head of government are designated by popular election and are thus a product of the sovereignty of the people, just as Parliament is. From the moment the constitution attributes sovereignty to the people, it is definitely clear that this quality cannot be affirmed in one body of the state with respect to another; therefore,

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196 E. GARCÍA DE ENTERRÍA, La Constitución como norma y el Tribunal Constitucional, Madrid 1981, p. 164.

197 Quoted by Ch. H. MCILWAIN, *The High Court of Parliament and its Supremacy*, Yale 1910, p. 323

198 Quoted by E. GARCÍA DE ENTERRÍA, *op. cit*., p. 164, note 88.

199 Quoted by M. TROPER, La séparation des pouvoirs et l'histoire constitutionnelle française, Paris 1980, cit., p. 60.

all the powers of the state and all the bodies that carry them out find their legitimacy in the people. Thus, no constitutional body is or can be sovereign, not even the Chambers of Parliament,[200] and all of them must be submitted to the constitution.

Furthermore, in contemporary democracies, political and social forces produce a greater relativity in the constitutional functions of the state bodies, converting Parliament into a forum for the political parties and subjecting the government to necessary negotiations with them and with trade unions and pressure groups. On many occasions, this primacy of the parties has erased the principle of the separation of powers and has conversely led to its factual concentration in the hands of the government and or those of the parties themselves.

Thus, there can be no doubt about the need to adopt measures that serve to guide the activities of state bodies and those of the parties themselves, within constitutional channels.[201] It is not infrequent that, in addition to controlling the constitutionality of laws, the constitutionality of the actions of political parties may also be controlled by the bodies of control of constitutionality.

5. Judicial Review and the end of parliamentary absolutism

In any case, exception being made of the United Kingdom, this very myth of parliamentary sovereignty was broken in Europe, with some exceptions, such as in The Netherlands, whose Constitution expressly states that "the constitutionality of acts of parliament and treaties cannot be reviewed by the courts." (Article 120).

In contrast, it can be said that the Judicial Review of constitutionality really appeared in Europe after the great crisis brought about by World War I and by the tragedies that political irrationality caused throughout Europe that made individual rights disappear. This led both to the transformation of the constitution into a normative code that could be directly applicable and enforceable, and to the establishment of a constitutional body for constitutional justice, which would ensure the supremacy of the constitution not only over the executive power which, apart from this, was controlled by another type of tribunal, but basically over Parliament; that is to say, over legislative acts, and particularly, the laws.

Consequently, the sovereignty of Parliament ceased to be above justice, and judicial review of constitutionality was to become the instrument governing the subjection of Parliament to the constitution whenever, because of occasional majorities, the balance was upset among state powers or in the rationality of political and social relations themselves. In fact, the terrible lessons learnt from the abuses of the Nazi and Fascist regimes in Europe, doubtlessly brought about a complete change in the existing myths and theories in Europe regarding the infallibility of the law. Thus, as Favoreu pointed out, the Rousseaunian myth of the infallibility of the law and, thus, of Parliament, which expresses the general will, began to collapse, and the celebrated formula, according to which the legislator could do no wrong" *(ne peut mal faire)*, began to be re–examined.[202]

Indeed, the European experience of the last century, acquired during the period between the two wars, gave rise to a feeling of caution, marked by skepticism, with reference to Parliaments and their assumed sovereignty and the myth of representativeness. As Mauro Cappelletti said, "it was realized that there was too much illusion in the Liberal democratic theory" in the sense that most often the reality was far from the myth of the supremacy of the people's will and that

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200 P. Lucas MURILLO DE LA CUEVA, "El examen de la constitucionalidad de las leyes y la soberanía parlamentaria", in *Revista de estudios políticos*, 7, Madrid 1979, p. 212.

201 *Idem*, p. 212.

202 See L. FAVOREU, "Europe occidentale," in L. FAVOREU and J. A. JOLOWICZ. (ed) *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents*, Paris 1986, p. 43. Published as "Actualité et légitimité du contrôle juridictionnel des lois en Europe Occidentale", in *Revue du droit public et de la science politique en France et à l'étranger*, Paris 1984 (5), p. 1147 and 1201. Also published in L. FAVOREU and J.A. JOLOWICZ (ed.), *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents*, Paris 1986, p. 17–68.

"Parliaments and their legislation, too, would become instruments of despotic regimes; and that majorities could themselves be brutally oppressive."[203]

In fact, the legislators of Weimar Germany and Mussolini's Italy failed as guarantors of freedom. On the contrary, they became the instruments of circumstantial majorities for consolidating totalitarian regimes.

Consequently, these two countries learnt from experience and in their new post–war constitutions they not only established entrenched fundamental values, freedoms, and rights out of the reach of Parliament, but also adopted the principle of the judicial review of constitutionality of laws, as it was previously established in the Austrian system in the 1920's.

In this way, the awareness that it was necessary to protect liberties not only from the executive, but also from the legislative grew. As Jean Rivero described,

> "The old idea that marked the liberal nineteenth century, that of the protection of liberty *by the law*, tended to be substituted by the experimental idea of the need of protection of liberties *against the law*. This evolution made the extraordinary phenomenon of the acceptance of a superior authority to the Legislator itself, of an authority in charge to impose upon the Legislator the respect of the constitution possible."[204]

Thus, European continental countries adopted the review of the constitutionality of laws following a path different from that of the North American system, adopting the principle of judicial review for other reasons. According to what Louis Favoreu said, the European phenomenon was less in response to a problem of legal logic –that is, in the *Marbury v. Madison* tradition, that a law contrary to the constitution could not be applied– than to a political logic. It was more:

> "the fear of oppression by a parliamentary majority, which was decisive in the change in the position of the continental European countries regarding the review of the constitutionality of laws".[205]

This political logic of judicial review can also be found in the fact that the myth of representativeness of the general will as expressed by those elected, has broken down in many countries, particularly because the legislative body is frequently made up of men chosen by the political parties, and who represent these parties, not being really, in fact, representatives of the general will.

Anyway, the idea that certain number of fundamental values should be established beyond the reach of a circumstantial or temporary majority is what led, in one way or another, to the transfer of the traditional sacredness of the law to the constitution.

Thus, it was, after World War II, that the European continental countries "rediscovered the constitution as a text of juridical character"[206] or rather, when they discovered the true fundamental nature of the constitution as a higher and supreme law, applicable to all state organs and enforceable by the courts. In the words of Mauro Cappelletti, what is new in modern constitutionalism:

> "Is the serious attempt to conceive the constitution not as a mere guideline of a political, moral, or philosophical nature, but as a real law, itself a positive and binding law although of a superior, more permanent nature than ordinary positive legislation."[207]

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203 See M. CAPPELLETTI, "Rapport général," in L. FAVOREU and J. A. JOLOWICZ (ed) *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents,* Paris 1986, pp. 293–294. Also published in L. FAVOREU and J.A. JOLOWICZ (ed.), *Le contrôle juridictionnel des lois... cit*., p. 285–300.

204 J. RIVERO, "Rapport de Synthèse" in L. FAVOREU (ed.), *Cours constitutionnelles européenes et droits fondamentaux*, Aix–en–Provence 1982, p. 519.

205 L. FAVOREU, Le contrôle juridictionnel…, doc. cit., p. 22.

206 L. FAVOREU, Le contrôle juridictionnel…, *doc.cit*., p. 23.

207 M. CAPPELLETTI, *doc. cit*., p. 20.

Obviously, this positive and superior law was to apply to all the organs of the State, especially the Parliament and the Government. In this sense, judicial review of the constitutionality of state acts is the ultimate consequence of the consolidation of the Rule of Law where the state organs are not sovereign, are subject to limits imposed by a constitution having the force of a superior law, and in particular, when the legislator is limited in his legislative action and there is judicial control over the "legality of laws."

Paul Duez stressed the argument almost a hundred years ago in an article published in the *Mélanges Hariou* when he wrote:

> "Modern Public Law establishes as an axiom that Governments are not sovereign and that, in particular, the Parliament is limited in its legislative action by superior legal rules that it could not infringe; Acts of Parliament are submitted to the law, and no Act of Parliament can be contrary to the law."[208]

This is the principle accepted today in France, but certainly was not the one accepted in that country sixty years ago when Duez wrote his essay and when the principle of the sovereignty of the National Assembly was still in force. That is why this article is of historical importance in France. In effect, Duez, by establishing the principle of the limitation of all state organs by a constitution as a superior rule, added:

> "But it is not sufficient to proclaim such a principle: it must be organized, and practical and effective measures must be adopted to ensure it."[209]

Subsequently, he referred to the very important French system of judicial control related to public administration and to administrative action, through the *recours pour excès de pouvoir*; nevertheless, he said: "The spirit of legality requires that a similar control be established in relation to legislative action,"[210]

And concluded by saying that,

> "There is not a real organized democracy, and a Legal state (*État de Droit*), except only where this control of legality of laws (Acts of Parliament) exists and functions."[211]

The logic of Duez's statement in our perspective is certainly impeccable: No organ of the state can be considered sovereign; and all state organs, particularly, the legislator in its actions are submitted to limits established in superior rules, embodied in a constitution.

Therefore, acts of Parliament must always be submitted to the law and cannot be contrary to the law. Consequently, the spirit of legality imposes the existence and functioning not only of a control of legality of administrative acts, but also of a control of the legality of laws, as acts of Parliament.

Only in countries where this control exists, are there truly organized democracies and *État de Droit*.

Therefore, this judicial control of the "legality of laws" is, precisely, the judicial control of the constitutionality of legislation and of other state acts issued in direct execution of the constitution, in relation to which legality means "constitutionality."

Duez's thesis, in any case, was accepted in France fifty years later, by the Constitutional Council in France when it declared, in the well–known Nationalizations decision of 16 January 1982, that:

> "Considering that if article 34 of the constitution places "the nationalization of companies and their transfer from the public to the private sector," in the sphere of the statute, that disposition as well as the one that assigns the role of determining the fundamental principles

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208 P. DUEZ, "Le contrôle juridictionnel de la constitutionalité des lois en France", *Mélanges Hauriou*, Paris 1929, p. 214.

209 *Idem*, p. 214.

210 *Idem*, p. 215.

211 *Ibid*. p. 215.

of the right to property to the statute, does not excuse the legislator, when exercising its powers, from the respect of the principles and rules of constitutional value that are imposed upon all state organs."[212]

Louis Favoreu, when referring to this decision of the Constitutional Council qualified it as a "fundamental affirmation of the complete realization of the *État de droit* in France," comparing it to the previous situation in which the legislator "in fact escaped, if not legally, from the submission to a superior rule."[213]

Therefore, the supremacy of the constitution over Parliament marked the end of Parliamentary absolutism,[214] transformed the old concept of parliamentary sovereignty and led the way to constitutional review in France through the Constitutional Council, even though in a limited way and, previously, in a more complete way in other countries in continental Europe such as Austria, Germany and Italy.

