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Mauro Cappelletti

ADDRESS

REPUDIATING MONTESQUIEU? THE EXPANSION AND LEGITIMACY OF "CONSTITUTIONAL JUSTICE" *

*Mauro Cappelletti***

INTRODUCTORY REMARKS BY GUIDO CALABRESI***

Dean Frankino, it is a great honor to be here to introduce a dear friend and one of the truly great scholars of our time.

One cannot understand the moving force behind your Lecturer's work without understanding the war he fought against fascism. For your speaker is not only a theorist of democratic institutions, but also a committed participant in the Italian resistance.

If he seems too young, it is because he was only a lad when he left his home in the mountains of northern Italy to join the partisans of "Justice and Liberty" (Giustizia e Libertà), a small group of democrats, with a small "d," who had opposed fascism not because of devotion to other ideologies, but simply out of love for freedom itself.

When the war ended, he went to Florence where many of the intellectual leaders of this resistance group lived and taught. Among them was Piero Calamandrei, who knew from the history of fascism in Italy how wrong people like Learned Hand are when they suggest that if courts are needed to preserve a democracy, that democracy is

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** Professor of Law, Stanford University and European University Institute; Dr. Jur. 1952, University of Florence; Dr. hon. c. University of Aix-Marseille and University of Ghent; hon. prof., Universidad Externado de Columbia. The author is grateful for research assistance to Christopher Bertics, Stanford Law School Class of 1985, and for much information and insight to the regional reporters to the Conference of the International Association of Legal Science held in June 1984 in Uppsala, Sweden, on "Judicial Review of Legislation and Its Legitimacy—Recent Developments." The regional reports, as well as Mr. Cappelletti's general report, are being published in volume form under the editorship of Professors Louis Favoreu and J.A. Jolowicz [hereinafter cited as UPPSALA REPORTS].

*** Dean and Sterling Professor of Law, Yale Law School.

already lost. Calamandrei, like Madison long before, and others who had experienced tyranny in the 1930's and '40's, believed instead that courts and a written constitution were needed to be an "impenetrable bulwark against any infringement of the rights of the people." And so, in the post-war period, land after land, people after people, adopted written constitutions and created constitutional courts.

But rules wither and structures decay if scholars do not explain and justify them, if practical theorists do not help to make them work. Making constitutional courts work, to be impenetrable bulwarks against any infringements of the rights of the people, by explicating their roles in a democratic system, has been a dominant part of your Lecturer's work. Thus under his care the acorn planted by Calamandrei has become a great tree whose shade protects us all, a far greater tree than even Calamandrei imagined.

For this and for his other great works, of which I will only mention those analyzing access to justice in different lands and promoting equal *access to justice under different approaches and systems, he has been justly honored throughout the world. These honors are too long to list; indeed, it would take me less time to describe the* thirty-one *books he has written than to list his awards, honorary degrees, affiliations, and distinctions. Just his academic chairs, Professor of Law at Stanford University, at Florence University, and at the European University Institute, are three times those of ordinary mortals!*

Without more then, and with great affection, I present to you the Pope John XXIII Lecturer, Professor Mauro Cappelletti.

I. The Contribution of Legal Justice to the Pursuit of Political Freedom

What "human justice" can do is solve, or attempt to solve, concrete problems of individual and societal life: to enact and enforce norms, to create institutions, to design processes, all with that one goal in mind—to solve actual problems. But human problems continuously change, and so do norms, processes, and institutions. Human justice is changing justice—whether or not there is, at a final point, an all-encompassing permanence, an Absolute which gives pause, and meaning, and light to all this moving and striving and passing which is human life.

I am honored to join you today in paying a tribute of respect and gratitude to Pope John XXIII. His vision of, and faith in, the Absolute did not diminish his deep commitment to, and compassion for, the changing. Human justice never ceased to be his concern. His two major Encyclicals, *Mater et*

Magistra (1961) and *Pacem in Terris* (1963),[1] represent a formidable effort to trace the guidelines for the solution of, perhaps, the most challenging life-problems of our epoch: the challenges of oppression, of poverty, and of war; the problems of human freedom and dignity, of social justice, and of peaceful coexistence of individuals and peoples—problems whose solution should unite, as he said, all men of good will, whatever their race, nationality, and faith. He thus gave us a basis for designing a philosophy of life for individuals and nations of our epoch.

His was, one might say, at its roots a doctrine relevant for all times, because every epoch has suffered from oppression, social injustice, violence, and war. But in a deeper sense, his doctrine was meant as a philosophy most essentially of and for our time. It was the lesson drawn from the tremendous challenges of our century, for our century is one that, while uttering the proclamations of the noblest ideals of individual freedom and human dignity, yet has been justly characterized as the epoch of the most terrifying systems of oppression of individuals, groups, and peoples, with the holocausts and the attempted genocide of entire populations and nations. Ours is also a century that, while witnessing the most impressive growth of material wealth and a unique possibility to create new wealth and welfare, yet has been, and is, plagued by widespread misery and massive starvation. And, our century is one in which a shrinking world demands, and indeed cries out for, unity and peace, and yet has been the era of two most dreadful world wars and of the impending menace of a third and ultimate conflict, the last universal deluge, the end, possibly, of humankind.

It is time, isn't it, for all of us to be concerned with fundamentals. If such relatively limited episodes as, say, the Watergate scandal, have reminded American lawyers and law teachers that there is a problem of morality in law, in the legal profession, and in legal education; and if Vietnam, but also Iran, and Chile, and Afganistan, and many more, have reminded men and women—hopefully behind the iron curtain as well—that there is a problem of morality in politics and in the way our endangered world is run; so it is time, isn't it, for all of us to be concerned about finding a proper solution to the most fundamental issues—the survival problems of our epoch. The problems of pursuing freedom, justice, and peace are new, at least insofar as they have assumed an unprecedented dimension in our time: a dimension that, if adequate solutions are not found, might eventually signify the end of millennia of civilization.

Let me try, then, to use this distinguished forum to make a brief inquiry

1. An English version and commentary can be found in THE ENCYCLICAIS AND OTHER MESSAGES OF JOHN XXIII 227-378 (Staff of The Pope Speaks Magazine ed. 1964).

into a specific answer that our epoch has been trying to give to these major problems of survival, and especially to one of them—the problem of political oppression. On a personal level, let me add that it is especially rewarding for me to be speaking to you on this topic today, the 25th of April, Italy's *liberation day,* the fortieth anniversary of the liberation of my country from a dreadful system of political oppression which had led to the most tragic of all wars. My inquiry will focus on, without being limited to, Europe; and it will obviously be the inquiry of a lawyer, for I will try to sort out some of the most significant *legal* norms, institutions, and processes that characterize, in my opinion, actual or potential responses to a most dramatic challenge of our time. Others, of course, might emphasize different answers to this challenge—or, as I would prefer to think, different facets of the same answer—in terms of, for instance, economic approaches rather than the legal ones with which I am more directly concerned here and now.

II. The Meaning of "Constitutional Justice"

The principal answer in terms of legal justice to the problem of oppression can be expressed with a formula widely used today in Europe: *constitutional justice.* It is used to indicate that governmental power is limited by a constitutional norm, and that procedures have been designed and institutions created to enforce such limitation.

True, the forms of oppression that have characterized our epoch are many and very complex. For instance, nongovernmental power, such as the power of organized groups, economic corporations, unions, callings and political parties, has at times proved to be no less dangerous and oppressive, no less intrusive into the privacy and freedom of individuals, than the official power of the state. Even the fantastic, splendid developments in technology are themselves a potential menace, for instruments of intrusion have become more and more readily available for oppressive use. And indeed, never, perhaps, as deeply as in our time has the individual felt the oppression of his or her "solitude within the crowd"; the sentiment that our voice is like the Biblical one, *clamans in deserto;* the sense of alienation, which is one of the basic psychological diseases of modern man.

Still, the danger which has proved to be most fearful in our century is, no doubt, that of the organized official power—the state and its manifold branches and agencies, its central and local proliferations. The cases, to mention only the most clamorous ones, of Nazi Germany, of Fascist Italy, of Stalin's Russia, shall not have passed without teaching us their important lesson: when the political power is unchecked, then even the instruments of new technology, of mass communication, of so-called "popular education,"

all can be perverted into a grand corrupting machine. The corruption of the minds is obtained through massive misinformation and the interdiction of all criticism. Remember one of the infamous laws discussed years ago in the much cited debate on law and morals between Professors Hart and Fuller.[2] That German law of 1944 had allowed for a man, denounced by his wife, to be sentenced to capital punishment, his "crime" having been that while at home on leave from the army, he had made critical remarks about Hitler.[3] What can emerge from unchecked government, as sad recent history tells us, is a distortion of even the most common sense of justice—hence intolerance and fanaticism, and, eventually, the acceptance, even the call for, violence and war.

Constitutional justice, I believe, is one and indeed a most important and promising answer that a growing number of nations have tried to give to this problem of governmental oppression. As already mentioned, what is implied by constitutional justice is the adoption of a new[4] kind of *constitutional norms, institutions,* and *processes* in an attempt to thereby limit and control the political power. There are, of course, a variety of ways to help achieve that end. These include regionalism, which brings about a decentralization of at least part of the political power, one form of a "vertical sharing" of that power. Here, however, I intend to center my discussion on judicial review of the constitutionality of state action, and particularly of legislation. This is a development which, in a most real sense, has changed the governmental structure of much of Continental Europe over the last forty years or so, with expansions into other parts of the world, including, for instance, Japan.

III. The Rise and Growth of Constitutional Justice in the Post-World War II Era

Austria since 1945, Japan since 1947, Italy since 1948, Germany since 1949: emerging from the nightmare of tyranny and war, all these countries have followed a similar path in their effort to build a new form of government, civil-libertarian and democratic. Each of them has adopted a written constitution, declared to be binding for all branches of government; they have introduced severe limitations to the amendment process of the constitu-

2. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630 (1958).

3. Hart, *supra* note 2, at 618-619; Fuller, *supra* note 2, at 654-55.

4. For some historical precedents, however, see, e.g., M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 25-43 (1971) [hereinafter cited as JUDICIAL REVIEW]; Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations,* 79 HARV. L. REV. 1207 (1966).

tion, thus shielding the new basic law from the whims of passing majorities; they have included a bill of rights in the constitution, thus extending the constitution's protection to the individual in his or her relationship with the governmental power; and, last but not least, they have entrusted the enforcement of the constitution, and its bill of rights, to new or renewed judicial tribunals, endowed with important guarantees of independence vis-à-vis the political branches.[5]

This, of course, might seem "old hat" to Americans. Let me suggest, however, that even in this country the role of constitutional adjudication has acquired its current importance only in the post-World War II epoch, when it became the foremost instrument for the enforcement of certain basic civil rights of individuals and minority groups against reluctant majorities in the states, and against the inaction of the political branches at the federal level. As for the rest of the world, it should be noted that in many other countries, constitutional justice, in all its meanings mentioned a moment ago, has represented a fundamental innovation. Indeed, it has been a real revolution at least in Continental Europe and, perhaps, in Japan.

