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

Por el doctor Mauro Cappelletti

1. 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 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) 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 Afghanistan, 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 in so far 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 into a specific answer that our epoch has been trying to give to these major problem 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 thing, 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.

2. The Meaning of "Constitutional Justice"

The principal answer in terms of legal justice to the problem of op-
pression 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, call-
ings, and political parties, has at times proved to be no less dangerous
and oppressive, no less intrusive into the privacy and freedom of indi-
viduals, than the official power of the state. Even the fantastic, splendid
developments in technology are themselves a potential menace, for tech-
nology 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 "solicitude within the crowd"; the senti-
ment 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 teach-
ing 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.\(^2\) 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.

3. 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 Constitution, 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,

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\(^2\) Hart, op. cit., 618-619; Fuller, op. cit., 634-655.

\(^4\) For some historical precedents, however, see, e.g., M. Cappelletti and J. C. Adams, “Judicial Review of Legislation: European Antecedents and Adaptations,” 79 Harv. L. Rev. 1297-1224 (1966); M. Cappelletti, Judicial Review in the Contemporary World, Indianapolis, Bobbs-Merrill, 1971, 24-43 [hereinafter cited as Judicial Review].
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 created, 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

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\(^5\) 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 *et passim.*
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, specially 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 thought, naturally enough, dissent is often voice 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 colonels10 for Portugal in 1976, after the fall of the Salazar re-

7 See id., at 22-23. 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., K. SCHRAG, "Procédures et techniques de protection des droits fondamentaux. Tribunal Constitutionnel Fédéral Allemant," in Louis FAVOREU (sous la direction de), Cours constitutionnelles européennes et fondamentaux, Paris, Economica, 1982, 105, at 128-129 [hereinafter cited as Cours constitutionnelles].

8 See the report by L. FAVOREU on Western Europe, §§8-10, presented to the Conference of the International Association of Legal Science held in June 1984 in Uppsala, Sweden, on "Judicial Review at Legislation and Its Legitimate - Recent Developments." The regional reports, as well as M. CAPPETELLETTI's general report are being published in volume form under the editorship of Professors Louis FAVOREU and J. JOLOWIEZ [hereinafter cited as Uppsala Reports]. (An adapted version of Dean FAVOREU's report is published in Revue du droit public et de la science politique en France et à l'étranger, 1984, 1147-1201.)

9 Constitutions of Cyprus (1960), Turkey (1961) and Malta (1964). See Judicial Review, supra note 4, at 50-51.

10 Greek Constitution of 1975. See E. SIKLOPOLOUS, "Judicial Review of Legis-
gime; 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 “Solidarność” 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, anti-libertarian, 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 con-

11 Portuguese Constitution of 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 L. Favore, supra note 8, ¶ 22-25; H. F. ZAMUDIO, La protección jurídica y procesal de los derechos humanos ante las jurisdicciones nacionales, Madrid, Civitas, 1982, 193-207.


13 The system was reaffirmed in the Yugoslav Constitution of 1974. See the Uppsala report by Pavle Nikolic on the Socialist countries, supra note 8, §§ I.1, III.2 A et passim; see also H. F. ZAMUDIO, supra note 11, 208-212; Judicial Review, supra note 4, 51-52.

14 See Uppsala report by P. Nikolic, supra note 13, ¶ 111.2.B: Uppsala general report by M. Cappelletti, supra note 8, ¶ 2.

timents, and most frequently in Latin America and Africa. 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.

18 See the enlightening Uppsala reports by J. Carpio & H. Fix-Zamudio on Latin America and by B. O. Nwabueze on Africa, supra note 8.

19 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 & Others v. Minister of the Interior, 1952(2) S.A. 428 (A.D.), also known as the Voté case. In the decision, the Court held that Act 46 of 1951 (the Separate Representation of Voters Act) was unconstitutional. 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 section 55 which provided that "no law ... shall disqualify any person ... who is or may become capable of being registered as 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 Snadt 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. R. 1561, 1374 (1953) 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 are specially protected in the Constitution of this country." Voté case at 473. The South African government was not pleased with the Voté decision and later in 1952 each House of Parliament by simple majority enacted the High Court of Parliament Act, 55 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 which declared an Act of Parliament to be invalid. The "High Court" then proceeded to review the Voté case and overruled it holding that the "entrenched" sections of the South African Constitutions were no longer binding. The High Court Act, however, was quickly challenged aid 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. 709 (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. Senate Act, 55 of 1955. In the following year, the South African Amendment 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 section 55 relating to franchise rights. The constitutional amen-
4. 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 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.\(^8\)

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.\(^9\)

ment 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].” Of course, as previously noted, the 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 Constitutional of 1961 fully reflected the weakened “entrenched” sections and the wording of the 1956 Amendment. This absence of effective judicial review has review has been retained in South Africa’s 1983 Constitution, be new constitutional, 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.