Another factor that contributed to the appearance of mechanisms for judicial review of the constitutionality of laws was the transformation of the very notion of "law" in the sense of an act of Parliament or statute. In fact, statutes –the work of the legislator, once the expression of the general will in the tradition of the nineteenth century– came to be seen, with the evolution of parliamentary systems, as acts adopted by both the parliamentary majority and the government, through a system of connecting vessels, through the political parties. This way, the statutes are not necessarily the expression of the general will, approved by a solid and mythical majority, but, as Jean Rivero said, they are "no more than the expression of the governmental will approved by a solidary majority."[215] Moreover, with the evolution of the tasks of the state, the law has tended to become a more technical product, whose content as a result, frequently even escapes the effective control of Parliament, since it is the technocrats within the administration who draw it up and settle its real content, without the actual participation of members of Parliament. Therefore, judicial review is an effective tool to control the constitutionality of such acts of Parliament or statutes that are the expression of governmental will, rather than the expression of the general will.

Anyway, the supremacy of the constitution and its enforceable character over the legislative body has led to the adoption of judicial rather than political guarantees of the constitution, the latter being proven ineffective, as shown by the French example of the Conservative Senates (*Sénat Conservateur*) of the 1799 and 1852 Constitutions. Constitutions commonly established a distribution of state powers among the various state organs, and basically, assigned fundamental powers to the legislative body, which used to be considered unable to do wrong, as the expression of the general will. Therefore, politically speaking, its self-control is really an illusion.

But constitutions also establish fundamental rights of individuals and minorities even against majoritarian will; hence, as Cappelletti correctly said, "no effective system of review can be entrusted to the electorate or to persons and organs dependent on and strictly accountable to, the majority's will"[216] that is to say to the representative legislator itself. Therefore, contrary to the political systems of review of the constitutionality of legislation, the common trend of contemporary constitutionalism in constitutional systems with written constitutions is the existence of judicial means of protection of the constitution, through the assignment of effective powers of judicial control of the constitutionality of legislation to the courts, either ordinary or special constitutional courts.

It must be said, in fact, that in most contemporary countries, judicial review or constitutional justice, that is to say, the power to control the constitutionality of laws and protect fundamental

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212 See in L. FAVOREU and L. PHILIP, *Les grandes décisions du Conseil Constitutionnel*, Paris 1984, p. 527. See also L. FAVOREU, "Les décisions du Conseil Constitutionnel dans l'affaire des nationalisations", *Revue du droit public et de la science politique en France et à l'étranger*, 1962, p. 400.

213 L. FAVOREU, "Les décisions du Conseil Constitutionnel…", *doc. cit*., p. 400.

214 J. RIVERO "Fin d'un absolutism", *Pouvoirs*, 13, Paris.1980, pp. 5-15.

215 J. RIVERO "Rapport de Synthèse", *doc. cit*, p. 519.

216 M. CAPPELLETTI, *doc. cit*, p. 23.

rights, is in many countries constitutionally vested in the organs exercising the Judicial power. In these countries, it can be said that the constitutional judge is the Judiciary. In other countries, on the other hand, particularly in continental Europe, the judicial authorities do not fully exercise constitutional justice, but this is conferred, in some cases, to constitutional bodies different and independent from the Judiciary, especially created for this purpose, in the form of Constitutional Courts, Tribunals or Councils. Therefore, in these countries, the constitutional judge is not always a judicial authority, but a constitutional body with jurisdictional functions that does not depend on the Judicial or any other branch of government.

Evidently, in both systems, the constitutional judge exercises a jurisdictional function, in the sense of declaring the law with the force of legal truth as an independent body within the State, from the organs of the legislative and executive powers. In both systems, constitutional justice is the most eloquent expression of the supremacy of the Constitution and its guarantee. The difference between them lies in the fact that in the first system, that is, in those countries in which the Judiciary is the constitutional judge, the jurisdictional guarantee of the supremacy of the Constitution is a judicial guarantee, while in the other systems it is only a jurisdictional guarantee, not a judicial one. Of course, in both cases, in order for judicial review or constitutional justice to be effective, the organs in charge of exercising it must be endowed with autonomy and independence.

According to the principles of modern constitutionalism that emerged from the American Revolution, the Judiciary must be considered as the branch of the State that has, par excellence, the function of being a constitutional judge, that is, the branch of the State that in accordance with the principle of the separation of powers must ensure the supremacy of the Constitution, both from an organic and dogmatic point of view; being therefore empowered to control the constitutionality of laws and protect the fundamental rights established in the Constitution.

It can be said that this is the principle in almost all the countries of the contemporary world that have been influenced by modern constitutionalism, without the deviations relating to the separation of powers emanating from the French Revolution. This is the reason why the general principle in the field of judicial review or control of the constitutionality of laws, except in European countries, is the attribution of the function of constitutional judge to the Judiciary. On the other hand, as regards the protection of constitutional rights and guarantees, in all countries of the contemporary world, it is the Judiciary, i.e. the judicial authority, which has the task of being the guardian of the freedoms and constitutional rights of the individual.[217]

On the other hand, it should be noted that when the judicial review is attributed to the Judiciary, it may be the task of all the judges or of some of them. In the first case, the system of judicial review is the diffuse system, the most widespread in the contemporary world; in the second case, the system of judicial review is the concentrated system, since the task of control is granted to a single judicial body, either the Supreme Court of the country or a Constitutional Court belonging to the Judiciary. In some countries, both systems of control even coexist.[218]

In any case, judicial review or jurisdictional control of the constitutionality of laws, that is, this power to control the conformity of acts of the State with the Constitution, especially legislative acts and those dictated in direct execution of the Constitution, as we have pointed out, can only occur in legal systems in which there is a written Constitution that imposes limits on the activities of the organs of the State and, in particular, of the Parliament, and where the separation of powers is guaranteed. Consequently, even in systems of judicial review, the power of the courts to control the constitutionality of the acts of the State is not necessarily a consequence of the existence of an autonomous and independent Judiciary, but of the legal limits imposed in a Constitution sanctioned as supreme law over the constituted organs of the State.

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217 Allan R. BREWER-CARÍAS, *Constitutional Protection of Human Rights in Latin America*, Cambridge University Press, New York 2009.

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

6. Judicial review and constitutional limitations on State bodies

As has been pointed out, in order for there to be judicial review system, it is not only necessary that there be a written Constitution, as the supreme norm that enshrines the fundamental values of a society, but also that this superior norm be established in a rigid and stable form, in the sense that it cannot be modified by ordinary legislation. In such a system, all the organs of the State are limited by the Constitution and are subject to it, so that their activities must be carried out in accordance with this supreme law.

This implies, of course, not only that the Administration and judges, as law enforcement organs, are subject to legality (Constitution and "legislation"), but also that the organs that create "legislation," especially legislative bodies, are also subject to the Constitution.

Of course, a written and rigid constitution, at the apex of a legal system, not only demands that all the acts issued by state organs in direct execution thereof should not violate the constitution but must also provide a guarantee to prevent or sanction such violations.[219] Thus, the judicial review of constitutionality as the power of the judiciary to control the submission of state organs to the superior rule of the country.

However, in all legal systems with written and rigid Constitutions, as we have previously argued, that there is always a hierarchical system of legal norms and acts, so not all state acts have the same level of derivation in creating legal rules.[220] On the contrary, in the first place, there are acts that directly and immediately execute the constitution and that are subject to this superior rule alone, which are generically referred to as "legislation"; and second, there are also state acts that execute the constitution in an indirect way, being at the same time acts issued in direct and immediate execution of "legislation," thus directly subject to it. Among the former are, basically, the formal laws and other acts of Parliament, including the *interna corporis*, and acts of government issued in accordance with their constitutionally attributed powers, and among the latter, there are the administrative and the judicial acts.

In an *État de Droit* then, the guarantee of the rule of law must be established at those two levels of creation or derivation of legal rules by way of three judicial systems of control: first, the judicial review of constitutionality, established to control state acts issued in direct execution of the constitution; second, the judicial control of administrative action basically established regarding administrative acts; and, concerning judicial acts issued by courts, the judicial control system is the third, established by systems of appeal or cassation.

Moreover, in the *État de droit,* which implies that fundamental rights and liberties are established in the constitution, judicial mechanisms of control must also be provided to protect and guarantee such rights against any act by the state that may violate them, and even against acts by individuals that may so affect them.

Judicial review, that is, the systems of jurisdictional control of constitutionality, have relevance with respect to the acts of the constitutional organs of the State, in which the rule of law becomes the "rule of the constitution" since they are acts that execute the constitution itself, directly and immediately.

In fact, among the acts subject to judicial review of constitutionality are the formal laws or acts of Parliament, and it is precisely because of this that judicial review of constitutionality is often identified with the judicial review of the constitutionality of legislation.[221] However, laws are not the only state acts issued in direct execution of the constitution and as an expression of constitutional powers. So too are other acts of Parliament, such as internal parliamentary rules of procedure and even other parliamentary acts that do not have the form of law and that are not normative, such as those established in the constitution regarding the relations between the

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219 *Cf.* H. KELSEN, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)" *Revue du droit public et de la science politique en France et à 1'étranger*, T. XLV, 1928, p.197–257.

220 See, on the hierarchical system of the legal order, what has been said in *Part Four* of this book.

221 See, for example, M. CAPPELLETTI, *Judicial Review in Contemporary World*, Indianapolis 1971, p. VII.

Congress or Assembly and the other constitutional organs of the state. All these acts adopted by Parliament are subject to the constitution because they are issued by virtue of powers attributed directly in that fundamental text. Thus, in an *État de droit* they must also be liable to judicial review of constitutionality.[222]

Apart from these acts of Parliament, however, the government, in an *État de droit*, also issues acts that directly execute the constitution, which have the same status as laws in the hierarchical legal system, and which, in some cases, even have the same force as formal laws.

In fact, in contemporary constitutional law, the government issues acts with the same force as the formal laws in a variety of forms, either as delegate legislation or by reason of powers established in the constitution itself. In these cases, they are executive acts with legislative content, and with the same ran, force, and power of derogation as the formal laws established in acts of Parliament. For this reason, such executive acts issued in direct execution of the constitution are not administrative acts but acts of government with normative and legislative content. Thus, they are also liable to judicial review of constitutionality.[223]

However, we have seen that the government also has powers established in the constitution to produce certain acts without any legislative interference, for instance when declaring a state of siege or the restriction of constitutional guarantees, when directing international relations or when vetoing an act of Parliament. All these acts, shaped by the continental European doctrine of administrative law, as "acts of government," are also subject to judicial review of constitutionality. It is true that in the traditional criteria of administrative law, such "acts of government" were developed to exclude them from judicial administrative control either because of their political content or motives or because they were issued by the government in its relations with other constitutional bodies, particularly with Parliament.[224] Nevertheless, as we have seen, these acts are also subject to the constitution, and they are liable to be submitted to judicial review of constitutionality.[225]

Moreover, in contemporary legal systems, leaving aside problems arising from monist and dualist conceptions, international treaties and agreements are also subject to judicial review of constitutionality in the *État de droit*,[226] whether this be directly, or by review of the acts of Parliament or government that introduce them into domestic law, also by virtue of constitutional powers granted to those state organs. There are exceptions, however, as in the case of The Netherlands, where the Constitution excludes the control of constitutionality not only over laws, but also over treaties (art. 120); which, on the other hand, was mitigated by the provision in the Constitution on the control of conformity of all State acts, including laws, with respect to treaties of general and immediate application (article 94), such as those relating to human rights, which has given rise to an important system of control of the "conventionality" of laws, with effects similar to the control of constitutionality, but basically in the area of human rights.