Constitutions and bills of rights, of course, have existed in France, Germany, and elsewhere for many years. Until the post-World War II epoch, however, their meaning tended to be that of political-philosophical declarations rather than that of legally binding enactments. For, with few sporadic and short-lived exceptions (most notably that of Austria in the 1920's and early 1930's),[6] no independent body was entitled to supervise their actual application. The constitutional revolution—and I do mean what this word says—occurred in Europe only with the suffered acquisition of the awareness that a constitution, and a constitutional bill of rights, need judicial machinery to be made effective. The United States certainly provided an influential precedent. But the most compelling lesson came from domestic experience, the experience of tyranny and oppression by a political power unchecked by machinery both *accessible* to the victims of governmental abuse, and *capable* of restraining such abuse.

The lesson was eventually learned: constitutional courts have been cre-

5. On these developments, see JUDICIAL REVIEW, *supra* note 4, especially ch. 3. The major characteristic of the European systems of review is their "centralized" nature, meaning that the authority to declare a law unconstitutional, hence (in principle) null and void, is reserved to a newly-created constitutional court. If faced with the question of the unconstitutionality of a law relevant in the case at hand, the other courts shall not decide that question but rather suspend the case and refer the issue of constitutionality to the constitutional court, whose decisions have *erga omnes* effect. The European systems are contrasted to the American "decentralized" system in which all the courts have the judicial review power. *See* JUDICIAL REVIEW, *supra* note 4, chs. 3-5.

6. *See id.* at 46-47.

ated, and constitutional processes have been designed to make them work. Let me mention only one such process, for it seems most indicative of the philosophy permeating this constitutional and civil rights revolution. In Germany, in 1951, ordinary legislation gave standing to any individual to bring a complaint before the newly instituted Constitutional Court against any kind of state action, legislative, administrative, or judicial, that violates his or her constitutionally entrenched rights.[7] In 1969 this extraordinary remedy, called *Verfassungsbeschwerde* or constitutional complaint, was made part of the German constitution; and Austria, especially since 1975, has adopted a similar process.[8] Through this and other devices, the constitutionality of thousands of legislative and other governmental actions has been controlled and the people's fundamental rights have been protected by independent courts in Germany, Austria, Italy, and elsewhere.

The success of "constitutional justice" as an instrument for the protection of human rights, and its profound impact on the democratic-libertarian form of government, have been generally recognized in all those countries, even though, naturally enough, dissent is often voiced about the contents of particular constitutional decisions or even about some general trends in the constitutional case law. The most conclusive evidence, perhaps, of the success of this phenomenal development is offered by its tremendous force of expansion. Let me mention just a few episodes: Cyprus in 1960, Turkey in 1961, and Malta in 1964 all have introduced forms of constitutional adjudication largely modeled after those of Germany, Austria, and Italy.[9] Indeed, it seems as though no country in Europe, emerging from some form of undemocratic regime or serious domestic strife, could find a better answer to the exigency of reacting against, and possibly preventing the return of, past evils, than to introduce constitutional justice into its new system of government. This has been the case for Greece in 1975, after the fall of the regime of the colonels;[10] for Portugal in 1976, after the fall of the Salazar

7. *See id.* at 22-23, 78. To prevent abuse of this process, exhaustion of the normal remedies is required, but even this prerequisite is unnecessary in the case of a complaint reflecting a "general interest" or when delay would cause important prejudice to the party concerned. *See, e.g.*, Schlaich, *Procédures et techniques de protection des droits fondamentaux. Tribunal Constitutionnel Fédéral Allemand,* in COURS CONSTITUTIONNELLES EUROPÉENNES ET DROITS FONDAMENTAUX 105, 128-29 (L. Favoreu ed. 1982) [hereinafter cited as COURS CONSTITUTIONNELLES].

8. *See* UPPSALA REPORT, *supra* note **, at §§ 8-10. (For an adapted version of Dean Favoreu's report, see Favoreu, Actualité et Légitimité du contrôle des lois en Europe occidentale, 5 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 1147-1201 (1984).

9. CONST. (Cyprus 1960); CONST. (Turkey 1961); CONST. (Malta 1964). *See generally* JUDICIAL REVIEW, *supra* note 4, at 50-51.

10. CONST. (Greece 1975). *See* Spiliotopoulos, *Judicial Review of Legislative Acts in*

regime;[11] and for Spain in 1978, after the fall of Franco.[12] Significantly, Yugoslavia too, in its quest for political and ideological autonomy vis-à-vis the Soviet Union, enacted a constitution in 1963 that introduced a system of judicial review.[13] Yugoslavia has been the first and, so far, the only country under a Communist regime to do so; but it is most meaningful that Czechoslovakia in 1968—the year of the passions and hopes of the "Spring of Prague"—tried to follow suit,[14] and that so did Poland in 1982 before "Solidarnosh" and all the rest were condemned to silence.[15] Unlike Yugoslavia, however, the constitutional amendments of both Czechoslovakia and Poland have remained dead letter, crushed by the resurgence of their autocratic regimes. Indeed, if one wisdom clearly emerges from comparative analysis of these most recent developments, a wisdom that many critics of the democratic legitimacy of judicial review seem to neglect, it is that no effective system of judicial control is compatible with, and tolerated by, antilibertarian, autocratic regimes, whether they place themselves at the left or the right of the political spectrum. This fact, that judicial review is anathema to the tyrant, is confirmed by developments in many countries in several

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Greece, 56 TEMP. L.Q. 463 (1983); Iliopoulos-Strangas, *Grundrechtsschutz in Griechenland,* JAHRBUCH DES OEFFENTLICHEN RECHTS 396 (1983); Rotolo, *La Corte Suprema Speciale nella Costituzione Greca del 1975,* 29 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 183 (1979); UPPSALA REPORT, *supra* note **, at §§ 27-31. Under the Greek system, all courts have the power to deny application of unconstitutional laws, but a newly instituted "Special Supreme Court" has the final word in case of conflicting opinions among higher courts. As to this so-called "decentralized" system of review, *see supra* note 5.

11. CONST. (Portugal 1976). Especially after the constitutional reform of 1982, Portugal has adopted a system of judicial review similar to that prevailing in the majority of the European nations mentioned in the text, entrusting the control function to a newly created constitutional court. *See* UPPSALA REPORT, *supra* note **, at §§ 22-26; H. FIX ZAMUDIO, LA PROTECCIÓN JURÍDICA Y PROCESAL DE LOS DERECHOS HUMANOS ANTE LAS JURISDICCIONES NACIONALES 203-07 (1982).

12. CONST. (SPAIN 1978), FOLLOWED BY THE CREATION, IN 1980, OF A VERY ACTIVE CONSTITUTIONAL TRIBUNAL. *See* E. GARCÍA DE ENTERRÍA, LA CONSTITUCIÓN COMO NORMA Y EL TRIBUNAL CONSTITUCIONAL (2d ed. 1982); J. GONZALEZ PÉREZ, DERECHO PROCESAL CONSTITUTIONAL (1980); Reyes, *El control de Constitucionalidad en la Constitución Española de 1978,* 7 REVISTA DE ESTUDIOS POLÍTICOS 171 (1979); H. FIX ZAMUDIO, *supra* note 11, at 197-202; UPPSALA REPORT, *supra* note **, at §§ 13-14.

13. The system was reaffirmed in the Yugoslav Constitution of 1974. *See* the UPPSALA REPORT by Pavle Nikolić on the Socialist countries, *supra* note **, at §§ I.1, III.2.A *et passim*; *see also* H. FIX ZAMUDIO, *supra* note 11, at 208-12; JUDICIAL REVIEW, *supra* note 4, at 51-52.

14. *See* UPPSALA REPORT by P. Nikolić, *supra* note 13, at § III.2.B; UPPSALA GENERAL REPORT by M. Cappelletti, *supra* note **, at § 2.

15. *See* A. Gwizdz, The Constitutional Review of Laws in Poland: Polish Report to the 1st Congress of the International Association of Constitutional Law held in Belgrad, September 1983 (unpublished); UPPSALA REPORT by P. Nikolić, *supra* note 13, at § III.2.C; UPPSALA GENERAL REPORT by M. Cappelletti, *supra* note **, at § 2.

continents, and most frequently in Latin America and Africa.[16] A peculiar illustration is offered by South Africa where a "constitutional crisis" developed in the 1950's when the judiciary declared certain discriminatory enactments of the South African Parliament to be unconstitutional. The crisis culminated with the adoption of South Africa's Constitution of 1961 which effectively denied the judiciary any authority to review the validity of legislation.[17]

16. See the enlightening UPPSALA REPORTS by J. Carpizo & H. Fix Zamudio on Latin America and by B. O. Nwabueze on Africa, *supra* note **.