\(^8\) See Uppsala report by Y. Taniguchi on Japan, supra note 8.

\(^9\) 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 text accompanying and following note 33), infra, lies in the
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." The reading by those courts of such—mostly unratified—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, and their activity was to be paid by each individual litigant as though it were their privilege, not their duty, to administer justice. Their status, education, and personal, family, and class interest combined to motivate their extremely conservative attitude, an attitude which eventually contributed to the triggering of the revolutionary explosion. The popular feelings against the Parlements were well justified, and this justification is reflected, albeit in a veiled form, in fact that for the American independents of the British Parliament. This might explain why, as Professor Hening says, the framers of the American Constitution "were not content with democracy, even with representative government, for parliament, too, they had learned, could be despotict could be despotic." Louis Benning, The Rights of Man Today, Boulder, Colorado, Westview Press, 1978, at 10, quoting The Federalist no. 47 (James Madison): "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

20 The gradual development and the political consequences of the Parlements' "power to veto the king's legislation" are described in John P. Dawson, The Oracles of the Law, Ann Arbor, The University of Michigan Law School, 1968, 362-371. The veto power was exercised both by a refusal to register the royal enactment on the records of the Parliament and by a public protest (remonstrance) against a royal act of which the Parliament disapproved.

21 See, e.g., J. P. D. Dawson, supra note 20, at 359-362.


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. P. 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
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 "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 brindly apply the law, for

> the judges of the nation are ... nothing but the mouth which pronounces the words of the law; they are inanimate being who cannot moderate either the force or the rigor of the law.28

escaped into exile." J. P. Dawson, supra note 20, at 370. "The highest rate of mortality was suffered by the parlementaires in Toulouse (55 executed, i.e., 50 per cent), Bordeaux was next (26 executed, i.e., 20 per cent), and Paris third (28 executed or 14 per cent)." *Ibidem*, at 370, n. 22.


26 *De l'esprit des lois*, book XI, ch. VI (translations in this Article, unless otherwise indicated are by M. Cappelletti).

27 *Ibidem*. Montesquieu's theory is not without serious ambiguities, however. Contrary to J. J. Rousseau, who was in favor of a "republican" government — i.e., a government "guided by the general will, which is the law" (Jean-Jacques Rousseau, *Du contrat social ou Précédés du Droit politique*, book II, ch. VI, note 1 et passim) or, in Montesquieu's definition, a government in which "the people ... have the sovereign power" (*Montesquieu*, op. cit., book II, ch. I) — Montesquieu advocated a moderate, nonabsolute or, as we would call it, constitutional monarchy (book II, ch. IV and book V, ch. XI), while condemning the despotic form of government (book II, ch. V and 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" (book II, ch. I) 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" (*ibidem*). Repeatedly, he emphasized that the nondespotistic monarch shall be bound "by fundamental laws" (book II, ch. IV; book V, ch. XI) and shall not concentrate in himself the judicial function (book VI, ch. V). In so doing, however, Montesquieu seems to support exactly what the *Parlements* had
Thus, although Montesquieu, unlike Locke, did list the judiciary as one of the "three powers", coming after the legislative and the exec-

for a long time been trying to do — to impose, even against the monarch, the su-

periority 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, 32-35; and see text and note 20, supra. There
are at least two passages in 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 no degenerate into rashness because state action
is bound to respect the laws. Did, then, Montesquieu "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 "ar-
bitrary" (book XI, ch. VI); that in the good monarchy, the judge's virtue is in "la
mediocrité" (book XX, ch. XII); 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") (book VI, ch. III); that the judgment shall never reflect the personal opin-
ions of the judge (book XI, ch. VI); that no liberty exists when the judge is also
legislator (book XI, ch. VI); in sum, that the judge has to be only the "inanimate"
mouth of the law (ibidem)? One explanation, of course, could be the influence of
the natural law theories dominating all over Europe in the XVII-XVIII centuries,
to which Montesquieu paid more than lip service (see, e.g., book I, ch. II; for a
learned interpretation see R. SHACKLETON, "Montesquieu in 1948," § French Studies
299, 305-312 (1949)). Such theories asserted 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. These theories, too, were hardly
compatible with a purely mechanical role of the judge, however, 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 Montes-
quieu (see R. SHACKLETON, "Montesquieu in 1948," § French Studies 299, at 310-311
(1949)). 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 admit-
ted 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 do-
main" (thus R. Darathé, supra note 25, at 439). This was much too little, of course,
to represent the foundation for a system of judicial review of the monarch's legis-
lation. A third explanation, which seems more plausible to me, is that Montes-
quieu'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., De l'esprit
des lois, book II, ch. IV) and most particularly by the nobility (ibidem) rather
than by the role of the courts. The contrary opinion of Darathé, cit., 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 Darathé seems
to suggest. For, as already mentioned, even there Montesquieu magnifies the "mé-
tive powers," 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, the judicial is, in a sense, null.  