In any case, what is general is that in legal systems with written Constitutions, all acts of the State dictated in execution of the Constitution are subject to jurisdictional control of constitutionality.

7. The Variety of Judicial Review Systems

It is evident, however, that in comparative law no single system for judicial review of constitutionality exists, but rather a very varied range of systems in which not even all the state acts mentioned can be subject to judicial review.

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222 *Cf.* H. KELSEN, *loc. cit*., p. 228.

223 *Idem*, p. 229.

224 See the classical work of P. DUEZ, *Les actes de gouvernement*, Paris 1953.

225 *Cf.* H. KELSEN, *loc. cit*., p. 230.

226 *Idem*, p. 231.

In fact, different criteria can be adopted for classifying the various systems of constitutional justice or judicial review of the constitutionality of state acts, particularly of legislation,[227] but all are related to a basic criterion referring to the state organs that can carry out constitutional justice functions.

In effect, judicial review of constitutionality can be exercised by all the courts of a given country (diffuse system) or only by the Supreme Court of the country or by a court especially created for that purpose (concentrated system).

Certainly, this classic distinction of the judicial review systems in the contemporary world, between the concentrated systems of judicial review and the diffuse systems of judicial review,[228] has developed and has changed, and is difficult to apply in many cases clearly and sharply.[229] That is why nowadays, in almost all democratic countries, a convergence of principles and solutions on matters of judicial review has progressively occurred,[230] to the point that it is possible to say that there are no means or solutions that apply exclusively in one or another system.[231]

Nonetheless, this fact, in my opinion, does not deprive the distinction of its basic sense.

In effect, and in spite of criticisms of the concentrated–diffuse distinction,[232] the distinction remains very useful, particularly for comparative law analysis, and it is not possible to consider it obsolete.[233] The basis of the distinction, which can always be considered valid, is established

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227 See, in general, M. CAPPELLETTI, *op.cit.*, p. 45 and M. CAPPELLETI and J.C. ADAMS, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard Law Review*, 79, 6, April 1966, p. 1207.

228 See, generally, Mauro CAPPELLETTI, *Judicial Review in Contemporary World*, Bobbs–Merrill, Indianapolis 1971, p. 45; Mauro Cappelletti and J. C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard Law Review* 79, Nº 6, April 1966, p. 1207; Mauro CAPPELLETTI, "El control judicial de la constitucionalidad de las leyes en el derecho comparado," in *Revista de la Facultad de Derecho de México* 61, 1966, p. 28; Allan R. BREWER–CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Allan R. BREWER–CARÍAS, *Études de droit pubic comparé*, Bruylant, Brussels 2000, pp. 653 ff.

229 See, e.g., Lucio PEGORARO, "Clasificaciones y modelos de justicia constitucional en la dinámica de los ordenamientos," *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 2, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 131 ff.; Alfonse CELOTTO, "La justicia constitucional en el mundo: Formas y modalidades," *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 1, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 3 ff.

230 See, e.g., Francisco FERNÁNDEZ SEGADO, La justicia constitucional ante el siglo XXI. La progresiva convergencia de los sistemas americano y europeo–kelseniano, Librería Bonomo Editrice, Bologna 2003, pp. 40 ff.

231 On the effort to establish a new basis for new distinctions, see Louis FAVOREU, *Les cours constitutionnelles*, Presses Universitaires de France, 1986; Michel FROMONT, *La justice constitutionnelle dans le monde*, Dalloz, Paris 1996; D. ROUSSEAU, *La justice constitutionnelle en Europe*, Montchrestien, Paris 1998.

232 See Francisco FERNÁNDEZ SEGADO, "La obsolescencia de la bipolaridad 'modelo Americano–modelo europeo–kelseniano' como criterio analítico del control de constitucionalidad y la búsqueda de una nueva tipología explicativa," in *La justicia constitucional: Una visión de derecho comparado*, Ed. Dykinson, Madrid 2009, vol. 1, pp. 129–220; Guillaume TUSSEAU, *Contre les "modèles" de justice constitutionnelle: Essai de critique métodologique*, Bononia University Press, Universitá di Bologna, Bologna 2009 (bilingual French–Italian edition); Guillaume TUSSEAU, "Regard critique sur les outils méthodologiques du comparatisme. L'example des modèles de justice constitutionnelle," *IUSTEL: Revista General de Derecho Público Comparado*, Nº 4, Madrid, January 2009, pp. 1-34.

233 In fact, what can be considered obsolete is the distinction that derives from an erroneous denomination that has been given to the two systems, particularly by many in Europe, contrasting the so–called American and European systems. This ignores that the "European system," which cannot be reduced to the existence of a specialized Constitutional Court, was present in Latin America a few decades before its introduction in the Czechoslovak Constitution and that the "American system" is not at all endemic to countries with common law systems, having spread since the nineteenth century into countries with Roman law traditions. See Allan R. BREWER–CARÍAS, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Vicki C. JACKSON and Mark TUSHENT, *Comparative Constitutional Law*, 2nd ed., Foundation Press/Thomson West, New York 2006, pp. 465 ff., 485 ff. Also, as has been pointed out by Francisco RUBIO LLORENTE, it is impossible to talk about a European system, when within Europe there are more differences between the existing systems of judicial review than between any of them and the American system. See Francisco RUBIO LLORENTE, "Tendencias actuales de

between, on the one hand, constitutional systems in which all courts are constitutional judges and have the power to review the constitutionality of legislation in decisions on particular cases and controversies, without such power necessarily being expressly established in the Constitution, and, on the other hand, constitutional systems in which a constitutional jurisdiction is established assigning its exercise to a constitutional court, tribunal or council or to the supreme or high court or tribunal of the country, as the only court with jurisdictional power to annul statutes contrary to the Constitution – such courts or the assignment of power to them must be expressly provided for in the Constitution. These are the basic grounds for the distinction that still exists in comparative law, even in countries where both systems function in parallel, as happens in many Latin American countries.[234]

It is in this sense that this book refers to the concentrated system and the diffuse system of judicial review.[235]

In the case of the diffuse system of judicial review, all the courts of a given country are empowered to judge the constitutionality of laws. This is the case in the United States of America, thus this system has been identified as the 'American system', because it was first adopted in the United States particularly after the famous *Marbury* v. *Madison* 1 Cranch 137 case decided by the Supreme Court in 1803. This system is followed in many countries with or without a common law tradition. This is the case, for example, in Argentina, Mexico, Greece, Australia, Canada, India, Japan, Sweden, Norway and Denmark. This system is also qualified as a diffuse system of judicial review of constitutionality,[236] because judicial control belongs to all the courts from the lowest level up to the Supreme Court of the country.

By contrast, there is the concentrated system of judicial review in which the power to control the constitutionality of legislation and other state organs issued in direct execution of the constitution is assigned to a single organ of the state, whether to its Supreme Court or to a special court created for that particular purpose. The latter case, is also referred to as the Austrian system because it was first established in Austria, in 1920, and was materialized through the creation of a special constitutional court established outside of the judicial branch of government with the power not only to declare the unconstitutionality of statutes that violate the Constitution, but also to annul them with *erga omnes* effects, that is, to expel them from the legal system. This concentrated system, incorrectly called the "European model," was initially followed in Germany, Italy, and Spain, and is nowadays followed in almost all democratic rule of law states in Europe. It is called a concentrated system of judicial review, as opposed to the diffuse system, because the power of control over the constitutionality of state acts is given only to one single constitutional body that can also be the Supreme Court of a given country or, as in the Austrian or "European model," to a specially created constitutional court or tribunal, that although it exercises judicial functions, in general, it is created by the constitution outside the ordinary judicial power, as a constitutional organ different to the Supreme Court of the country.

In other words, the so-called "European model" refers to the concentrated system of judicial review when the constitutional jurisdiction is assigned to a special constitutional court. However, other countries without special constitutional courts also follow the concentrated system of judicial

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la jurisdicción constitucional en Europa," in *Manuel Fraga: Homenaje académico*, Fundación Canovas del Castillo, Madrid 1997, vol. 2, p. 1416.

234 As is, for instance, the case of Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Venezuela, as well as Portugal, and in a certain way Greece, and Canada. See Allan R. BREWER–CARÍAS, "La jurisdicción constitucional en América Latina," in Domingo GARCÍA BELAÚNDE and Francisco FERNÁNDEZ SEGADO (coords.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117-161.

235 See Allan R. BREWER–CARÍAS, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceeding*, Cambridge University Press, New York 2009, pp. 81 ff.

236 M. CAPPELLETTI, "El control judicial de la constitucionalidad de las leyes en el derecho comparado," in *Revista de la Facultad de Derecho de México*, 61, 1966, p. 28.

review by assigning the constitutional jurisdiction to existing supreme courts. In this sense, the concentrated system of judicial review has been adopted in Brazil, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. Only in Bolivia, Colombia, Chile, Guatemala, Peru, and Ecuador is the constitutional jurisdiction assigned to special constitutional courts or tribunals. In the other countries, it is exercised by the existing supreme courts. Only in Bolivia, Costa Rica, Chile, Ecuador, El Salvador, Honduras, Panama, Paraguay, and Uruguay does the system remain exclusively concentrated. In the other countries, it has been mixed with the diffuse system, functioning in parallel[237]

Concerning the judicial organs that can exercise the power of controlling the constitutionality of laws, other countries have adopted a mixture of the aforementioned diffuse and concentrate systems, in the sense of allowing both types of control at the same time. Such is the case in Colombia and Venezuela where all courts are entitled to judge the constitutionality of laws and therefore decide autonomously on their inapplicability in a given process, and the Supreme Court has the power to declare the unconstitutionality of laws in an objective process. One can say that these countries have a diffuse and concentrated parallel system of judicial review at one and the same time, perhaps the most complete in comparative law.[238]

However, other distinctions can be observed regarding the so–called concentrated systems of judicial review, in which the power of control is given to the Supreme Court or to a Constitutional Court.

In the first place, in relation to the moment at which control of the constitutionality of laws is performed, which may be prior to the formal enactment of the law, as was initially the case in France, or the judicial control of the constitutionality of laws which can be exercised by the court after the law has come into effect, as is the case in Germany and Italy.

In this respect, other countries have established both possibilities, as is the case of Spain, Portugal and Venezuela. In the latter, a law sanctioned by Congress prior to its enactment, can be placed by the president of the Republic before the Supreme Court to obtain a decision regarding its constitutionality, and the Supreme Court can judge the constitutionality of the law after it has been published and has come into legal effect.

Moreover, in relation to the concentrated systems of judicial review, two other types of control can be distinguished regarding the manner in which this review is required, either incidentally or through an objective action. In the first place, the constitutional question is not considered justiciable unless it is closely and directly related to a particular process, in which the constitutionality of the concrete law is not normally necessary to the unique issue in the process. In this case, judicial control is incidental, and the Supreme Court or constitutional tribunal can only decide when it is required to do so by the ordinary court that has to decide the case. In this circumstance, it is the function of the ordinary courts, upon hearing a concrete case, to place the constitutional issue before the constitutional court.