17. The South African story of the struggle of a court against some excesses of an illiberal regime is most significant and deserves to be recounted in some detail. The "constitutional crisis" of that country can be traced back to the 1952 decision of the South African Supreme Court in the case of Harris v. Minister of the Interior, [1952] 2 S.A. 428 (A.D.), also known as the *Vote* case. In the decision, the court held that Act 46 of 1951 (the Separate Representation of Voters Act) was unconstitutional. [1952] 2 S.A. at 472. The Act had the basic effect of disenfranchising the Cape Coloureds and the court ruled that this was violative of certain "entrenched" sections in the South African Constitution (the South Africa Act of 1909), particularly § 35, as amended by Act 12 of 1936, which provided that "no law . . . shall disqualify any person . . . who is or may become capable of being registered as a voter from being so registered . . . by reason of his race or colour only . . . unless [passed by a two-thirds majority of the Senate and of the House of Assembly in joint session]." At the time, the judicial review authority of the Supreme Court with respect to the "entrenched" sections was the subject of great debate and the decision by Chief Justice A. van de Sandt Centlivres (which was declared by at least one commentator—the then-Dean of Harvard Law School, Erwin Griswold—to rank among the best decisions in constitutional law (*see* Griswold, *Comment: The "Coloured Vote Case" in South Africa,* 65 HARV. L. REV. 1361, 1374 (1952)), created quite a controversy in South Africa. In the decision, Chief Justice Centlivres declared that the court was competent to inquire whether an Act of Parliament had been validly passed: "to hold otherwise would mean that courts of law would be powerless to protect the rights of individuals which were specially protected in the Constitution of this country." *Vote,* [1952] 2 S.A. at 470. The South African government was not pleased with the *Vote* decision and later in 1952 each House of Parliament, by simple majority, enacted the High Court of Parliament Act, Act 35 of 1952, which created a "High Court" of which every member of Parliament was to be a member. The "High Court" was declared to be a court of law and was given the power to review any decision by the Supreme Court that declared an Act of Parliament to be invalid. The "High Court" then proceeded to review the *Vote* case and overruled it, holding that the "entrenched" sections of the South African Constitution were no longer binding. The High Court of Parliament Act, however, was quickly challenged and held by the Supreme Court to be invalid, the judges agreeing that the High Court was simply "Parliament in disguise." Minister of the Interior v. Harris, [1952] 4 S.A. 769 (A.D.). Finally, in 1955 in another attempt to overcome the judiciary's "unfriendliness," Parliament enlarged the Senate, and the judiciary, and loaded the enlarged Senate with National Party supporters so that at a joint sitting of both Houses of Parliament the Government would have a two-thirds majority of the total membership of both Houses. Act 53 of 1955. In the following year, the South African Amendment Act, Act 9 of 1956, was passed at such a joint sitting. This constitutional amendment considerably revised the entrenched clauses of the constitution and particularly deleted § 35 relating to franchise rights. The constitutional amendment also considered judicial review. Section 2 stated in general terms: "No court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by Parliament [except those that effect the "entrenched" sections]." South Africa Amendment Act, Act 9 of 1956. Of course, as previously noted, the

IV. HAS FRANCE REPUDIATED MONTESQUIEU?

I am not an expert on Japanese affairs. Yet I am told by those who know that even in that nation, constitutional justice, initially seen by many as an alien element in the Japanese system of government, has gradually carved out for itself a relevant place and a genuine significance within that system, even though not, or not yet, as great a place and significance as in Continental Europe.[18]

Returning to Europe, my story would be much too incomplete if I did not elaborate somewhat on those two other great nations, France and England. These countries have been, and in part still are, much more reluctant than most of the rest of Europe to participate in the "constitutional revolution." Parliamentary supremacy has long been their political credo—the national parliament, as the embodiment of the democratic will, being thought to be immune from judicial control. This has been the tradition, and the myth, both of England since the Glorious Revolution of 1688, and of France since its Revolution one century later, a myth not shared by the American Revolution.[19]

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entrenched sections had been weakened considerably by the amendment. The Act enlarging the Senate and the constitutional amendment were challenged but upheld by the newly expanded judiciary. The Government was thus able to proceed and successfully disenfranchise the Cape Coloureds as it had originally attempted to do in 1951. The uproar caused by these developments was finally put to rest in 1961 when South Africa formally became a republic. The South African Constitution of 1961 fully reflected the weakened "entrenched" sections and the wording of the 1956 amendment. This absence of effective judicial review has been retained in South Africa's 1983 constitution. The new constitution, however, has incorporated some "bill of rights" terminology in its preamble and it might imply a more active constitutional role for the courts. Whether judicial review can become viable again in South Africa remains to be seen.

For further discussion of the South African "constitutional crisis" of the 1950's, see H. MAY, THE SOUTH AFRICAN CONSTITUTION, (3d ed. 1955); Beinhart, *The South African Appeal Court and Judicial Review,* 21 MOD. L. REV. 587 (1958). For further discussion of judicial review and the constitutional background in South Africa, see H. HAHLO & E. KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 53-63 (1968) L. ROSE INNES, JUDICIAL REVIEW OF ADMINISTRATIVE TRIBUNALS IN SOUTH AFRICA 1-20 (1963). For discussion of South Africa's 1983 Constitution (and further bibliography), see L. BOULLE, CONSTITUTIONAL REFORM AND APARTHEID, (1984).

18. *See* UPPSALA REPORT by Y. Taniguchi on Japan, *supra* note **.

19. Perhaps the historical reason for this basic difference, which is reflected in the profound difference between the French and the American versions of "separation of powers" (*see infra* text accompanying and following note 33), lies in the fact that for the American revolutionaries, parliamentary supremacy had the hateful meaning of supremacy of the British Parliament. This might explain why, as Professor Henkin says, the framers of the United States Constitution "were not content with democracy, even with representative government, for parliament, too, they had learned, could be despotic." L. HENKIN, THE RIGHTS OF MAN TODAY 10 (1978) (quoting THE FEDERALIST No. 47 (J. Madison) "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or

To be sure, each of those two European nations has a different history of parliamentary supremacy. In France it must be traced back, in part, to a deeply felt popular revulsion against the abuse of the judicial office by the higher courts of justice under the *ancien régime.* These courts, whose name, ironically, was *Parlements,* asserted their power to review acts of the sovereign, refusing to apply those found to be incompatible with the "fundamental laws of the realm."[20] The reading by those courts of such—mostly unwritten—fundamental laws, however, led the courts to affirm the "*heureuse impuissance*" of the legislator to introduce even minor liberal reforms. Those judges were so deeply rooted in the feudal regime that they found any liberal innovation unacceptable. Their office was hereditary and could be bought and sold,[21] and their activity was to be paid by each individual litigator as though it were their privilege, not their duty, to administer justice.[22] Their status, education, and personal, family, and class interests combined to motivate their extremely conservative attitude, an attitude which eventually contributed to the triggering of the revolutionary explosion.[23] The popular feelings against the *Parlements* were well justified,[24] and this justification is reflected, albeit in a veiled form, in that celebrated work, *De l'Esprit des lois,* first published in 1748 by one who, when speaking of the judges of his time and country, knew only too well what he was saying. Charles-Louis de Secondat, the offspring of an ancient family of judges

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many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

20. The gradual development and the political consequences of the *Parlements'* "power to veto the king's legislation" are described in J. DAWSON, THE ORACLES OF THE LAW 362-71 (1968). The veto power was exercised both by a refusal to register the royal enactment on the records of the *Parlement* and by a public protest (*remonstrance*) against a royal act of which the *Parlement* disapproved. *Id.* at 362.

21. *See, e.g.,* J. DAWSON, *supra* note 20, at 350-62.

22. The so-called "principle of the venality of justice" was abolished in France by the Revolution with the law of August 16-24, 1790, tit. II, art. 1. *See* Cappelletti & Gordley, *Legal Aid: Modern Themes and Variations,* 24 STAN. L. REV. 347, 355 (1972).

23. By 1750 the Parlements had emerged as an articulate and determined opposition, resisting every effort at moderate reform that successive ministers sought to propose. The Parlements rested their claims on the highest grounds. They invoked the fundamental laws of the kingdom and claimed to be guarding its liberties. . . . [T]heir consistent line of policy was defense of the privileges of the nobility and resistance to all change in administration.

J. DAWSON, *supra* note 20, at 369.

24. The Revolution promptly dissolved all the *Parlements* and, "[w]hen one considers the savagery of popular feelings against them, it is surprising that so few of their members were actually guillotined, though this is largely because so many escaped into exile." J. DAWSON, *supra* note 20, at 370. "The highest rate of mortality was suffered by the *parlementaires* in Toulouse (55 executed, i.e., 50%). Bordeaux was next (26 executed, i.e., 20%), and Paris third (28 executed or 14%)." *Id.* at 370, n.22.

"parlementaires," at the age of twenty-seven, in 1716, had already become "Président à mortier" at the *Parlement* of Bordeaux, having inherited the high judicial office, as well as the name of Montesquieu, from his deceased uncle.[25] Quite understandably given the kind of judges of the time, an enlightened Montesquieu preached that the judges should be entrusted with no political power at all: "There is no liberty . . . if the power to adjudicate is not separated from the legislative and the executive powers."[26]

Even if the law, "which," he said, "is at the same time clairvoyant and blind,"[27] should appear in certain cases to be too harsh, still it is not for the judges but only for the legislator to intervene. To the judges appertains only the duty to blindly apply the law, for "the judges of the nation are . . . nothing but the mouth which pronounces the words of the law; they are inanimate beings who cannot moderate either the force or the rigor of the law."[28] Thus, although Montesquieu, unlike Locke, did list the judiciary as

25. *See* Derathé, (Introduction) to MONTESQUIEU, DE L'ESPRIT DES LOIS, Tome I (editions Garnier Frères 1973) at LXVII-LXVIII.

26. MONTESQUIEU, DE L'ESPRIT DES LOIS, *supra* note 25, at book XI, ch. VI (editions Garnier Frères 1973) [translations in this article, unless otherwise indicated, are by M. Cappelletti].

27. *Id.*

28. *Id.* Montesquieu's theory is not without serious ambiguities, however. Contrary to Jean-Jacques Rousseau, who was in favor of a "republican" government—i.e., a government "guided by the general will, which is the law," J.-J. ROUSSEAU, DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE, book II, ch. VI, n.1 *et passim,* or, in Montesquieu's definition, a government in which "the people . . . have the sovereign power" MONTESQUIEU, *supra* note 26 at II, ch. 1—Montesquieu advocated a moderate, nonabsolute or, as we would call it, constitutional monarchy, MONTESQUIEU, *supra* note 26, at book II, ch. IV & book V, ch. XI, while condemning the despotic form of government. MONTESQUIEU, *supra* note 26, at book II, ch. V & book V, ch. XIV. Montesquieu's monarchy was characterized by him as the system in which "only one person governs, but on the basis of fixed and established laws," *id.* at book II, ch. 1, and was contrasted to the despotic regime in which "one person decides everything, with no laws and no rule, based merely on his will and caprices." *Id.* Repeatedly, he emphasized that the nondespotic monarch shall be bound "by fundamental laws," *id.* at book II, ch. IV & book V, ch. XI, and shall not concentrate in himself the judicial function. *Id.* at book VI, ch. V. In so doing, however, Montesquieu seems to support exactly what the *Parlements* had for a long time been trying to do—to impose, even against the monarch, the superiority of certain, essentially unwritten, *leges generales* or fundamental laws, *fixes et immuables,* which, however, due to their essentially fluid and vague nature, were interpreted arbitrarily by those courts of justice of the *ancien régime.* This doctrine of the superiority of the "fundamental laws of the kingdom" led the *Parlements* to exercise what amounted essentially to judicial review of legislation. *See* JUDICIAL REVIEW, *supra* note 4, 32-36; *see also supra* note 20 and accompanying text. There are at least two passages in DE L'ESPRIT DES LOIS where Montesquieu seems to support such judicial function of the *Parlements*: in book III, ch. X, where he complains that in the despotic regime, the "prince" requires absolute obedience to his will and no "remonstrances" are allowed; and in book V, ch. X, where he praises the (moderate) monarchy for the fact that, although the affairs of state are conducted by a person alone, hence more efficiently and promptly than in a "republican" government, such efficiency does not degenerate into rashness because state action is bound to respect the laws. Did, then, Montes-

one of the "three powers," coming after the legislative and the executive powers,[29] he also made it clear, however, that the third branch, in a real way, is no "power" at all: "Of the three powers of which we have spoken,