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 denoting 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.

To be sure, the strict separation, "French style", of the government powers, whether or not actually "Montesquieuian" in inspiration, 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," and...
der 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 19th 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. More importantly still, the Montesquieuian (and Rousseauian) 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 "organization 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 for-

Charles Scribner's Sons, 1978, 251- 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. H. MERRYMAN, The Civil Law Tradition, 2nd ed., Stanford, Cal., Stanford University Press, 1985, 15-16; Sir Otto KAHN-FREUND, "Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation," in M. CAPPELLETI, ed., New Perspectives for a Common Law of Europe, Leyden & Bruxelles, Sijthoff & Bruylant, 1978, 157, at 158. The French (and Continental European) history of Justice administrative in the 19th century and of justice constitutionnelle in our time, on which see infra in this Section, would be totally incomprehensible if the above affirmation were correct.

Even legal positivists agree. See, e.g., Alf Ross, On Law and Justice, Berkeley, University of California Press, 1959, 284 ("no concrete situation allows for only one application of the law"); H. L. A. Hart, supra note 2, at 629 ("the existing law imposes only limits on our choice and not the choice itself").
feiture 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...38

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.39 Effective control of the political branches must be control from outside: it must be entrusted to persons and agencies sufficiently dependent 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'État, gradually evolved in the 19th 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 impar-

38 The full text of the loi can be found in J. B. Duvergier, Collection complète des lois, etc., I, Paris, Cayot et Scribe, 1834, 510-553.
39 For the French precedents see Judicial Review, supra note 4, at 33 and the references in note 30 ibidem. 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 Nikolic in his Uppsala report on the Socialist countries, supra note 15, informs us that this “autocinool, i.e., the control of the constitutionality of legislation entrusted to the legislative body itself,” has proved to be “ineffective.” This very ineffectiveness has been the main reason which brought Yugoslavia to adopt, and Czechoslovakia and Poland to try to adopt, a system of judicial rather than political review. See Nikolic's report, §§ II.2.1, III.2.A-B-C; and see text and notes 13-15. supra.
tiality 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 initiation, 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 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 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 control—a created a new type of organ of control—almost as a pendant of the 19th-century Conseil d’État and its German and Italian analogues, the judicial organs or 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 du-

38 The influence of the French system of administrative justice outside France is discussed in id., 162-171.
39 See the Uppsala report by L. Favoreu, supra note 8, § 48; see also Jean Rivero, Le Conseil constitutionnel et les libertés, Paris, Economica, 1984, 166.
40 See M. Cappelletti, "Nécessité et légitimité de la justice constitutionnelle," in Cours constitutionnelles, supra note 7, 461, 464-471 [hereinafter cited as "Nécessité et légitimité"]
41 See note 5, supra.
rable than those in the other countries. This might explain why France, although the leader in the 19th-century development of justice administra-
tive, 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. 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 Favoreau, 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; at least two serious limitations of the French system should not be neglected, however. 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 60 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

43 Uppsala report by L. Favoreau, supra note 8, § 38 et passim.
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

5. 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 which 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 transfan man into a woman or a woman into a man”.47 Rejegcting such judicial precedents as the famous decision by 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

46 See Judicial Review, supra note 4, 36; J. H. Merryman, supra note 33, 16.
48 The Bonham’s decision, 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 control it and adjudge such act to be void.” 8 Coke’s Reports 118a; 77 Eng. Rep. 652. For a very learned commentary see T. F. T. Plucknett, “Bonham’s Case and Judicial Review,” 40 Harvard Law Rev. 30:70 (1928). See also Judicial Review, supra note 4, 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 William Blackstone, Com-
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” and the “legislative”, whereas the “supreme” power, the “executive”, is magnified as “the Soul that gives Form, Life, and Unity to the Commonwealth”. Even though Locke’s “executive” was bound to “pronounce” and “enforce” the “eternal and immutable laws of nature”, which are found, not created, by reason, he did not see the judiciary as the authorized and privileged enforcer of these.