Of course, the incidental nature of judicial review is essential to diffused control systems and, therefore, to all legal systems that follow the American model.

However, in the field of the concentrated system of judicial review, the control granted to the constitutional court can also be exercised through direct action where the constitutionality of the particular law is the only issue in the process, without reference or relation to a particular process.

In this latter case, another distinction can be made in relation to the *locus standi* to exercise the direct action of unconstitutionality: in most countries with a concentrated system of judicial review, only other organs of the state can place the direct action of constitutionality before the

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237 See Allan R. BREWER–CARÍAS, Judicial Review in Comparative Law, Cambridge University Press, Cambridge 1989; and Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceeding, Cambridge University Press, New York 2009.

238 See Allan R. BREWER–CARÍAS, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela,* Universidad Externado de Colombia y Pontificia Universidad Javeriana, Bogotá 1995.

constitutional court, for instance, the head of government, or a number of representatives in Parliament.

Other systems of concentrated judicial review grant the action of constitutionality to individuals, whether requiring that the particular law affect a fundamental right of the individual, or by means of a popular action, in which case any citizen can request the constitutional court or Supreme Court to decide upon his claim concerning the constitutionality of a given law, without any particular requirement regarding his standing.

The principle, in any case, is the impossibility for constitutional courts or supreme courts to initiate judicial review processes *motu proprio*, that is, ex *officio*. The principle is that such control of constitutionality of State acts must be initiated at the request of a party, being an exception to the rule of standing the cases in which the Constitution of a country assigns to a constitutional court the power to issue rulings, for instance for the abstract interpretation of the Constitution, without the request of any specific party, whether an individual or a State entity.

This is the exceptional case, for instance, of the Constitutional Courts in Croatia and in Serbia. In Croatia, the Constitutional Court has cautiously avoided using this power, showing a considerable measure of deference, except in cases where an obviously unconstitutional act has unconstitutionally regulated the Constitutional Court itself.[239] In the case of Serbia, in contrast, the Constitutional Court has often initiated proceedings *ex officio* to assess the constitutionality of statutes, which in practice blurs the difference between requests for judicial review filed by authorities (initiatives) having the required standing. In addition, when the Court declines to start a procedure on an initiative, it usually states its opinion on the constitutionality of the challenged act. Only when it rejects an initiative for formal reasons does the court does not assess the constitutionality of the act in the reasoning of the decision.

However, the court can, in any case, put the proceeding in motion independently, even when the initiative has been filed having formal inaccuracies.[240] In such cases, we consider that the Court must always follow elemental rules of due process calling and allowing any interested party to participate in the same.

In any case, as we have seen, the basic division that we can establish regarding the various systems of judicial review depends, in our opinion, upon the concentrated or centralized or diffuse or decentralized character of judicial control of constitutionality, that is to say, when the power of control is given to all the courts of a given country or to one special constitutional court or to the Supreme Court of that country.

We have also said that some countries have even adopted both systems of judicial review that developed in parallel. Regarding this main classification, as we said, other criteria can be adopted to identify the various systems of judicial control of the constitutionality of laws: the incidental and the principal or objective action systems.

Furthermore, in relation to the main distinction between the diffuse and concentrated systems of judicial review, we can also distinguish other criteria for classifying the various systems, according to the legal effects given to the judicial decision of review.

Within this scope, we can distinguish decisions with *in casu et inter partes* or *erga omnes* effects, that is to say, when the judicial decision has effects only within the parties in a concrete process, or when it has general effects applicable to everyone.

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239 See Decision Nº U–I–39/2002, Official Gazette *Narodne novine*, Nº 10/2002; Sanja BARIĆ and Petar BAČIĆ, "Constitutional Courts as Positive Legislators, *Croatian National Report*," in Allan R. BREWER–CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2011, pp.407.

240 See Boško TRIPKOVIĆ, **"**A Constitutional Court in Transition**:** Making Sense of Constitutional Adjudication in Post authoritarian Serbia," *Serbian National Report*, in Allan R. BREWER–CARÍAS, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2011, pp. 735 ff.

For instance, in the diffused systems of judicial review, according to the American system, the decision of the courts, in principle, only has effects for the parties of the process, which effects are closely related to the incidental nature of judicial review.

And in the concentrated system of judicial review, following the Austrian model, when the judicial decision is a consequence of the exercise of an objective action, the effects of such a decision are general, with *erga omnes* validity.

Thus, in the diffused systems of judicial review, a law declared unconstitutional with *inter partes* effects, in principle, is considered null and void, with no effect whatsoever. Therefore, in this case the decision, in principle, is retroactive in the sense that has *ex tunc*, or *pro pretaerito* consequences; that is to say, the law declared unconstitutional is considered never to have existed or never to have been valid. Thus, this decision, in principle, has "declarative" effects, in the sense that it declares the pre–existing nullity of the unconstitutional law.

In the concentrated systems of judicial review, on the contrary, a law declared unconstitutional, with *erga omnes* effect, in principle, is considered annullable. Therefore, in this case, the decision is prospective, in the sense that has *ex nunc, pro futuro* consequences, that is to say, the law declared unconstitutional is considered as having produced its effect until its annulation by the court, or until the moment determined by the court subsequent to the decision. In this case, therefore, the decision has "constitutive" effects, in the sense that the law will become unconstitutional only after the decision has been made.

Nevertheless, this distinction related to the effects of the judicial decision regarding the unconstitutionality of a law is not absolute. On the one hand, if it is true that in the diffuse systems of judicial review the decision has *inter partes* effects, when the decision is adopted by the Supreme Court, as a consequence of the *stare decisis* doctrine, the practical effects of the decision, in fact, are general, in the sense that it binds all the lower courts of the country. Therefore, as soon as the Supreme Court has declared a law unconstitutional, no other court can apply it.

On the other hand, in concentrated systems of judicial review, when a judicial decision is adopted on an incidental issue of constitutionality, some constitutional systems have established that the effects of that decision only relate, in principle, to the particular process in which the constitutionality question was raised, and between the parties of that process, even though this is not the general rule.

In relation to the declarative or constitutive effects of the decision, or its retroactive or prospective effects, the absolute parallelism with the diffuse and concentrated systems has also disappeared.

In the diffuse systems of judicial review, even though the effects of the declarative decisions of unconstitutionality of the law are *ex tunc, pro pretaerito*, in practice, exceptions have been made in civil cases to allow for the invalidity of the law not to be retroactive. In the same manner, in the concentrated systems of judicial review, even though the effects of the constitutive judicial decisions of unconstitutionality of the law, are *ex nunc, pro futuro*, in practice, exceptions were needed to be made in criminal cases to allow for the invalidity of the law to be retroactive, thus benefitting the accused.

8. The legitimacy of judicial review and the systems of distribution of public power.

As we have pointed out above, it can be said that in modern constitutionalism, the Judiciary, which is supposedly the "least dangerous" of all state powers,[241] was given the power to defend the constitution and to control the constitutionality of legislation. This is the case in the United States and in many Latin American countries, where all judges and courts have the general power to act as constitutional judges as the obvious consequence of the principle of the supremacy of the constitution.

If the constitution is the supreme law of the land, in cases of conflict between a law and the constitution, the latter must prevail, and it is the duty of the judiciary to say which law is applicable

[241] See A. BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Indianapolis 1962.

in a particular case. As Justice William Paterson stated in *Vanhorne's Lessee* v. *Dorrance* (1795) more than two hundred years ago:

> "If a legislative act oppugns a constitutional principle, the former must give way, and be rejected, on the score of repugnance. I hold it to a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void."[242]

Or, as it was definitively stated by Chief Justice Marshall in *Marbury* v. *Madison* (1803):

> "Those who apply the rule to particular cases, must of necessity expound and interpret that rule... so, if a law be in opposition to the constitution... the court must determine which of these conflicting rules governs the case: This is the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution as superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."[243]

Thus, supremacy of the constitution and judicial review as the power of all judges to defend the constitution and control the constitutionality of legislation are essentially linked. That is why regarding the constitutions and laws of the federal states this was expressly established in the well known "supremacy clause" of Article VI, Section 2, of the American constitution, which states:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the constitution or laws of the state to the contrary notwithstanding."

This supremacy clause was extended to federal laws in *Marbury* v. *Madison* through a logical and rational interpretation and application of the principle of the supremacy of the constitution, and was expressly established in a general sense, as a positive rule in other countries.

In this sense, for instance, since 1910, Article 215 of the Colombian constitution established that:

> "In all cases of incompatibility between the constitution and the law, the constitutional dispositions will preferably be applied."[244]

In a similar sense, since 1897, the Venezuelan Civil Procedural Code has also established in Article 20 that:

> "When a law in force whose application is required collides with any constitutional disposition, the courts will preferably apply the latter."[245]

In other cases, as in Europe, the jurisdictional function of the control of constitutionality has been attributed to special constitutional bodies or courts independent of the Judiciary. In Europe, this was the main contribution of Hans Kelsen, with his own experience on the establishment and functioning of the Constitutional Court of Austria in 1920[246] (also established the same year as that

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242 Vanhorne's Lessec v. Dorrance, 2 Dallas 304 (1795). See the text in S.I. KUTLER (ed.), *The Supreme Court and the Constitution. Readings in American Constitutional History*, NY 1984, p. 8.

243 *Marbury* v. *Madison*, 1 Cranch 137 (1803). See the text in S.I. KUTLER (ed.), *op. cit.*, p. 29.

244 See in J. ORTEGA TORRES (ed.), *Constitución Política de Colombia*, Bogotá 1985, p. 130. The origin of this norm can be traced up to the Legislative act, Nº 3, Art. 40, 1910.

245 The text is the one of the 1985 Civil Procedural Code. With similar words it was adopted in article 10 of the 1897 and 1904 Codes, and article 7 of the 1916 Code.

246 See, generally, Charles EISENMANN, *La justice constitutionelle et la Haute Cour Constitutionelle d'Autriche* (reprint of the 1928 edition, with H. Kelsen's preface), Economica, Paris 1986; Konrad Lachmayer, *Austrian National Report*, p. 1.

of Czechoslovakia), according to Kelsen's own ideas,[247] outside of the judicial branch of government, but with jurisdictional powers to annul statutes they deemed unconstitutional.[248]

The proposal was also based on the principle of constitutional supremacy and its main guarantee, that is, the nullity and the annullability of statutes and other State acts with similar rank, when they are contrary to the Constitution. But, given the general fear regarding the Judiciary and the prevailing principle of the sovereignty of Parliaments, the system materialized through the creation of a special constitutional court established outside of the judicial branch of government with the power not only to declare the unconstitutionality of statutes that violate the Constitution, but also to annul them with *erga omnes* effects, that is, to expel them from the legal order.

Kelsen's initial arguments were developed to confront the problems that such powers of judicial review in the hands of a new constitutional organ different from the Legislator could arise in Europe regarding the principle of separation of powers and, in particular, its incidence on legislative functions. Nevertheless, the system, by that time and without the need to create a separate constitutional court, was already in existence, with similar substantive trends in some Latin American countries such as Colombia and Venezuela, where the annulment powers regarding unconstitutional statutes had been granted since 1858 to supreme courts of justice.[249]

However, regarding the creation of the concentrated system in Europe, the basic thoughts of Kelsen on the matter were expressed in his article of 1928: "The Jurisdictional Guarantee of the Constitution (Constitutional Justice),"[250] in which he considered the general problem of the legitimacy of the concentrated system of judicial review. In particular, he analyzed the compatibility of the system with the principle of separation of powers, based on the fact that an organ of the State other than the Legislator could annul statutes without the decision to do so being considered an invasion of the Legislator's domain.