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quieu "repudiate"—or, in fact, contradict—himself? Where is the "real" Montesquieu? How can such passages be reconciled with the continuous spell—that judicial decisions shall not be "arbitrary," MONTESQUIEU, *supra* note 26, at book XI, ch. VI; that in the good monarchy, the judge's virtue in *la mediocrité, id.* book XX, ch. XIII; that judges are bound to apply rigorously the *loi:* "where it is precise, the judge simply follows it; where it is not, he searches its spirit," *id.* at book VI, ch. III; that the judgment shall never reflect the personal opinions of the judge, *id.* at book XI, ch. VI; that no liberty exists when the judge is also legislator, *id.* at book XI, ch. VI; in sum, that the judge has to be only the "inanimate" mouth of the law? One explanation, of course, could be the influence of the natural law theories dominating all over Europe in the 17th -18th centuries, to which Montesquieu paid more than lip service, *see, e.g., id.* book I, ch. II; for a learned interpretation, see Shackleton, *Montesquieu in 1948,* 3 FRENCH STUDIES 299, 309-23 (1949). Such theories affirmed the existence of certain fundamental, unwritten laws, rooted in human nature or reason, immutable and universal and superior to the positive laws of the time and place. However, these theories, too, were hardly compatible with a purely mechanical role of the judge, lest the obedience to and the enforcement of natural law were to be left to the exclusive concern of the sovereign, as in Hobbes' conception which was harshly condemned by Montesquieu. *See id.* at 310-11. Another explanation might be that Montesquieu did not after all attribute too great an importance to the "fundamental laws" in the determination of the role of the judges. One should note that, although even the kings of France admitted the existence of such laws, by which their power was bound, "they had limited the number [of these laws] to two only: the law regulating the succession to the crown (the Salic Law) and the law establishing the inalienability of the royal domain." Derathé, *supra* note 25, at 430. This was much too little, of course, to represent the foundation for a system of judicial review of the monarch's legislation. A third explanation, which seems more plausible to me, is that Montesquieu's vision, and defense, of the "moderate monarchy" was one in which the monarch's powers were limited by the *pouvoirs intermédiaires, see, e.g.,* MONESQUIEU, *supra* note 26, at book II, ch. IV, and most particularly by the nobility, *id.,* rather than by the role of the courts. The contrary opinion of Derathé, *supra* note 25, at XXXI-XXXII, does not seem convincing; even the so-called *éloge de l'état de la robe* by Montesquieu in book XX, ch. XXII is far from signifying what Derathé seems to suggest. For, as already mentioned, even there Montesquieu magnifies the *médiocrité* and the *suffisance* of the judge *parlementaire,* although he pays lip service to the *gloire* of the *corps* as such, a glory, at any rate, which is immediately declared quite inferior to that of the nobility. MONTESQUIEU, *supra* note 26, at book XX, ch. XXII. And indeed, how prophetic he was in preaching such mediocrity! Implementing the spirit of his recommendation, not many decades later France and, on the wake of France, much of Continental Europe were to introduce a career judiciary, made up of bureaucratic civil servants—the real glory of *mediocrité.* As I have tried to demonstrate elsewhere, *see* JUDICIAL REVIEW, *supra* note 4, at 60-66; *The Doctrine of Stare Decisis and the Civil Law,* in FESTSCHRIFT FÜR KONRAD ZWEIGERT, 381, 387-93 (H. Bernstein, U. Drobnig & H. Kätz eds. 1981), this social and professional "mediocrity" of the ordinary continental ("civilian") judges was to become one of the reasons why they were unsuitable for the challenging role of judicial review of both administrative and legislative action. Hence, this was one important reason why special administrative courts had to be created in the 19th century, and special constitutional courts in our century, to fulfill that role. Today, administrative and, even more so, constitutional judges in Europe resemble American federal judges much more than they resemble ordinary civilian judges.

29. MONTESQUIEU, *supra* note 26, at book XI, ch. VI.

the judicial is, in a sense, null."[30] Whatever the actual influence of Montesquieu on the French Revolution, this idea was to become a central part of its ideology. The Revolution proclaimed as one of its first principles the absolute supremacy of statutory law, the law enacted by the *corps législatif* as the representatives of the people, while demoting the judiciary to what was seen as the purely mechanical task of applying that law to concrete cases. Of course, also the Rousseauian faith in the *infallibilité* of the *loi* as the expression of the *volonté générale* found its triumph in this Revolutionary development.[31]

To be sure, the strict separation, "French style," of the governmental powers, whether or not actually "Montesquieuian" in inspiration,[32] was miles away from the kind of separation of powers which almost contemporaneously was adopted by the American Constitution. Separation of powers in America is better described as "checks and balances";[33] under this principle, an extremely important role of review of both administrative and legislative action was to be reserved to the courts. *Séparation des pouvoirs* French style, on the contrary, implied that the judiciary should assume a role totally subservient to, and at any rate strictly separate from, the role and activity of the political branches; as such, it soon proved to be the source of problems and difficulties no less serious than those it was intended to solve. The legal history of France throughout most of the nineteenth century is a continuous illustration of such problems, as well as of the striving efforts to find new and more appropriate solutions for these problems. Reducing the judicial function to a blind, "inanimate," slot-machine application of the laws to individual cases is oblivious of the reality, that is, of the fact that no norm, law, or code can be so clear and complete as to allow for only one "correct" interpretation.[34] More importantly still, the Montesquieuian (and Rousseauian)

30. *Id.*

31. *See* J.-J. ROUSSEAU, *supra* note 28, at book II, chs. VI-VII *et passim*.

32. The influence of "the dictates of Montesquieu's logic in producing this strict separation of governmental powers, which was to remain a basic feature of French judicial organization," is affirmed by J. DAWSON, *supra* note 20, at 376.

33. The frequently made affirmation that "the Constitution of the United States . . . embodies [Baron de Montesquieu's] idea" of the separation of powers—as one can read, for example, in P. WIENER, DICTIONARY OF THE HISTORY OF IDEAS 251 (1973)—is, to say the least, of dubious justification. The fact is that *séparation des pouvoirs*, French style, is a profoundly different thing from the American version of it, better described as "checks and balances." *See, e.g.*, J. MERRYMAN, THE CIVIL LAW TRADITION 15-16 (1985); O. Kahn-Freund, *Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 137, 159 (M. Cappelletti ed. 1978). The French (and Continental European) history of *justice administrative* in the 19th century and of *justice constitutionnelle* in our time would be totally incomprehensible if the above affirmation were correct.

34. Even legal positivists agree. *See, e.g.*, A. ROSS, ON LAW AND JUSTICE 284 (1958)

approach, as implemented by French Revolutionary legislation, while intended to protect against tyranny, left the doors wide open to both legislative and executive tyranny. The famous Revolutionary *loi* of 16-24 August 1790 on "*organisation judiciaire,*" whose principles were to become the pillars of the French judicial system and other Continental systems influenced by the French, established that no control whatsoever by the judiciary was allowed either of legislative or of administrative action:

> *Title II, Art. 10:* The judicial tribunals shall not take part, either directly or indirectly, in the exercise of the legislative power, nor impede or suspend the execution of the enactments of the legislative body . . . .
>
> *Title II, Art. 12:* [The judicial tribunals] shall refer to the legislative body whenever they find it necessary either to have a statute interpreted or to have a new statute.
>
> *Title II, Art. 13:* Judicial functions are distinct and shall always remain separate from administrative functions. Under penalty of forfeiture of their offices, the judges shall not interfere in any way whatsoever with the operation of the public administration, nor shall they call administrators to account before them in respect of the exercise of their administrative functions . . . .[35]

This meant that both legislators and public administrators were exempt from any check by a third, independent, nonpolitical or, at least, less political branch. *Internal* controls, of course, could be and, in fact, were designed. But history, and often unhappy history at that, has proven that, to be effective, controls of the political branches can hardly be controls *from within.* Efficient executive power is hierarchical; at its top level it does not easily allow for independent internal control; and this is no less true for a legislative power which affirms itself as supreme. It should come as no surprise, then, that all systems past and present of political, nonjudicial control, such as those experimented with in France under the Constitutions of 1799, 1852 and 1946, and those currently adopted by most communist countries have proved to be utterly inefficient.[36] Effective control of the political branches

("no concrete situation allows for only one application of the law"); Hart, *supra* note 2, at 629 ("the existing law imposes only limits on our choice and not the choice itself").