In this regard, after arguing that "to annul a statute [] is to establish a general norm, because the annulment of a statute has the same general character of its adoption," and after considering that to annul a statute is "the same as to adopt it but with a negative sign, and consequently, in itself, a legislative function," Kelsen considered that the court that has the power to annul statutes is, consequently, "an organ of the Legislative branch."[251] Nonetheless, Kelsen finished by affirming that, although the "activity of the constitutional jurisdiction" is an "activity of the Negative Legislator," this does not mean that the constitutional court exercises a "legislative function," because that would be characterized by the "free creation" of norms. The free creation of norms,

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247 Kelsen called constitutional justice his "most personal work." See Theo ÖHLINGER, "Hans Kelsen y el derecho constitucional federal austriaco: Una retrospectiva crítica," *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 5, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2006, p. 219.

248 Hans KELSEN himself began to explain the functioning of the concentrated system in his very well–known article, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," in *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197-257. See also the Spanish text in Hans KELSEN, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001.

249 On the origins of the Colombian and Venezuelan systems, see Allan R. BREWER–CARÍAS, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia, Pontificia Universidad Javeriana, Bogotá 1995.

250 See Hans KELSEN, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," in *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197–257. See also Hans KELSEN, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitutions," in *Journal of Politics* 4, Nº 2, Southern Political Science Association, May 1942, pp 183–200; "El control de la constitucionalidad de las leyes: Estudio comparado de las Constituciones Austríacas y Norteamericana," in *Revista Iberoamericana de Derecho Procesal Constitucional*, Nº 12, Editorial Porrúa, Mexico 2009, pp. 3–17; "Le contrôle de constitutionnalité des lois. Une étude comparative des Constitutions autrichienne et américaine," *Revue française de droit constitutionnel*, Nº 1, Presses Universitaires de France, Paris 1999, pp. 17–30.

251 See Hans KELSEN, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 54.

however, does not exist in the case of the annulment of statutes, which is a "jurisdictional function" that can only be "essentially accomplished in application of the norms of the Constitution," that is, "absolutely determined in the Constitution."[252] His conclusion was that the constitutional jurisdiction accomplishes a "purely juridical mission, that of interpreting the Constitution," with the power to annul unconstitutional statutes as the principal guarantee of the supremacy of the Constitution.[253]

In any case, both with respect to the diffuse and the concentrated systems of judicial review, the fact is that of entrusting, particularly in Europe, the judicial review to state bodies that are not responsible to the people, to control the acts of those who, on the contrary, are politically responsible,[254] provoked in the past an endless discussion of what Mauro Cappelletti called "the mighty problem of judicial review," that is to say, the discussion, now over, related to the legitimate or illegitimate power of judicial review given to courts or, from another angle, the democratic or non–democratic character of judicial review.[255]

Of course, the discussions had been developed either to justify the absence of judicial review in systems in which the sovereignty of Parliament prevails, or to criticize judicial review when judges have shown an outstanding activism in the adaptation of the constitution, in creating non–written constitutional rules or in attributing constitutional character to certain rules. In this context, judicial review has been considered illegitimate because it is believed that non–elected bodies must not control elected bodies of the state, and that non–elected state bodies must not determine which norm of the state is law, that is to say, which is constitutional or unconstitutional.

We think that this really is an abstract and Byzantine discussion, and that it will remain endless, mainly because it is orientated as if there were a problem of abstract legitimacy of judicial review that could be resolved in an abstract way, identifying democracy with sole representativeness.[256] The problems of judicial review or of the powers assigned to judges to control the constitutionality of legislation cannot be explained or criticized on the grounds of legitimacy or illegitimacy, considering the democratic principle solely as representativeness. Democracy goes beyond the framework of mere representation and elections because it is rather a political way of life and a system necessarily based on the principle of the separation of powers and the control of power, on political pluralism, and on the existence and guarantee of individual freedoms and the fundamental rights of human beings, which have primacy.[257] This is so, to the point that it can be said that a system of effective jurisdictional control of the constitutionality of laws is not viable in non-democratic regimes, espec We think that this really is an abstract and Byzantine discussion, and that it will remain endless, mainly because it is orientated as if there were a problem of abstract legitimacy of judicial review that could be resolved in an abstract way, identifying democracy with sole representativeness.[258] The problems of judicial review or of the powers assigned to judges to control the constitutionality of legislation cannot be explained or criticized on the grounds of legitimacy or illegitimacy, considering the democratic principle solely as representativeness. Democracy goes beyond the framework of mere representation and elections because it is rather a political way of life and a system necessarily based on the principle of the separation of powers and the control of power, on political pluralism, and on the existence and guarantee of individual

252 *Id.*, pp. 56–57. See Allan R. BREWER–CARÍAS, *Études de droit public comparé*, Bruylant, Brussels 2003, p. 682.

253 See Hans KELSEN, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 57.

254 M. CAPPELLETTI, "E1 formidable problema del control judicial y la contribución del análisis comparado", *Revista de estudios políticos*, 13, Madrid 1980, p. 61-103 ("The Mighty Problem of Judicial Review and the contribution of comparative analysis", in *Southern California Law Review*, 1980, p. 409).

255 M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy*…, doc. cit, pp. 24-32.

256 See Allan R. BREWER–CARÍAS**,** Judicial Review in Comparative Law, cit., pp. 116 ss.

257 See on the scope of democracy and of democratic regimes what was said in *Part Two* of this book.

258 See Allan R. BREWER–CARÍAS**,** Judicial Review in Comparative Law, cit., pp. 116 ss.

freedoms and the fundamental rights of human beings, which have primacy.[259] This is so, to the point that it can be said that a system of effective jurisdictional control of the constitutionality of laws is not viable in non-democratic regimes, especially because in such systems there can be no real independence and autonomy of judges.[260]

In other words, a Cappelletti said:

> "An efficient system of judicial review is totally incompatible with any antilibertarian, absolute, dictatorial regime, as is ample proven by historical experience and comparative study." [261]

Therefore, it is clear that there cannot be effective independence of judges, and it is "clear that judicial review cannot be practiced efficiently where the Judiciary has no guarantee of its independence."[262] In these systems, no matter how many elections there may be, and no matter how many "representative" members the Parliament may have, there is no effective democracy, and in them, the constitutional judge subjected to power is rather an instrument for the consolidation of authoritarianism.

That is also, why in most European countries it has been noted that after periods of dictatorship, systems of judicial review of constitutionality were established, as was the case of Germany, Italy, Spain, and Portugal.[263]

From this, of course, it cannot be inferred that constitutional justice is only a system of new democracies, or of states whose democratic tradition is weaker and more fragile.[264]

Therefore, in a representative and democratic regime where the separation of powers and the control of power are guaranteed, the power attributed to judges or to certain independent and autonomous constitutional bodies to control the deviations of the legislative body and the infringements by the representative body of fundamental rights must be considered absolutely democratic and legitimate.[265]

As Jean Rivero stated in his final report to the 1981 International Colloquium of Aix–en–Provence on the protection of fundamental rights by constitutional courts in Europe:

> "I think that the (judicial constitutional) control marks progress, in the sense that democracy is not only a way of attribution of power, but also a way of exercising it. And I think that all that reinforces the fundamental liberties of citizens goes along with the democratic sense."[266]

Along this same line of thought, Eduardo García de Enterría referring to constitutional liberties and fundamental rights as limits imposed on state powers, stated:

> "If the constitution established them, it is obvious that an occasional parliamentary majority who ignore or infringe them, is very far from being legitimate to do so based on the

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259 See on the scope of democracy and of democratic regimes what was said in *Part Two* of this book.

260 See M. CAPPELLETTI, "Rapport Général", in L. FAVOREU and J. A. JOLOWICZ. (ed) *Le contrôle juridictionnel des lois. Légitimité, effectivité et développements récents,* Paris 1986, p. 29.

261 M. CAPPELLETTI, Judicial Review of Legislation and its legitimacy…, loc. cit., p. 11.

262 J. CARPIZO and H. FIX–ZAMUDIO, The Necessity for and the Legitimacy of the Judicial Review of the Constitutionality of the Laws in Latin America, Recent Development, International Association of Legal Sciences. Uppsala Colloquium 1984 (mimeo), p. 22. Published in Spanish "La necesidad y la legitimidad de la revisión judicial en América Latina. Desarrollo reciente," Boletín mexicano de derecho comparado, 52, 1985, pp. 31-64. Also published in L. FAVOREU and J.A. JOLOWICZ (ed.), Le contrôle juridictionnel des lois..., cit., pp. 119-151.

263 L. FAVOREU, *Le contrôle juridictionnel des lois et sa légitimité..., doc. cit*., p. 24. *Cf.* P. DE VEGA GARCÍA, "Jurisdicción Constitucional y Crisis de la Constitución", *Revista de estudios políticos*, 7, Madrid 1979, p. 108.

264 Como lo afirmó Francisco Rubio Llorente, "Seis tesis sobre la jurisdicción constitucional en Europa", in *Revista Española de Derecho Constitucional*, Nº 35, Madrid 1992, p. 12.

265 E.V. ROSTOW "The Democratic Character of Judicial Review", *Harvard Law Review*, 193, 1952, p. 193

266 J. RIVERO "Rapport de Synthèse", *loc. cit.*, p. 525–526. *Cf.* M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy..., doc. cit*, p. 32.

majoritarian argument and is rather revealing its abuse of power and its possible attempts at exclusion of minorities.

The protective function of the Constitutional Tribunal confronting that abuse, annulling the legislative acts which make an attempt on the liberty of a few or all citizens, is the only effective instrument against infringement; there is no other possible alternative if one prefers to have an effective guarantee of liberty, that could make it more than simply rhetoric in a constitutional document."[267]

This was also the main reasoning put forward by Hans Kelsen in his very important article published in the French *Revue du Droit Public et de la Science Politique en France et a l'étrangèr* in 1928, when arguing against the majoritarian argument. He said:

"If one sees the essence of democracy, not in the all-powerful majority, but in the constant compromises between the groups represented in Parliament by the majority and the minority, and consequently in the social peace, constitutional justice appears as a means particularly proper for the achievement of this idea. The simple threat of an action to be brought before the Constitutional Court can be an adequate instrument in the hands of the minorities for preventing unconstitutional violations of juridically protected interests by the majority, and consequently being able to oppose the majority dictatorship, which is not less dangerous to social peace than the minority one."[268]

However, democratic legitimacy of judicial review does not arise only through the judicial protection of fundamental rights, but also through the protection of the organic part of the constitution, that is to say, through the control of the systems of distribution of powers adopted in the constitution.