35. The full text of the *loi* can be found in 1 J. DUVERGIER, COLLECTION COMPLÈTE DES LOIS 310-33 (1834).

36. For the French precedents *see* JUDICIAL REVIEW, *supra* note 4, at 33. Most constitutions of Eastern European and other Socialist countries entrust the role of controlling the constitutionality of legislation to the "Supreme Soviet" or "Popular Assembly" and/or their *praesidiums.* The Yugoslav constitutionalist Pavle Nikolić in his UPPSALA REPORT on the Socialist countries, *supra* note 13, informs us that this "autocontrol, i.e., the control of the constitutionality of legislation entrusted to the legislative body itself," has proved to be "ineffective." UPPSALA REPORT, *supra* note 13. This very ineffectiveness has been the main reason

must be control *from outside:* it must be entrusted to persons and agencies sufficiently independent from those controlled. And this, in fact, is what the French have gradually realized, at least as far as administrative action is concerned. A glorious institution, the *Conseil d'Etat,* gradually evolved in the nineteenth century from what initially was a mere department internal to the administration, into an independent judicial agency fully recognized as a high court of France. Its role is to control the legitimacy of administrative action. The more the *Conseil's* role was to become important and accepted, the more independent the *Conseil* was to become vis-à-vis the political branches. And, with its independence, the judicial nature of its process also became more and more pronounced and recognized, with all the consequences of such development—including the adoption of those safeguards most characteristic of the judicial process: the impartiality of the adjudicator, the right of the parties to be heard, and all the many corollaries of these basic rules of "natural justice."[37]

France, of course, was the initiator, on the Old Continent, of this development, the establishment of *justice administrative* or judicial review of administrative action. Sooner or later, however, other Continental countries followed its lead, and so the French system of *justice administrative* became the model for the development of its analogues, *Verwaltungsgerichtsbarkeit* in Germany, *giustizia amministrativa* in Italy, etc.[38]

Our century, however, was to teach us yet another lesson: that the Rousseauian idea of the infallibility of parliamentary law is but another illusion,[39] for even the legislative, not only the administrative branch might abuse its power; that this possibility of legislative abuse has grown tremendously with the historical growth of legislation in the modern state;[40] also, that legislatures might be made subservient to uncontrolled political power, and that legislative and majoritarian tyrannies can be no less oppressive than executive tyranny. Suffice it to remember Fascist legislation depriving the Jews and other minorities of their most basic rights. This is why Austria and Italy and Germany, surfacing from the moral and material ruins of political

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which brought Yugoslavia to adopt, and Czechoslovakia and Poland to try to adopt, a system of judicial rather than political review. *See* Nikolić's UPPSALA REPORT, *supra* note 13, at §§ II.2.1, III.2.A, B, C; *see also supra* notes 14-15 and accompanying text.

37. For a brief survey of the development of *justice administrative* in France *see* L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW 28-31 (1973).

38. The influence of the French system of administrative justice outside France is discussed *id.* at 162-71.

39. *See* the UPPSALA REPORT by L. Favoreu, *supra* note 8, at § 48; *see also* J. RIVERO, LE CONSEIL CONSTITUTIONNEL ET LES LIBERTÉS 166 (1984).

40. *See* Cappelletti, *Nécessité et Légitimité de la Justice Constitutionnelle,* in COURS CONSTITUTIONNELLES, *supra* note 7, 461, 464-71 [hereinafter cited as *Nécessité et Légitimité*].

perversion, dictatorship, and defeat, soon turned to *constitutional justice,* as previously explained, to create a new kind of control to be added to the more traditional one of *administrative justice.* In so doing, they attempted to limit and check the power of the legislature and legislative majorities, within the scheme of the new constitutional norm made binding by constitutional adjudication. The historical influence of French ideas, however, can also help us understand why in order to do so all these countries felt it necessary to follow a path similar to that of *justice administrative:* they all created a new type of organ of control—almost as a *pendant* of the nineteenth-century *Conseil d'Etat* and its German and Italian analogues, the judicial organs of control of administrative action.[41]

France, on the other hand, was somewhat less immediately involved in this newer course of action. The abuses of the Vichy *régime* during World War II had been less outrageous, perhaps, and certainly less durable than those in the other countries. This might explain why France, although the leader in the nineteenth-century development of *justice administrative,* has not been a leader in the post-World War II development of "constitutional justice."

This is not yet the end of the French story, however. If not the leader, France, too, has become involved lately, and quite deeply so, in this newer development, the constitutional and judicial review revolution.[42] This has become apparent especially since 1971, when a body created by de Gaulle's Constitution of 1958, called the *Conseil Constitutionnel,* most courageously transformed its role, and transformed it radically. Originally envisaged as a mere watchdog of the enlarged powers of the executive under the *Général's* régime, in July 1971 the *Conseil Constitutionnel* asserted itself for the first time as an independent, quasi-judicial organ whose role is to review the constitutionality of parliamentary legislation violative of fundamental rights. A constitutional amendment of 1974 under President Giscard d'Estaing reinforced this development by granting parliamentary minorities standing to challenge legislation before the *Conseil Constitutionnel.* Today many an expert would agree with our French colleague, Doyen Louis Favoreu, when he maintains that the system of judicial review of the constitutionality of legislation developed in France during the last fifteen years or so, is almost as effective as those of neighboring Continental nations.[43] At least two serious

41. *See supra* note 5.

42. The developments in France are described in Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis,* 53 S. CAL. L. REV. 409, 412-21 (1980) [hereinafter cited as *"Mighty Problem"*]; *see also* the UPPSALA REPORT by L. Favoreu, *supra* note 8, at §§ 15-20.

43. UPPSALA REPORT by L. Favoreu, *supra* note 8, at § 38 *et passim.*

limitations of the French system should not be neglected, however.[44] First, there is no possibility in France for individuals whose fundamental rights have been violated to bring their complaint to the *Conseil Constitutionnel;* parliamentary legislation can be attacked only by a minority of at least sixty members of either chamber of parliament, or by a handful of political authorities having individual standing to do so in the general interest. Second, legislation can be attacked only during the short period between its enactment by Parliament and its promulgation; once promulgated, no judge in France can set aside a *loi* by declaring its conflict with the constitution. And yet, even with these limits, it took only a few years for judicial review of legislation in France to gain a remarkable importance. In many cases constitutional rights of minorities and individuals have found in this review system a formidable shield against what was felt by many as majoritarian abuse. Thus the French constitution, and most particularly its bill of rights which includes by reference the 1789 *Déclaration des droits de l'homme et du citoyen,* has for the first time become in a full sense a legally binding, judicially enforceable document.[45]

V. ENGLAND'S "GRUNDNORM": THE ABSOLUTE SUPREMACY OF PARLIAMENT

England, of course, presents us with a much different story. On the one hand, contrary to *ancien régime* France, there have been no deeply felt popular feelings in England against the judiciary whose historical role in protecting individual liberties has generally enjoyed widespread respect.[46] This can explain why, unlike France, judicial review of *administrative* action has never encountered serious obstacles in Great Britain. The doctrine of separation of powers was never fully adopted in England in its "French version," that is in the version that implied the prohibition of any "interference" by the courts even with the administrative, not only with the legislative, branch. On the other hand, the English Revolution of 1688 did affirm, and very strongly so, the absolute supremacy of Parliament which, as the proverb goes, "can do anything except transform a man into a woman or a woman into a man."[47] Rejecting such judicial precedents as the famous decision by

44. On the "infirmities" of the French system, see *Nécessité et Légitimité, supra* note 40, at 499-501.

45. Some of the *Conseil Constitutionnel's* most remarkable decisions are translated in M. CAPPELLETTI & W. COHEN, COMPARATIVE CONSTITUTIONAL LAW, chs. 3.C. & 5.C. [hereinafter cited as COMPARATIVE CONST. LAW]. *See* L. FAVOREU & L. PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL (1984).

46. *See* JUDICIAL REVIEW, *supra* note 4, at 36; J. MERRYMAN, *supra* note 33, at 16.

47. The phrase quoted in the text has a literature of its own, discussing inter alia who

Lord Coke in Dr. Bonham's case of 1610,[48] parliamentary supremacy had as its corollary the unreviewability of parliamentary legislation—the "omnipotence" of positive (statutory) law and the judicial powerlessness to control the "validity" of that law.[49]

If the French brand of judicial powerlessness might find in Montesquieu its most authoritative, though not unambiguous, theorist, the great liberal thinker and theorizer of the Glorious Revolution, John Locke, might be seen to have played a similar role in England. Although frequently associated with the historic doctrine of separation of powers, Locke in fact did not even view the judiciary as a separate "branch" or "power." In his trichotomy, the two "derivative" or "inferior" powers are the "executive"[50] and the

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deserves paternity of it (De Lolme? Bagehot?). *See, e.g.*, 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 344 n.5 (1938); H. ABRAHAM, THE JUDICIAL PROCESS 295 (2d ed. 1968).

48. *Bonham's Case,* as is well-known, affirmed the judicial power to control the validity of legislation: "for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void." 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (C.P. 1610). For a very learned commentary see Plucknett, Bonham's Case *and Judicial Review,* 40 HARV. L. REV. 30-70 (1926); *see also* JUDICIAL REVIEW, *supra* note 4, at 36-41.

49. In a passage much criticized by John Austin, Blackstone affirmed that natural law, being "superior in obligation" to positive law, "is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original," so that "we are bound to transgress that human law" which is violative of natural law. *See* 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *41, 43; J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED at 184-86, Lecture V (1954). Nevertheless, Blackstone also affirmed that the Parliament's power is

> so transcendent and absolute, that it cannot be confined . . . within any bounds. . . . It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. . . . It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo. . . . So long, therefore, as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

1 W. BLACKSTONE *supra* at *160-62; *see also id.* at *90-91, where Blackstone rejects the possibility for the judges to set aside parliamentary laws even if these laws command "a thing to be done which is unreasonable." "I know of no power," he says, "that can control" such laws; and to maintain that the judges "are at liberty to reject" them, "[would] set the judicial power above that of the legislature, which would be subversive of all government." *Id.* As Pound rightly noted, when Blackstone "comes to apply [his theory of natural law] to legislation, he retracts." Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383, 392 (1908).

50. J. LOCKE, *The Second Treatise of Government* in TWO TREATISES OF GOVERNMENT §§ 144, 149 *et passim* (1698) [hereinafter cited as *The Second Treatise*].

"federative,"[51] whereas the "supreme" power, the "legislative,"[52] is magnified as "the Soul that gives Form, Life, and Unity to the Commonwealth."[53] Even though Locke's "legislative" was bound to "pronounce" and "enforce" the "eternal and immutable laws of nature," which are found, not created, by reason,[54] he did not see the judiciary as the authorized and privileged enforcer of these natural law limits of the legislative will.[55] Locke's doctrine was to be echoed and made more explicit by Blackstone when the great commentator bluntly rejected judicial review as being tantamount to setting "the judicial power above that of the legislature, which would be subversive of all government."[56]

Unlike France, this is not past history for England. Parliamentary supremacy is still affirmed as the basic principle, the *Grundnorm*[57] of the unwritten constitution of that country. Yet, significant breaches have been opened over the last few years into the principle's solid, tricentenary walls. I shall mention two of them, which apply to the United Kingdom but at the same time to much of the rest of Western Europe as well. For they lead us to a new and most unique dimension in the extraordinary development and growth of judicial review in Europe—its *transnational dimension.*

VI. Is England Abandoning Her Lockeian Grundnorm? Community Law "Cannot Be Held Back"

A first "breach in the walls" has been opened by Community law. As you know, since 1973 the United Kingdom has become a full member of the European Community—the so-called Common Market, in which now ten countries of Europe participate, soon to become twelve countries with a population of over 300 million people. One of the basic features of the Community is that it has been entrusted with law-making powers in a wide variety of areas, especially of economic, but also of social concern. Community law, mostly enacted by the Council of Ministers of the European Community

51. *Id.* §§ 145-49.

52. *Id.* § 134, § 149.

53. *Id.* § 212. It might be true, however, that because the legislative power, and more generally "the power to govern," was seen by Locke as "the pronouncing and enforcing of a law, the law of nature which is the law of reason," he saw a "judicial" feature inherent in and pervading that power, as noted by Peter Laslett. *See* Laslett *Introduction* to J. Locke, Two Treatises of Government 15, 96, 107 (1960); *see, e.g., The Second Treatise, supra* note 50, at §§ 88-89, 136.

54. *See, e.g., The Second Treatise, supra* note 50, at § 124.

55. *See, e.g., id.* § 135.

56. *See supra* note 49.

57. *See, e.g.,* Wintertorn, *The British Grundnorm: Parliamentary Supremacy Reexamined,* L.Q. Rev. 591-617 (1976).

with some participation of the Communities Commission and the European Parliament, has indeed proved to be an expanding body of transnational legislation, primarily consisting of, by now, thousands of so-called "regulations" and "directives."[58] In the colorful expression of Lord Denning, this body of Community legislation penetrates the British legal system, and the systems of the other nine member states as well, "like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."[59] And the reason why it cannot be held back is that a basic principle of Community law affirms the "direct applicability" of Community law as if it were, automatically, *the law of the land* of each of the member states.[60] Again in Lord Denning's words, "Parliament has decreed that [Community law] is . . . to be part of our law."[61]

It belongs to the very nature of Community law, moreover, that, as a general rule at least, it must be uniform and uniformly applied in all the member states. This explains why, since at least 1964, a consistent stream of decisions of the European Court of Justice—the Court of the Community sitting at Luxembourg—has established that Community law not only is the law of all the member states, to be directly applied by all the national courts, but that it is, moreover, the *higher* law of the member states, prevailing over conflicting national legislation.[62] No matter when enacted, national legislation must be set aside by all the national courts of the ten countries if they find it to be contrary to Community legislation;[63] and problems of interpretation are decided, in last resort and with final effect for all the member

58. *See, e.g.*, Sasse & Yourow, *The Growth of Legislative Power of the European Communities* in COURTS AND FREE MARKETS 92-126 (T. Sandalow & E. Stein eds. 1982). *See generally* E. STEIN, P. HAY & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE (1976); COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW (1983).

59. *See* COMPARATIVE CONST. LAW, *supra* note 45, at 137; the quotation is from Bulmer v. Bollinger, [1974] 2 All E.R. 1226.

60. The principle was affirmed for the first time in the historic 1963 decision by the European Court of Justice [ECJ], van Gend en Loos v. Nederlandse Administratie Belastingen, 1963 E. Comm. Ct. J. Rep. 1. *See, e.g.*, L. BROWN & F. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 162 (1983).

61. *See* COMPARATIVE CONST. LAW, *supra* note 45, at 137; *see generally* THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP OF THE EUROPEAN COMMUNITIES AND OF RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1-246 (M. Furmston, R. Kerridge & B. Sufrin eds. 1983).

62. The first affirmation of the preeminence doctrine can be found in another historic decision of the ECJ, Costa v. ENEL, 1964 E. Comm. Ct. J. Rep. 585. On the gradual acceptance by most of the national courts of the doctrine of the supremacy of Community law, see *Mighty Problem, supra* note 42, at 424-26; R. Kovar, *The Relationship Between Community Law and National Law,* in THIRTY YEARS OF COMMUNITY LAW 109 (1982).

63. *See* the ECJ decision in *Simmenthal,* 1978 E. Comm. Ct. J. Rep. 629.

states, by the European Court of Justice.[64]

Here we can see, then, that an important new form of judicial review of legislation has penetrated into "the estuaries and the rivers" of the British as well as the other nine European systems. It is a form of review quite akin to the American adjudicatory enforcement of the supremacy of federal legislation over conflicting state law. To be sure, it is not a control of the *constitutionality* of legislation; yet it is at least a first important move toward recognizing, even in England, that the historical principle—the absolute supremacy of parliamentary law—does no longer fully prevail.

VII. THE "TRANSNATIONAL JUSTICE" OF THE EUROPEAN COURT OF HUMAN RIGHTS

A second development is even more akin to our concern, that is, to review of the *constitutionality* of legislation, and most particularly to judicial review as an instrument to protect human rights. Indeed, a few years ago the development I am now going to discuss motivated the distinguished American constitutionalist Charles Black—a past "Pope John XXIII lecturer" as I have learned—to maintain that England, contrary to generally accepted opinion, *does* already have a written and binding bill of rights.[65]

This second episode materialized especially when the United Kingdom, a ratifying member of the European Convention of Human Rights since 1951, in 1966 accepted the optional clause of Article 25 of that Convention.[66] This clause creates a form of transnational *Verfassungsbeschwerde;* after exhaustion of the national remedies, it grants standing to all individuals to bring before the Convention's judicial machinery in Strasbourg their complaints against any sort of state action, including legislation, violative of their rights entrenched in the Convention. Let us be reminded that the Convention is a comprehensive transnational bill of rights; with only one exception, Finland, it is now adhered to by all the countries of Western Europe, twenty-one countries encompassing a population of more than 350 million people.[67]

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64. *See, e.g.,* L. BROWN & F. JACOBS, *supra* note 60, at 281-85; *Da Costa en Schaake,* 1963 E. COMM. CT. J. REP. 31. Generally on the role of the European Court of Justice, see Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration* in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, Vol. 1, Book 1, (M. Cappelletti, M. Seccombe & J. Weiler eds. publication forthcoming).

65. Black, *Is There Already a British Bill of Rights?,* 89 L.Q. REV. 173 (1973).

66. The acceptance, first limited to a period of three years, was since regularly renewed; the last renewal occurred in 1981 for a period of five years. *See generally* A. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY 177-87, 362-63 (1983).

67. For brief surveys *see, e.g.,* Higgins, *The European Convention on Human Rights* in II

Thus a transnational bill of rights has become binding for England, among other nations, and is enforceable by a transnational adjudicator to whom the British citizens have access. From this it is perhaps only a small step to accept the idea that the Convention is part of the law of England, and indeed binding also for the British Parliament; and that the British courts must enforce such higher law, lest their judgments be subject to the condemnation of the transnational adjudicators at Strasbourg.[68] Whether the Britons are ready to take this further step and thus adopt a full-fledged system of judicial review is not a question I want to discuss now. Suffice it to say that complaints successfully brought under the Convention by individuals against British legislation and other British state action have been rather frequent in the last several years, and in quite a few cases the condemnations by the European Commission and Court of Human Rights have aroused bad feelings in the United Kingdom, for they have cut into cherished traditions; nevertheless, British authorities, including the Parliament, have generally shown their willingness to comply with the final decisions of the European Court of Human Rights. *De facto* at least, the supremacy of the transnational bill of rights has been largely confirmed in Western Europe.[69] Great

HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL & POLICY ISSUES 495-549 (T. Meron ed. 1984); A. ROBERTSON, HUMAN RIGHTS IN THE WORLD 80-117 (1982). The Convention has been ratified by the following countries (in parenthesis is, first, the year of ratification, and second, the year, if any, of the acceptance, even since uninterrupted, of the optional clause of Art. 25): Austria (1958; 1958); Belgium (1955; 1955); Cyprus (1962); Denmark (1953; 1953); France (1974; 1981); Federal Republic of Germany (1952; 1955); Greece (1974); Iceland (1953; 1955); Ireland (1953; 1953); Italy (1955; 1973); Liechtenstein (1982; 1982); Luxembourg (1953; 1958); Malta (1967); Netherlands (1954; 1960); Norway (1952; 1955); Portugal (1978; 1978); Spain (1979; 1981); Sweden (1952; 1952); Switzerland (1974; 1974); Turkey (1954); and the United Kingdom (1951; 1966). Of these countries, only four—Cyprus, Greece, Malta, and Turkey—have not yet accepted the optional clause of Art. 25. For further information concerning also the ratifications of the Convention's protocols *see* A. DRZEMCZEWSKI, *supra* note 66, at 362.

68. On the impact of the European Convention on the United Kingdom see A. DRZEMCZEWSKI, *supra* note 66, at 177-87 (with reference to a number of cases); M. FURMSTON, R. KERRIDGE & B. SUFRIN, *supra* note 61, at 247-428.

69. On the authority of and compliance with the decisions of the adjudicatory organs of the European Convention on Human Rights in the various member states, *see* A. DRZEMCZEWSKI, *supra* note 66, at 260-325. With particular regard to the United Kingdom, see the recent comments by the Chairman of the Law Commission for England and Wales, the Honourable Mr. Justice Gibson in Gibson, *Legal Procedure: Access to Justice: 1883 to 1983,* 9 DALHOUSIE L.J. 3, 27-28 (1984):

> The United Kingdom has been adjudged to be in breach of its obligations under the European Convention in a number of cases which I can only call large. Government has, no doubt, found these events both surprising and embarrassing. Breach was established in a case about the working of the closed shop in our nationalized railways for which damages . . . and costs . . . were awarded to three claimants. There have been cases . . . about immigration. Breaches have also been established on individual petitions in other contexts, such as the use of corporal punishment in a

Britain, in particular, while ostensibly sticking to its tradition of rejecting judicial review of legislation, has gone a long way by now toward repudiating its own brand—a "Lockeian" and "Blackstonian" brand, we might be tempted to say—of the doctrine of the judicially uncontrollable supremacy of the legislative will.[70]

VIII. On the "Mighty Problem" of the Democratic Legitimacy of Constitutional Justice

We have seen how judicial review has been recently introduced, and/or has greatly expanded its role, in a large number of nations. Indeed, to be complete our list should have been extended to many more countries, including Sweden, especially since 1980,[71] and Canada, especially since its new constitutional "Charter of Rights and Freedoms" of 1982.[72] I should have mentioned, moreover, that even in its most striking, historically unprecedented dimension—the transnational dimension—the European precedent is no longer alone. The American Convention on Human Rights signed in San José of Costa Rica in 1969 has become binding for several Latin-American countries since 1978; largely modeled after the European Convention, this transnational bill of rights led to the creation, in 1979, of an Inter-American

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> school without the consent of parents, the censorship of mail by prison authorities and the refusal of permission for a prisoner to seek legal advice, and the working of the common law of contempt against *The Sunday Times* newspaper in its investigation and reporting of the Thalidomide case. In one case, *Eire v. U.K.*, the proceedings were between two parties to the Convention. It was alleged that the authorities in Northern Ireland had inflicted torture on Republican prisoners by using a number of interrogative devices, such as wallstanding, subjection to noise, and deprivation of sleep. The [European] court held that the techniques did not amount to torture, but were inhumane and degrading treatment in breach of Article III.
>
> The response of the government to these and other decisions has been to discontinue the offending practices, often before decision by the court, and, when necessary, to change the relevant law, such as prison rules. There has been no sign of an intention to defy the decisions of the court, although not everyone agrees with the interpretation of the Convention by the various majorities in the Court of Strasbourg. The United Kingdom could denounce the Convention on six months' notice under Article LXV. . . . It has not done so and such a step is exceedingly improbable.