In this respect, we must point out that the problem of legitimacy has never been posed regarding the vertical distribution of state powers in the politically decentralized or federal systems; on the contrary, judicial review is essentially and closely related to federalism.[269]

That is why the form of the state, and particularly federalism, as a vertical form of distribution of power, is among the most important political principles that have led to the establishment of the judicial review of legislation and upheld its justification in contemporary constitutional law.

Federalism requires the affirmation of a certain degree of supremacy for federal laws with regard to local, regional or state laws; and similarly with regard to the sphere of powers attributed to them, according to the system adopted for the vertical distribution of power. Thus, it is not by chance that those countries with federal form of state and with politically decentralized state organization were among the first to establish judicial review of the constitutionality of legislation.

This was the case during the nineteenth century, in the United States of America and in all the federal states of Latin America (Argentina, Brazil, Mexico and Venezuela), which established a system of judicial control of the constitutionality of laws and other acts of the State. It also happened in Europe, in Germany, which has a federal form of state, and in the decentralized forms of the Italian regional state and the Spanish Autonomous Communities state that established a system of jurisdictional control of the constitutionality of laws.

In all these cases, it is evident that the need for judicial review or the establishment of a constitutional court is justified by the demand for a constitutional body, which could settle conflicts of powers between the national and regional bodies. One of the fundamental tasks of the constitutional courts in Austria, Germany, Italy, and Spain and of the judicial control of constitutionality exercised by the Supreme Courts and Constitutional Courts in Latin America, is precisely the resolution of conflicts between the levels of the national state and the member states of the Federation, or the political regions, or the Autonomous Communities, according to the

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267 E. GARCÍA DE ENTERRÍA, *op. cit.*, p. 190.

268 H. KELSEN, *loc. cit.*, p. 253.

269 W.J. WAGNER, *The Federal States and their Judiciary*, The Hague 1959, p. 85.

country, and similarly, conflicts that may arise between the regions or states themselves, or between them and the national level. Thus, it is the political decentralization, both in the federal states and in the so–called regional states that has encouraged the appearance and consolidation of constitutional tribunals responsible precisely for the function of constitutional review of legislation in order to guarantee the constitutional balance of the state and the territorial bodies. That is why, in federal states, or in politically decentralized states, there are no doubts about the legitimacy of judicial review of constitutionality, and no debate has arisen on the matter, except to justify its existence and necessity.[270]

Therefore, the problems of legitimacy of judicial review of constitutionality are not referred to the guarantee of the constitution concerning federalism or political decentralization or to the guarantee of the fundamental rights of the individual. These constitute limitations on legislative power in reference to which judicial control is exercised without discussion.[271]

Nevertheless, the same cannot be said about the horizontal distribution or separation of powers. Even though it also imposes limitations on the legislative power, the acceptance of judicial review of the constitutionality of legislation has here prompted discussions over its legitimacy, based, particularly, on the notion of supremacy of Parliament over the other state powers. However, on the other hand, it has given fundamental arguments in favor of judicial review, precisely, as the counterweight's essential element, which should be established among the various state powers to guarantee the constitution.

In effect, the separation of powers as a consequence of the horizontal distribution of state powers among the state organs essentially requires an independent mechanism to guarantee the organic part of the constitution. This system of control is essential to the distribution of power, particularly between the legislative and the executive power. It is necessary to establish a third counterweight system between them to maintain the equilibrium that the constitution lays down. Thus, the powers granted to the judicial organs to control the constitutionality and legality of administrative actions, accepted without debate has been essentially related to the Rule of Law, as well as to control the constitutionality of legislation.

However, the tradition of the principles of Parliamentary supremacy on the one hand, and of separation of powers on the other, have been so powerful in Europe, that these have led to impeding ordinary judicial bodies from any possibility of judging the constitutionality of legislation. This was the reason for the creation in France of the Contentious Administrative Jurisdiction, independent of the Judiciary, and in general, in Europe, systems of jurisdictional control of constitutionality had been established, but taking the precaution of entrusting them to new constitutional bodies, distinct and separate from the Judiciary. In this manner, the need for judicial review of legislation as a guarantee of the constitution has been adjusted to the principle of separation of powers that has traditionally considered any attempt to control the constitutionality of legislation an inadmissible intrusion by the judicial body in the sphere of the legislator.

It was this confrontation between the need for constitutional judicial review as a guarantee or means of protection of the constitution and the principle of separation of powers what led in Continental Europe to the creation of special constitutional bodies with the particular and special jurisdictional task of controlling the constitutionality of legislation, although not being part of the traditional structure of the Judiciary. Therefore, the solution to such confrontation has been resolved by creating new constitutional bodies (constitutional courts or tribunals) above the traditional horizontal separation of powers, –equally above the legislator, the executive and the courts– to ensure the supremacy of the constitution with respect to them all.

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270 In this sense, Hans KELSEN said in 1928 that "it is in Federal States where the constitutional justice acquired the most considerable importance. It is not excessive to affirm that the political idea of the Federal State is not entirely realized without the institution of a constitutional Tribunal", *loc. cit*., p. 24. *Cf.* L. FAVOREU, *Le contrôle juridistionnel des lois et sa légitimité..., doc. cit*., p. 35.

271 *Cf.* B.O. NWABUEZE, *Judicial Control of Legislative Action and its Legitimacy–Recent Developments*. African Regional Report. International Association of Legal Sciences. Uppsala Colloquium, 1984, (mimeo) p. 23. Also published in L. FAVOREU and J.A. JOLOWICZ (ed.), *Le contrôle juridictionnel des lois..., cit*., p. 193–222.

The "Austrian System" of judicial review or the "European model," as it has also been qualified,[272] is characterized by the fact that constitutional justice has been attributed to a constitutional body organized outside the ordinary judicial organization, that is to say, outside the ordinary courts, and hence not integrated within the general structure of the Judiciary. The members of the constitutional tribunal, court or council do not become so by way of a judicial career, but rather are appointed, basically by political bodies and, in particular, by the Parliament and the executive.

This system has given rise to a special constitutional organ, which, despite of not being integrated within the Judiciary, resolves legal controversies according to the law, and thus pursues a proper jurisdictional activity.

These constitutional courts, councils or tribunals have been considered the "supreme interpreters of the constitution," as the Spanish Constitutional Tribunal Organic law qualified it,[273] or as the "custodian of the constitution."[274] Eduardo García de Enterría, currently (1985) judge in the European Court of Human Rights, referring to the Spanish Constitutional Tribunal, qualified it as a "commissioner of the Constituent's power to sustain the constitution and to maintain all the constitutional organs in their strict quality of constituted powers,"[275] and the former president of the same Spanish Constitutional Tribunal, Manuel García Pelayo, considered it "as a constitutional organ, established and structured directly in the constitution", and that:

> "As regulator of the constitutionality of the state action, it is the one called upon to give full existence to the *Estado de derecho* and to ensure the validity of the distribution of powers established in the constitution, both essential components in our times of the true Constitutional state."[276]

9. The constitutional judge, the protection of fundamental rights and the control of conventionality

On the other hand, it should be noted that the defense of the Constitution as an essential function of constitutional justice not only aims to guarantee the different modes of distribution of power among the constituted bodies of the State and thus the stability and political continuity of the State, but also has the function of guaranteeing fundamental individual rights and freedoms. This is undoubtedly another essential element of the rule of law and one of the weighty arguments used to defend the legitimacy of judicial review of the constitutionality of the acts of the State.

In effect, judicial review or judicial control of the constitutionality of legislation are bound up in the effective establishment of fundamental rights. Therefore, the need for the establishment of a system of judicial review also arises when there are entrenched declarations of fundamental rights and liberties linked with the constitutional values of a given society.[277]

Nevertheless, even though the idea of fundamental rights established in a constitution, as a superior and effective rule of law in an entrenched way, has historical antecedents in the American and French Revolutions, and had spread throughout all Hispanic American countries, it did not appear in Europe until after World War II. Therefore, the problem of establishing a system of judicial review, exception made of the Austrian and Czechoslovakian systems in the 1920's only arose in Europe after World War II, as a mean for defending the rights of man, precisely because these suffered the greatest violations in Europe. Here, once again, it is not by chance that it was in

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272 M. CAPPELLETTI, *Judicial Review of Legislation and its Legitimacy*..., p. 26; L. FAVOREU, "Actualité et légitimité du contrôle juridictionnel des lois en Europe occidental", *loc. cit.*, p. 1149.

273 Art. 1. Ley Orgánica del Tribunal Constitucional, Oct. 1979, *Boletín Oficial del Estado*, Nº 239.

274 G. LEIBHOLZ, *Problemas fundamentales de la democracia*, Madrid 1971, p. 148.

275 E. GARCÍA DE ENTERRÍA, *op. cit.*, p. 198.

276 E. GARCÍA PELAYO, "El Status del Tribunal Constitucional", in *Revista española de derecho constitucional*, 1, Madrid 1981, p. 15.

277 See on this what has been said in *Part Five* of this book.

Italy and Germany when, for the first time in their constitutional texts, the validity of the rights of man and the need to organize mechanisms for their defense was affirmed, and among which, the review of constitutionality of legislation.

On the other end, the absence of entrenched fundamental rights of individuals with constitutional rank, as a limit on the legislator, is one of the main reasons for the absence of a system of judicial review of constitutionality, as happened in the United Kingdom. That is why D.G.T. Williams correctly pointed out:

> "The underlying problem either of an entrenched Bill of Rights or of an entrenched federal structure for the United Kingdom is judicial review," because "the adoption of a Bill of Rights would, of course, involve the exercise of judicial review by the English Courts," that is to say, the power of domestic courts, "to protect certain fundamental freedoms even against the legislative itself."[278]

However, to some extent this was achieved in the United Kingdom and in countries such as The Netherlands, which exclude judicial review of the constitutionality of laws by means of the review of the conformity of laws with the European Convention on Human Rights.

Anyway, what is true in constitutional systems with written constitutions is that, if the constitution purports to be a supreme, mandatory and enforceable law, the constitutional system must establish means for its defense and guarantee. On the contrary, as Hans Kelsen used to say:

> "A constitution without guarantees against unconstitutional acts is not completely obligatory in its technical sense... A constitution in which unconstitutional acts and, particularly, unconstitutional laws, remain valid because their unconstitutionality cannot lead to their annulment, is more or less, equivalent from a juridical point of view, to a desire without mandatory force."[279]

The judicial guarantees of the constitution, that is to say, the power given to judges –ordinary judges or special constitutional courts– to declare the unconstitutionality of state acts issued in violation of the constitution, or to annul those acts with general effects is, therefore, an essential part of the Rule of Law. It is a power to ensure precisely, that all state organs are submitted to the rule of law and, therefore, that they will respect the limits imposed upon them by the constitution, according to the system[280] of distribution of state powers adopted and that they will respect the fundamental rights and liberties declared in the constitution itself.

On the other hand, as a result of the process of internationalization of the constitutionalization of human rights, which are now generally declared in international instruments, especially when these instruments establish international judicial bodies for their protection, what has come to be known as the "control of conventionality" has acquired enormous interest in the contemporary world.[281] As far as Latin America is concerned, it has been developing since the entry into force of

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278 D.G.T. WILLIAMS, "The Constitution of the United Kingdom", *Cambridge Law Journal*, 31, 1972, pp. 278-279.