Id.

70. *See Mighty Problem, supra* note 42, at 424-30.

71. *See* the Uppsala Report by Eivind Smith on the Scandinavian countries, *supra* note **; *see also,* Hahn, *Verstaerkter Grundrechtsschutz und andere Neuerungen im schwedischen Verfassungsrecht,* Archiv des offentlichen Rechts 400-22 (1980).

72. *See* the Uppsala Report by John D. Whyte on the common law countries, *supra* note **; *see also* Bayefsky, *Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms* in Political Studies 239 (1983); D'Onorio, *Le Rapatriement de la Constitution Canadienne,* 1 Revue Internationale de Droit Comparé 69 (1983) (especially at 100-01 on the serious consequences of the "notwithstanding clause" of § 33 of the Charter).

Court of Human Rights sitting in San José and open, perhaps, to future developments similar to those, already quite sensational, of its European antecedent.[73]

But my time is almost over, and I shall still discuss, although briefly, the basic question about the significance and legitimacy of judicial review, in light of its tremendous growth in the contemporary world.[74]

For many nations, as we have seen, this significance has been primarily one of a reaction against past governmental abuses. This has been most evident in several of the countries we have mentioned; and others could be added, even from Africa, Asia, and Latin America. In these continents, too—and especially in Latin America, where some aspects of the phenomenon of judicial review are even older than in Europe[75]—comparative study has proved that judicial review of the constitutionality of legislation and other state action has, at least, the potential to work as an instrument to protect individuals and minorities. This is true even though the efficacy of judicial review in the developing world has been much too frequently jeopardized both by insufficient judicial independence and by the use and abuse on the part of the executive of the power to suspend constitutional guarantees.[76] But even in countries, such as England, where, happily, there has been no such legacy of serious governmental abuse, judicial review has been emerging, indirectly at least, as an element of a new and most fascinating

73. *See generally* T. BUERGENTHAL, R. NORRIS & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS (1982); Buergenthal, *The Inter-American System for the Protection of Human Rights* in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL & POLICY ISSUES, *supra* note 67, at II, 439-93; Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences,* 30 AM. U.L. REV. 155 (1981); Espiell, *The Organization of American States (OAS)* in II THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 543-65 (K. Vasak ed. 1982); P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 401-14 (1983). *See also* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, TEN YEARS OF ACTIVITIES 1971-1981, at 11-13 (1982) (discussing the newly created Inter-American Court of Human Rights); ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COURT ON HUMAN RIGHTS, ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1984 (1984) (a sadly impressive document of the, as yet, extremely limited activity of the Inter-American Court).

74. For a more elaborate discussion I shall refer to my studies Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis,* 8 MONASH U.L. REV., 15, 51-58 (1981) [hereinafter cited as *Law-Making Power*]; *Nécessité et Légitimité, supra* note 40, at 475-83.

75. *See generally* H. FIX ZAMUDIO, VEINTICINCO AÑOS DE EVOLUCIÓN DE LA JUSTICIA CONSTITUCIONAL 1940-1965 ch. 2 (1968).

76. *See* UPPSALA REPORT by Nwabueze, *supra* note 16, at 18-23; Carpizo & Fix, *supra* note 16, §§ 61-69, 91, 95, 110 *et passim*. Professor Henkin points out "what today might seem a striking but happy omission" of the U.S. Constitution which "does not provide for its suspension, or for government by decree even in emergency." "Only the privilege of the writ of habeas corpus may be suspended." L. HENKIN, *supra* note 19, at 13, 150 n.31.

trend in law, politics, and human rights: transnationalism. Vertical sharing of power and the ensuing pluralism of legal sources, a typical product of transnationalism as well as federalism, brings about, inevitably, the possibility of conflicts among the various levels of power, of laws, and of rights; and judicial review is the natural instrument to settle such conflicts.

There is, moreover, a general perception, at least in Western countries, that in our "age of statutes"—as Dean Calabresi has called it[77]—the control by an independent adjudicator of a more and more pervasive legislator, whose role in the modern state has grown to unprecedented dimensions, is a valuable safeguard; indeed that such control is the necessary "crowning" of the rule of law. True, the legislator in democratic societies is the representative of, and accountable to, the people, whereas it belongs to the very nature of the judicial function that judges shall not be so accountable. The paradox—entrusting unaccountable judges with the function of controlling accountable politicians—is merely apparent, however. In our societies, judges are nonaccountable only in the sense that they are not and shall not be held responsible to the other branches or to the people for their individual decisions and philosophies. Their nonaccountability, however, holds only in the short and medium term. There are many ties which, in the long term at least, connect them with their time and society. These ties might be reinforced by the manner of the judicial appointment, as in this country,[78] or, as in Europe, by the fact that the judges' tenure in office, which surely must be long enough to give them autonomy and assurance, is limited to a given number of years with, as a rule, no possibility of being extended. It should also be noted that the very nature of the judicial process is a highly participatory one, for the judges' role is based on real-life cases and can be exercised only upon, and within the limits of, the interested parties' complaints and demands. In this sense, there is at least a high potential for a continuous contact of the judiciary with society's real problems, needs, and aspirations.[79] A sound product of our freedom of speech, moreover, is the fact that judges, too, day after day are subject to public criticism.[80] When we

77. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

78. *See, e.g.*, Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284-85 (1957).

79. *See Law-Making Power, supra* note 74, at 42-46, 54-57. Even though their profession and role might to some extent insulate the judges from society, their very activity "forces the judges down to realities, since they are called to decide cases involving live persons, concrete facts and actual problems of life." *Id.* at 57.

80. Criticism, of course, is facilitated by the fact that in our societies the most important judgments and their reasons are published; it is further facilitated in those countries where dissenting and concurring opinions are also published. *See* the comparative study by Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMP. L. 415 (1959).

speak of separation of powers today, we certainly do not mean *séparation* in the original French significance; we mean, rather, reciprocal connections and mutual controls. The judicial nonaccountability is a *political* and a *legal* nonaccountability—and even that with important limitations in case of serious abuses; it is not, however, a *societal* nonaccountability.[81] Abuses of a kind analogous to those of the judges of *ancien régime* France would be hardly conceivable in our societies, for those were the abuses of a *corps séparé,* a group totally separated from the rest of society.

The "mighty problem" of the legitimacy of judicial review cannot be solved by means of purely speculative, abstract solutions valid for any place and time. Indeed there are no such universal solutions; and surely a page of realistic comparative analysis can be more worthy than many books of such abstract speculations.[82] Should our judges today be of the kind that prevailed in pre-Revolutionary France, then of course judicial review would be hardly legitimate. But in our Western world, in which the roles of the political branches have grown into so many areas of our life, and indeed inevitably so, the scrutiny of a more "detached," though not literally "separate," judiciary can be most salutary. Values which are more enduring can be better preserved;[83] individuals and groups that would be otherwise emarginated or oppressed can be better protected; and, more generally, the fairness and the permanent representativeness of the political process itself can be better

81. *See* Cappelletti, *"Who Watches the Watchmen?" A Comparative Study on Judicial Responsibility,* 31 AM. J. COMP. L. 1 (1983).

82. Applying the teaching of the great historian-philosopher Vico, *"verum ipsum factum,"* the comparativist "speculates" on the significance of facts, trends, and developments, not of abstractions. G. VICO, PRINCIPJ DI SCIENZA NUOVA (1744) (English transl. by T. BERGIN & M. FISCH, THE NEW SCIENCE OF GIAMBATTISTA VICO (1948)). Comparative analysis, of course, is not only comparison of contemporary laws and legal systems but also analysis of their evolution and trends. History, in other words, is an essential component of comparative analysis.

83. *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH 25-27 *et passim* (1962).

It is frequently said that modern constitutional adjudication, while potentially a powerful instrument for the protection of traditional political rights and values, has no potential for also being or becoming so for the protection and enforcement of the "new" social and economic rights. For these rights, unlike the traditional ones, usually require affirmative state action, and the judicial mandate is said to be powerless to determine such action. This is only a half truth, however. Greater difficulties are certainly encountered and greater restraint is advisable when courts, ascertaining the illegitimacy of governmental inaction, command the government to do something, with all the economic and other implications thereby involved, than when they simply declare the illegitimacy of an existing governmental act. Comparative study demonstrates, however, that there are many ways for the courts to intervene even in this more difficult area. A most recent example is provided by the Burger Court, certainly not an activist court in the sphere of socio-economic rights. *See* Ake v. Oklahoma, 105 S. Ct. 1087 (1985), in which, with only one dissent, the Court held that the states must provide indigent criminal defendants with free psychiatric assistance in preparing an insanity defense if the defendant's sanity at the time of the crime is likely to be a significant factor at trial.

assured.[84] The democratic principle requires that everyone should have a "voice" in the political process and that it be possible for the minority of today to become the majority of tomorrow. If basic rights such as the freedoms of speech, of opinion, of association could be limited, without due process, by the majority of today, the very democratic principle would be impaired; and this is no less true for the "new rights" of a social and economic nature, for their rationale is to make effective the most basic of all democratic entitlements—the right of access to the legal and political system.[85] Thus constitutional justice, far from being inherently antidemocratic and antimajoritarian, emerges as a pivotal instrument for shielding the democratic and majoritarian principles from the risk of corruption. Our democratic ideal, at any rate—let this point be firmly stressed—is not one in which majoritarian will is omnipotent. And our philosophy of life is not one in which everything can be bargained.

IX. The Contemporary Human Rights Revolution and Its Legitimacy—Overcoming the Traditional Conflict Between Natural and Positive Law

Let me sum up now, by way of conclusion, the two major theses I have tried to convey.

The first is that, since World War II, Western societies have been living what I do not hesitate to characterize as a constitutional and civil rights revolution. Indeed, at some points there have been signs of this trend going even beyond the Western world: I should only mention the Universal Declaration of Human Rights of 1948 and the International Covenants of 1966 in force since 1976.[86] But unfortunately, these documents have not been ac-

84. *See, e.g.*, M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review 37 (1966); J. Ely, Democracy and Distrust (1980). The central thesis of Dean Ely's book is its advocacy of a "representation reinforcing" approach; this approach emphasizes the role of judicial review as an instrument for the preservation of a fair, open political process and for the correction of "malfunctions" of this process which would impair the effective participation of minorities.

85. *See* Cappelletti & Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective*, in Access to Justice, Vol. I: A World Survey 3-124 (M. Cappelletti & B. Garth eds. 1978). *See generally* Access to Justice and the Welfare State (M. Cappelletti ed. 1981).

86. *See, e.g.*, The International Bill of Rights: The Covenant on Civil and Political Rights (L. Henkin ed. 1981); *see also* L. Henkin, *supra* note 19, at 89-101. Another major development of our time, the drive against colonialism, which brought about the creation of dozens of new nations in the post-World War II years, can be seen as an expression of the trend mentioned in the text. As Professor Henkin says, it was that drive that "brought a mass of new states and governments that looked to the idea of human rights to achieve 'self-determination' and the elimination of racism." *Id.* at 18.

companied by legal processes and institutions strong enough to give even an initial degree of effectiveness to the rules incorporated in them.[87] And yet even these attempts, as embryonic as they remain, are significant for they witness a universal aspiration, although largely unfulfilled.

Our skepticism, of course, and the many implementation failures and gross violations of the human rights philosophy might often hide this humanistic feature of our time, and indeed many developments might obscure it, even deny and ridicule it. We shall reject unconstructive, excessive skepticism, however, as well as its twin brother, nihilism—these recurring diseases of intellectual narcissism. We are convinced, with the great philosopher of "moderate skepticism," David Hume, that excessive skepticism cannot resist the test of "action" and the reality of "common life."[88] And this reality demonstrates that, as Professor Louis Henkin affirms and amply documents, there has been an "explosion" of human rights in the "libertarian democracies" of our contemporary world.[89] This explosion has been characterized by an unprecedented concern for the creation of effective instruments, national and transnational, if not yet universal, to protect the basic rights of individuals and groups—including the poor, racial and religious minorities, the young and the old, women and, more generally, those traditionally deprived of fair and equal access to the law. Not to recognize the historical importance and the unprecedented character of this ongoing development is

87. *Cf.* L. HENKIN, *supra* note 19, at 101-02, 107-13; Henkin, *International Human Rights as "Rights,"* in NOMOS XXIII: HUMAN RIGHTS 257-80 (1981); Sohn, *Human Rights: Their Implementation and Supervision by the United Nations,* in T. MERON, *supra* note 67, at II, 369-401.

88. D. HUME, *An Enquiry Concerning Human Understanding,* § XII, pt. I in ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 149 (L. Selby-Bigge ed., 2d ed. 1963, reprint of 1902 ed. of 1777 Posthumous ed.). Although teaching that human knowledge is limited to experience of ideas and impressions, and excluding the possibility of any definitive verification of their truth, Hume severely condemned what he called "excessive" or "Pyrrhonian" skepticism:

> For here is the chief and most confounding objection to *excessive* scepticism, that no durable good can ever result from it . . . . [The Pyrrhonian skeptic] must acknowledge . . . that all human life must perish, were his principles universally and steadily to prevail. . . . [However,] [n]ature is always too strong for principle. . . . [T]he first and most trivial event in life will put to flight all [the Pyrrhonian's] doubts . . . . When [the excessive skeptic] awakes from his dream, he will be the first to join in the laugh against himself, and to confess, that all his objections are mere amusement, and can have no other tendency than to show the whimsical condition of mankind, who must act and reason and believe; though they are not able, by their most diligent enquiry, to satisfy themselves concerning the foundation of these operations, or to remove the objections, which may be raised against them.

Id. at 159-60. I wonder how much contemporary legal writing would change its theme and tone and how much intellectual energy and talent would be put to better use if Hume's teaching were learned.

89. L. HENKIN, *supra* note 19, at 43-55, 156-61.

to be deaf and blind to, perhaps, the most phenomenal societal transformation trend that has ever occurred in human history.[90]

This is far from a rosy vision of our epoch. Indeed, the human rights explosion is but one attempt to give an answer to those problems which, more than ever before, as I said at the beginning of this talk, are endangering humankind's civilization and survival—the problems of oppression, of poverty, of war. Whether the attempt will fail or succeed is for the future to decide. But it seems clear to me that, if this attempt will be successful, national and transnational human rights and their judicial enforcement will have a good share of the merit. Let me make this statement very clear—that I see no future for humankind, unless a renewed philosophy of tolerance and mutual respect, in a real sense a human rights philosophy, will enable us to make decent use of the tremendous material power we have acquired.

The unprecedented expansion of judicial control of the political branches is a nonsecondary facet of this human rights revolution. The very fact that, until the post-World War II epoch, judicial review in this country, while playing an important role in the formation of "a more perfect Union," did not play a comparable role as an instrument for the protection of civil rights,[91] seems to prove my point. For only in our epoch has the time be-

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90. Henkin's documentation focuses on, without being limited to, the United States. For an account of developments in Europe, see COMPARATIVE CONST. LAW, *supra* note 45, chs. 6-12. The "rights explosion" since World War II is described as "impressive":

> The Fourteenth Amendment was held to have incorporated, and rendered applicable to the states, the principal provisions of the Bill of Rights—freedom of speech, press, assembly, religion, the security of the home and the person, safeguards for those accused of crime. . . .
>
> Even more impressive has been the expansion of our eighteenth-century rights in conception and content. We have opened our Constitution to every man and woman, to the least and the worst of them. We have opened it also to new rights and to expanded conceptions of old rights . . . . We safeguard not only political freedom but also, in principle, social, sexual, and other personal freedom, privacy, autonomy . . . . All racial classifications are suspect and sharply scrutinized . . . . There has been a fundamental and, I believe, irreversible transformation in the status of women . . . . The poor, too, have rights of equal protection, and the state cannot offer important rights—a criminal appeal, a divorce—for pay without making them available gratis to those who cannot pay . . . . Other once-closed categories are open: prisoners now have rights, as do military personnel, mental patients, pupils in the schools, and children independently of their parents.
>
> The courts also found new rights, for example, a right to travel, abroad as well as interstate. . . . [They] have found an area of fundamental individual autonomy (called "privacy"), invasions of which will be . . . invalidated unless they serve a compelling state interest.

L. HENKIN, *supra* note 19, at 43-44, 46.

91. The undeniable fact that judicial review in America played a modest, at times even a negative role in the protection of civil liberties until a very few decades ago, is often indicated as evidence of the democratic deficit of the institution itself. *See, e.g.*, Railton, *Judicial Review,*

come ripe for what I insist to call our civil rights revolution. A writer has one of his "characters" say that only danger and suffering make human beings sensitive to justice, to the feelings and the inquiry of what is bad and good—in sum, to human values.[92] The tensions and dangers of our time are so great and imminent, that this sense of values in some way has been and will be forced to emerge—hopefully, not only in the West. And, in our Western societies, it has been a privileged, though surely not exclusive, role of constitutional and transnational judges to interpret and sort out those values that cannot be compromised.

My second thesis has been that this judicial role is a legitimate one. Surely we might disagree with, even fight against, certain determinations or trends in constitutional adjudication. Still, a century and a half of Continental history is there to demonstrate that the alternative solution is worse indeed. In the absence of judicial control, the political power is more easily exposed to the risk of perversion. Judicial control, of course, is no infallible remedy; as a bulwark of our freedoms, it might often prove to be too weak to resist tyranny, as the experience of many countries demonstrates. If not an invincible bulwark, however, it may at least act as a warning and a restraint.

Does this development mark the revival of a new "natural law"? Many have said so.[93] I would go farther and say that modern constitutionalism, with its basic ingredients—a civil-libertarian bill of rights and judicial enforcement of it—is the only realistic attempt to implement natural law values in our real world. In this sense, our epoch, if any, is *the* epoch of natural law. More accurately, however, I would say that modern constitutionalism is the attempt to overcome the plurimillenary contrast between natural and positive law, the contrast, that is, between an immutable, unwritten higher law rooted in nature or reason, and a passing law written by a particular legislator of a given place and time. The modern constitutions, their bills of rights, and judicial review are the elements of a "positive higher law" made binding and enforceable: they represent a synthesis of a sort—a Hegelian synthesis as it were—of legal positivism and natural law. They reflect the most sophisticated attempt ever designed to "positivize" values without,

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Elites, and Liberal Democracy, in NOMOS XXV: LIBERAL DEMOCRACY, 153-80 (1983), (and the literature mentioned therein).

92. L. PIRANDELLO, SIX CHARACTERS IN SEARCH OF AN AUTHOR, act. III:

> never do people reason so much and become so introspective as when they suffer; since they are anxious to understand . . . whether it is just or unjust that they should have to bear it. On the other hand, when they are happy, they take their happiness as a matter of course, and do not analyze it, just as if happiness were their natural right.

93. A typical illustration is provided by the contributions in NATURAL LAW AND MODERN SOCIETY (1962). *See also,* L. HENKIN, *supra* note 19, at 19. *Cf.* Dworkin, *"Natural" Law Revisited,* 34 U. FLA. L. REV. 165 (1982).

however, either absolutizing such values or relinquishing them to the mutable whims of passing majorities.[94]

Let us condemn judicial decisions that in our perceptions are wrong. But let us be aware that there is a worth and a legitimacy in an institution whose very *raison d'être* is to control the political power and to protect us against abusive exercise of that power. If it is true, as I think comparative study amply demonstrates, that in the post-World War II era judicial review in very many countries has been a valuable instrument to reinforce our fundamental freedoms, then its democratic legitimacy is also confirmed. For anything which can reinforce the freedom of the citizens, surely reinforces democracy as well.[95]

94. *See* my studies *Judicial Review in Comparative Perspective,* 58 CALIF. L. REV. 1017, 1017-20, 1032-33 (1970); *The Significance of Judicial Review of Legislation in the Contemporary World,* in IUS PRIVATUM GENTIUM, FESTSCHRIFT FÜR MAX RHEINSTEIN 147, 155-62 (1969). *See* also L. HENKIN, *supra* note 19, at 5-23, 148-52, especially at 19-23.

95. *See* J. Rivero, *Rapport de Synthèse,* in COURS CONSTITUTIONNELLES, *supra* note 7, at 517, 525-26.