279 H. KELSEN, "La garantie juridictionnelle de la Constitution (La justice constitutionnelle)", in *Revue du Droit public et de la Science politique en France et à l'étranger,* Paris 1928., p. 250.

280 As M. HIDEN said, "probably there are as many methods of securing the constitutionality of laws and regulations as there are countries with a written constitution," in "Constitutional Rights in the Legislative Process: the Finnish System of Advance Control of Legislation", in *Scandinavian Studies in Law*, 17, Stockholm 1973, p. 97.

281 See Ernesto REY CANTOR, *Control de Convencionalidad de las Leyes y Derechos Humanos*, México, Editorial Porrúa-Instituto Mexicano de Derecho Procesal Constitucional, 2008; Juan Carlos HITTERS, "Control de constitucionalidad y control de convencionalidad. Comparación," in *Estudios Constitucionales*, Centro de Estudios Constitucionales de Chile, Universidad de Talca, Año 7, No. 2, 2009, pp. 109-128; Susana ALBANESE (Coordinadora), El control de convencionalidad, Buenos Aires, Ed. Ediar, 2008; Eduardo FERRER MAC-GREGOR, "El control difuso de convencionalidad en el Estado constitucional", in Héctor FIX-ZAMUDIO, and Diego VALADÉS (Coordinadores), *Formación y perspectiva del Estado mexicano*, México, El Colegio Nacional-UNAM, 2010, pp. 151-188; Eduardo FERRER MAC-GREGOR, "Interpretación conforme y control difuso de convencionalidad el nuevo paradigma para el juez mexicano," in *Derechos Humanos: Un nuevo modelo constitucional*, México, UNAM-IIJ, 2011, pp. 339-429; Carlos AYALA CORAO, *Del diálogo jurisprudencial al control de convencionalidad*, Editorial Jurídica venezolana, Caracas 2013, pp. 113 ff; and Jaime Orlando SANTOFIMIO and Allan R. BREWER-CARÍAS, *Control de convencionalidad y responsabilidad del Estado*,

the American Convention on Human Rights,[282] and, in general, in the democratic world when it comes to giving precedence in the internal order to international conventions ratified by the States.

In Hispanic America, this control of conventionality, in addition to that exercised by the Inter-American Court of Human Rights in judging violations of the American Convention on Human Rights committed by the acts or omissions of the States, even ordering the States to correct the unconstitutionality, for example, by modifying the challenged State acts,[283] is that exercised by national judges or courts when they have judged the validity of the State's acts, comparing them not only with the respective Constitution of each State, but also with the list of human rights and obligations of the States contained in the American Convention, or when applying the binding decisions of the Inter-American Court of Human Rights, duly deciding on the annulment of the national norms or their disapplication in the specific case according to their competence.

However, in reality, almost forty years had to go by since the Convention was signed (1969) for the important conceptualization made in 2003 by Judge Sergio García Ramírez of the Inter-American Court of Human Rights to capture within its own contours the control that the Court itself and the national judges and courts had been exercising previously.

In this matter, therefore, what is really new has been, on the one hand, the fortunate coining of a term such as "conventionality control"[284] which Sergio García Ramírez proposed in his Reasoned Opinion on the judgment in the case of *Myrna Mack Chang v. Guatemala*, of November 25, 2003,[285] and, on the other hand, the clarification that this control of conventionality is carried out in two aspects, dimensions or manifestations: on the one hand, at an international level by the Inter-American Court, and, on the other hand, in the domestic order of the countries, by the national judges and courts.

These two aspects were identified by García Ramírez, distinguishing between "the original or external control of conventionality" exercised by the Inter-American Court, and the "internal control of conventionality" exercised by the national courts;[286] and by Eduardo Ferrer Mac Gregor, distinguishing between the "concentrated control" of conventionality exercised by the Inter-

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Universidad Externado de Colombia, Bogotá 2013; Allan R. BREWER-CARÍAS, *Control de Convencionalidad. Marco conceptual, antecedentes, derecho de amparo y derecho administrativo,* Biblioteca de Derecho Administrativo, Ediciones Olejnik, Buenos Aires, Santiago de Chile, Madrid 2019.

282 See Karlos A. CASTILLA JUÁREZ, "El control de convencionalidad. Un nuevo debate en México a partir de la sentencia del caso *Radilla Pacheco*", in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, Mexico 2012, pp. 83-84

283 See Eduardo FERRER MAC-GREGOR, "Voto razonado a la sentencia de la Corte Interamericana en el caso *Cabrera García y Montiel Flores vs. México* de 26 de noviembre de 2010" (Párr. 22), in http://www.corteidh.or.cr/docs/casos/ articulos/seriec_220_esp.pdf. Also see: Eduardo FERRER MAC GREGOR, "Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano", in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, Mexico 2012, p. 132.

284 See Juan Carlos HITTERS, "Control de constitucionalidad y control de convencionalidad. Comparación," in *Estudios Constitucionales*, Centro de Estudios Constitucionales de Chile, Universidad de Talca, Año 7, Nº 2, 2009, pp. 109-128.

285 See Sergio GARCÍA RAMÍREZ, "Voto Concurrente Razonado a la sentencia en el caso *Myrna Mack Chang vs. Guatemala*, de 25 de noviembre de 2003," Serie C Nº 101, http:// www.corteidh.or.cr/docs/casos/articulos/seriec_101_esp. pdf. See also the comments in: Sergio GARCÍA RAMÍREZ, "El control judicial interno de convencionalidad," in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, México 2012, pp. 230 ss. See also the comments of Karlos A. CASTILLA JUÁREZ, "El control de convencionalidad. Un nuevo debate en México a partir de la sentencia del caso *Radilla Pacheco*," in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, México 2012, pp. 87 ff.

286 See Sergio GARCÍA RAMÍREZ, "El control judicial interno de convencionalidad," in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales)*, FUNDAp, Queretaro, Mexico 2012, pp. 213.

American Court, at an international level, and the "diffuse control" of conventionality by national judges, at the domestic level.[287].

These two aspects, in fact, were detected by Judge García Ramírez himself in 2004, in another reasoned opinion, this time on the judgment of the Case of *Tibi vs. Ecuador* of December 7, 2004, when he made a comparison between the control of constitutionality and the control of conventionality, considering that the function of the Inter-American Court was similar to that of the constitutional courts when they judge the unconstitutionality of laws and other normative acts in accordance with the rules, principles and constitutional values; adding that the Court analyzes the acts of the States that come before it "in relation to the norms, principles and values of the treaties on which it bases its contentious jurisdiction" and that while the "constitutional courts control the 'constitutionality', the international human rights court rules on the 'conventionality' of those acts"."[288]

On the other hand, with respect to the control of constitutionality carried out by the domestic jurisdictional bodies, according to García Ramírez himself, these "seek to conform the activity of the public power -and, eventually, of other social agents- to the order that entails the rule of law in a democratic society," while "the inter-American court, on the other hand, seeks to conform that activity to the international order enshrined in the founding Convention of the Inter-American jurisdiction and accepted by the States parties thereto in the exercise of their sovereignty"."[289]

But, of course, the matter of control of conventionality is not exclusive of Latin American countries, being applied in all countries subjected to International Conventions. Some examples can be illustrative referred to the same sort of control of "conventionality" of statutes developed in all European countries where European Union law, and particularly the European Convention of Human Rights, have prevalence over national law.[290] In particular, the case of The Netherlands must be highlighted. There, as no judicial review of the constitutionality of statutes is allowed in the Constitution, judicial review has developed only as a control of the "conventionality" of such statutes to ensure their subjection to international conventions, specifically on matters regarding human rights.

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287 See Eduardo FERRER MAC GREGOR, "Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano," in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, Mexico 2012, p. 132.

288 See Sergio GARCÍA RAMÍREZ, "Voto razonado del Juez a la sentencia en el caso *Tibi Vs. Ecuador*, Sentencia de 7 de septiembre de 2004," Serie C Nº 114 (Párr. 3), in http://www. corteidh. or.cr/docs/casos/articulos/seriec_114_esp.pdf. See the comments on the two sorts of control of conventionality in Víctor BAZAN and Claudio NASH (Editores), *Justicia Constitucional y derechos Fundamentales. El Control de Convencionalidad 2011,* Centro de Derechos Humanos Universidad de Chile, Konrad Adenauer Stiftung, 2011, pp. 24, 59; and Víctor BAZÁN, "Estimulando sinergias: de diálogos jurisprudenciales y control de convencionalidad", in Eduardo FERRER MAC GREGOR (Coordinador), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales), FUNDAp,* Queretaro, Mexico 2012, pp. 14 ss.

289 Sergio García Ramírez, "Voto razonado del Juez a la sentencia en el caso *Tibi vs. Ecuador*, Sentencia de 7 de septiembre de 2004," Serie C No. 114 (Párr. 4), in http://www.corteidh. or.cr/docs/casos/articulos/seriec_114_esp.pdf.

290 In the case of Poland, as mentioned by Marek SAFJAN, "The national court, denying application of a national norm which is contradictory to the European law or interpreting creatively a national norm in the spirit of a European norm *de facto* applies in the legal system a new, earlier non–existent, norm, thus becoming in a way a positive legislator on the level of a specific case." See Marek Safjan, "The Constitutional Court as Positive Legislator. *Polish National Report*," in Allan R. BREWER-CARÍAS in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study,* Cambridge University Press, 2011, pp. 701 ff. Also in Slovakia, according to article 154c of the Constitution, the international treaties, particularly the European Convention of Human Rights, having precedence over laws, the courts (including the Constitutional Court) exercise control of conventionality, by giving preference to convention. See Ján SVÁK and Lucia BERDISOVÁ, "Constitutional Court of the Slovak Republic as Positive Legislator via application and interpretation of the Constitution. *Slovak National Report*," in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study, cit.,* pp. 767 ff.

In effect, according to article 120 of the Dutch Constitution, "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts," which means that judicial review of primary legislation is prohibited, the courts being banned not only from determining the unconstitutionality of statutes, but also from declaring them incompatible with the Kingdom Charter.[291] Nonetheless, article 94 of the same Constitution establishes that "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions," thus leading to the very important development of the system of judicial review of "conventionality" of statutes, particularly on matters of human rights.

Thus, the Dutch system is referred to as a system of "constitutional fundamental rights review by the judiciary" or as "fundamental rights review of parliamentary legislation," that is, regarding the powers of the courts and particularly of the *Hoge Raad* (High Court) to review acts of Parliament for their compliance with convention rights if the treaty is ratified and insofar as the individual provisions are self–executing.[292] This means that, in The Netherlands, statutes can be reviewed by the courts for their consistency with the written provisions of international law, particularly the UN International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which has become the most important civil rights charter for The Netherlands.[293]

Such judicial review has also developed regarding European Union law, which also contains provisions on fundamental rights, in the sense that, because international treaties have precedence over national law, the courts must examine whether the national law is compatible with the law of the European Union and, if necessary, either construe national law consistently with European Union law or set it aside, if such an interpretation proves impossible under national constitutional law.[294]

In Greece, although the Constitution has no explicit provision for the control of the conventionality of statutes, the courts have held that international treaties have supra legislative status (article 28.1 of the Constitution), which is sufficient basis to exercise control of conventionality if the treaty in question is self–executing, such as the European Convention on Human Rights.

In the same sense of the control of constitutionality, if Greek courts find that a statutory provision is inconsistent with international law, that provision cannot be applied in the pending case. However, unconventional legislation remains in effect and thus, can be applied in a future occasion.[295]

On the other hand, it must be said that one of the important developments in the United Kingdom on matters of constitutional review or more precisely on matters of control of conventionality happened before the withdrawal from the European Union (Brexit) in 2020, regarding the compatibility of British statutes with European Union law. One example was the matter decided on the compatibility of a British statute concerning the limits for fishing with European Union law, which was raised and decided by the lowest tier of criminal law courts, the Magistrates' Court.[296]

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291 See J. Uzman, T. BARKHUYSEN, and M. L. VAN EMMERIK, "The Dutch Supreme Court: A Reluctant Positive Legislator, *Dutch National Report*," in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2011, pp. 645 ff.

292 *Idem*.

293 *Idem.*

294 *Idem.*,

295 See Julia Iliopoulos–Strangas and Stylianos–Ioannis G. Koutnatzis, "Constitutional Courts as Positive Legislator." *Greek National Report*, in Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, 2011, pp. 539 ff.

296 See John BELL, "Constitutional Courts as Positive Legislator.". *British National Report, in Idem.*, pp. 803 ff.

In addition, the question concerning the compatibility of British law with EU law could also be raised before the British courts, and if the matter did not give rise to a serious difficulty in interpretation, the courts could have applied European law directly and refuse to apply a British statute.[297]

Compatibility with EU law, in this sense, was the only area in which British judges had the power to strike down legislation of Parliament, an approach that was definitively adopted after the European Court of Justice specifically stated that the British courts ought not to apply a British act of Parliament that was incompatible with European legislation.[298]

In any case, the court's decision in those cases did not annul an act of Parliament. As expressed by John Bell:

> "The Government has to decide whether to propose an amendment of the law to bring it into line with the Convention or to take other action to maintain the incompatibility, e.g. by registering a formal derogation from the Convention.
>
> This is the nearest that English judges come to a constitutional review."[299]

As Lord Bingham highlighted in the case A (FC) v. Secretary of State for the Home Department:

> "The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible, the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament." [300]

This case of the House of Lords was issued to decide the challenge filed by a number of individuals regarding their detention without trial on the basis of them being a danger to national security, according to the Antiterrorism, Crime, and Security Act of 2001. The House of Lords declared the corresponding provision incompatible with articles 5 and 14 of the European Convention.

10. The constitutional judge as guardian of the Constitution, and the problem of the guardian's control

The Constitutional Judge, as was expressed by Eduardo García de Enterría when referring to the Spanish Constitutional Tribunal, can be considered as "the commissioner of the constituent power, responsible for defending the Constitution and ensuring that all constitutional bodies retain their strict quality of constituted powers."[301]

In fact, if the Constitutions are effective legal norms, which prevail in the political process, in the social and economic life of the country, and support the validity of the entire legal order,[302] then the institutional solution to preserve their validity and freedom lies precisely in establishing these commissioners of the constituent power as guardians of the Constitution, whose mission is to ensure that all the organs of the State abide by it; having also the obligation to respect the fundamental text, being submitted to its regulations, not being allowed to change it.

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297 Case 283/81, *Srl CILFIT v. Minister of Health*, [1982] ECR 3415. See John BELL, "Constitutional Courts as Positive Legislator." *British National Report, Idem,* (footnote 14).

298 See R v. Secretary of State for Transport, ex parte Factortame Ltd., [1990] 2 AC 85; R v. Secretary of State for Transport, ex parte Factortame Ltd (Nº 2), [1991] 1 AC 603; R v. Secretary of State for Employment, ex parte Equal Opportunities Commission, [1995] 1 AC 1. See John BELL, "Constitutional Courts as Positive Legislator." British National Report, in Idem pp. 803 ff. (footnotes 15-16).

299 See John BELL, "Constitutional Courts as Positive Legislator." *British National Report, Idem* pp. 803 ff.

300 See [2004] HL 56. See John BELL, "Constitutional Courts as Positive Legislator. *British National Report, Idem* (footnote 25).

301 See E. GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal constitucional*, Madrid 1985, p. 198.

302 *Idem*, pp. 33, 39, 66, 71, 177 and 187.

That is to say, as such guardian of the Constitution, and as it happens in any State under the rule of law, the submission of the constitutional court to the Constitution is an absolutely implicit preposition and not subject to discussion, since it would be inconceivable that the constitutional judge could violate the Constitution that he is called to apply and guarantee. This could be violated by the other branches of government, but not by the guardian of the Constitution.

However, to ensure that this does not happen, an additional guarantee is established in all legal systems, and that is that the constitutional court must enjoy absolute independence and autonomy from all branches of government.

In particular, because a constitutional court subject to the will of power, instead of being the guardian of the Constitution becomes the most egregious instrument of authoritarianism.

Therefore, the best system of judicial review in the hands of a judge subjected to power is a dead letter for individuals and an instrument to defraud the Constitution.

That is why that in order to guarantee this autonomy and independence, all Constitutions where judicial review systems have been established have provided, among other aspects, mechanisms to ensure the election of the members or magistrates of the courts, in order to neutralize undesirable political influences in a democracy. The aim is to ensure, through the selection of its members, that the powers attributed to constitutional courts, which has no one to control them, are not distorted and abused,

In any case, in this field of constitutional courts, *Quis custodies ipso custodiam?* always has to be asked, even if there is no answer.[303]

That is why, George Jellinek said that the only real guarantee of the guardian of the Constitution ultimately lies in its "moral conscience;"[304] and Alexis de Tocqueville was so precise in observing when he analyzed the U.S. federal Constitution that:

> "The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven judges. Without their active co-operation, the Constitution would be a dead letter…
>
> The Federal judges must not only be good citizens, and men possessing that information and integrity which are indispensable to magistrates, but they must be statesmen – politicians, not unread in the signs of the times, not afraid to brave the obstacles which can be subdued, nor slow to turn aside such encroaching elements as may threaten the supremacy of the Union and the obedience which is due to the laws.
>
> The President, who exercises a limited power, may err without causing great mischief in the State. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originates may cause it to retract its decision by changing its members.
>
> But if the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war."[305]

This is particularly important to bear in mind in democratic regimes, where the temptation of constitutional courts to become legislators and even constituent powers undermines the principle

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303 See Jorge CARPIZO, El Tribunal Constitucional y sus límites, Grijley Ed., Lima 2009, pp. 44, 47, 51; Allan R. BREWER-CARÍAS, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación," in *Revista de Derecho Público,* No. 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7-27; and in *VIII Congreso Nacional de derecho Constitucional*, Perú, Fondo Editorial 2005., Arequipa Bar Association, Arequipa, Arequipa, September 2005., pp. 463-489.

304 See George JELLINEK, *Ein Verfassungsgerichtshof fur Österreich*, Alfred Holder, Wien 1885, quoted by Francisco FERNÁNDEZ SEGADO, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, No. 12, 2008, Madrid 2008, p. 196.

305 See Alexis DE TOCQUEVILLE, *Democracy in America*, Chapter VIII "The Federal Constitution," of the translation by Henry Reeve, revised and corrected in 1899, at https://www. marxists.org/ reference/archive/ de-tocqueville/democracy-america/ch08.htm. See also the reference in Jorge CARPIZO, *El Tribunal Constitucional y sus límites,* Grijley Ed., Lima 2009, pp. 46-48.

of the separation of powers, since they would perform state functions without being subject to any control by the people or other state organs. In other words, the uncontrolled usurpation by the constitutional judge of normative powers "could transform the guardian of the Constitution into a sovereign."[306]

And the truth is that, unfortunately, in many countries, because of the political regime developed or because of the condition of the members of the constitutional courts, these important instruments designed to guarantee the supremacy of the Constitution, to ensure the protection and respect of fundamental rights and to ensure the functioning of the democratic system, have sometimes become one of the most diabolical instruments of authoritarianism, legitimizing the actions of the other branches of government contrary to the Constitution,[307] and in some cases, on their own initiative, as faithful servants of those who hold power, thus configuring what could be called the "pathology" of judicial review.[308]

This affection occurs precisely when the constitutional courts assume the functions of the legislator or proceed to mutate [309] the Constitution in an illegitimate and fraudulent manner,[310] conforming a complete picture of "un" constitutional justice.

In such a situation, no doubt, all the advantages of constitutional justice as a guarantee of the supremacy of the Constitution vanish, and constitutional justice becomes the most lethal political instrument for the unpunished violation of the Constitution, the destruction of the rule of law, and the dismantling of democracy.[311]

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306 See Francisco FERNÁNDEZ SEGADO, "Algunas reflexiones generales en torno a los efectos de las sentencias de inconstitucionalidad y a la relatividad de ciertas fórmulas estereotipadas vinculadas a ellas," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, Nº 12, 2008, Madrid 2008, p. 161.

307 See Néstor Pedro SAGÜES, La interpretación judicial de la Constitución, LexisNexis, Buenos Aires 2006, p. 31.

308 See Allan R. BREWER-CARÍAS, *La patología de la Justicia Constitucional*, Third edition, Editorial Jurídica Venezolana, Caracas 2014.

309 A constitutional mutation occurs when the content of a constitutional norm is modified in such a way that even though it preserves its content, it receives a different meaning. See Salvador O. NAVA GOMAR, "Interpretación, mutación y reforma de la Constitución. Tres extractos," in Eduardo FERRER MAC-GREGOR (coordinator), *Interpretación Constitucional*, Tomo II, Ed. Porrúa, Universidad Nacional Autónoma de México, Mexico 2005, pp. 804 ff. See, in general, on the subject, Konrad HESSE, "Límites a la mutación constitucional", *in Escritos de derecho constitucional*, Centro de Estudios Constitucionales, Madrid 1992. See, for example, on the case of Venezuela, Allan R. BREWER-CARÍAS, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *Revista de Administración Pública*, No. 180, Centro de Estudios Políticos y Constitucionales, Madrid 2009, pp. 383-418.

310 See Néstor Pedro SAGÜES, *La interpretación judicial de la Constitución*, Buenos Aires 2006., pp. 56-59, 80-81, 165 ss. See in this regard: Venezuela, Allan R. BREWER-CARÍAS, *La Constitución de plastilina y vandalismo constitucional. La ilegítima mutación de la Constitución por el Juez Constitucional al servicio del autoritarismo*, Editorial Jurídica Venezolana, Caracas 2022,

311 See for example, also on the case of Venezuela, Allan R. BREWER-CARÍAS, *The Collapse of the Rule of Law and the Struggle for Democracy in Venezuela. Lectures and Essays (2015-2020)*, Editorial Jurídica Venezolana International, Miami Dade College, 2020; "La demolición del Estado de derecho y la destrucción de la democracia en Venezuela (1999-2009)," in José Reynoso NÚÑEZ AND Herminio SÁNCHEZ DE LA BARQUERA and ARROYO (Coordinators), *La democracia en su contexto. Estudios en homenaje a Dieter Nohlen en su septuagésimo aniversario*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Mexico 2009, pp. 477-517.