mentaries on the Laws of England, Introduction, Section the Second “Of the Nature of Laws in General” (Oxford, Clarendon Press, 1765, at 41, 43); John Austin, The Province of Jurisprudence Determined, 1832, Lecture V (London, Weidenfeld & Nicolson, 1954, at 184-186). 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.” BLACKSTONE, Commentaries, Book I, Ch. II, at 160-162; see also Introduction, Section the Third “Of the Laws of England,” 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.” As Pound rightly noted, when Blackstone “comes to apply [his theory of natural law] to legislation, he retracts.” R. Pound, “Common Law and Legislation,” 21 Harv. L. Rev. 383, at 392 (1908).

50 John Locke, The Second Treatise of Government, Ch. XII, §§144, 149 et passim.
51 The Second Treatise, Ch. XII, §§145-148 et passim.
52 The Second Treatise, Ch. XII, §134, Ch. XIII, §149, et passim.
53 The Second Treatise, Ch. XII, §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 PIETRO LASKET, “Introduction” to John Locke, Two Treatises of Government, Cambridge: At the University Press, 1960, 90, 107; see, e.g., The Second Treatise, Ch. VII, §§85-89, Ch. XI, §136.
54 See, e.g., The Second Treatise, Ch. IX, §121.
natural law limits of the legislative will.\textsuperscript{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".\textsuperscript{56}

Unlike France, this is not past history for England. Parliamentary supremacy is still affirmed as the basic principle, the Grundnorm\textsuperscript{57} of the unwritten construction 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.


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 with some participation of the Community 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".\textsuperscript{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

\textsuperscript{55} See, e.g., The Second Treatise, Ch. XI, § 135.

\textsuperscript{56} See note 49, supra.


into the estuaries and up the rivers. It cannot be held back." 50 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. 51 Again in Lord Denning's words, "Parliament has decreed that [Community law] is . . . to be part of our law." 52

It belongs to the very nature of Community law, moreover, that, as 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 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. 53 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; 54 and problems of interpretation are decided, in last resort and with final effect for all the member states, by the European Court of Justice. 55

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 su-

50 See Comparative Const. Law, supra note 45, at 157; the quotation is from Bulmer v. Bollinger, [1974] 2 All E. R. 1226.
53 The first affirmation of the preeminence doctrine can be found in another historic decision of the ECJ, Costa v. ENEL, Case 6/64, [1964] ECR 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 424-428; R. Kovar, "The Relationship Between Community Law and National Law," in Thirty Years of Community Law, Luxembourg, 1982, 109.
54 See the ECJ decision in Simmenthal, Case 106/77, [1978] ECR 629.
premacy 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.

7. 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

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. Z. Drzemczewski, European Human Rights Convention in Domestic Law, Oxford, Clarendon Press, 1983, 177-187, 362-363.
67 For brief surveys see, e.g., Rosalyn Higgins, "The European Convention on Human Rights," in T. Meron, ed., Human Rights in International Law, II, Oxford, Clarendon Press, 1984, 495-549; A. H. Robertson, Human Rights in the World, 2nd ed., New York, St. Martin's Press, 1982, 80-117. 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, ever since uninterrupted, of the optional clause of Art. 25): Austria (1958; 1959); Belgium (1955; 1953); Cyprus (1962; Denmark (1953; 1963); France (1974; 1981); Federal Republic of Germany (1952; 1955); Greece (1974; 1985); Ireland (1953; 1955); Ireland (1953; 1953); Italy (1955; 1973); Liechtenstein (1982; 1982); Luxembourg (1953; 1958); Malta (1967); Netherlands (1994; 1960); Norway (1952; 1955); Portugal (1978; 1978); Spain (1970; 1978); Sweden
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. 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. Great Britain, in particular, while ostensibly

(1952; 1953; 1974; 1974; Turkey (1954; and the United Kingdom (1951; 1966). Of these countries, only three—Cyprus, Malta and Turkey—have not yet accepted the optional clause of Art. 25. For further information concerning the ratifications of the Convention's Protocols see A. Z. Dreizmierz, *supra* note 66, at 302.

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. Z. Dreizmierz, *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, "Legal Procedure: Access to Justice: 1982 to 1983," in *Dalhousie Law Journal* 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 school without the consent of the 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 of 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, subjectio to noise, and deprivation of sleep. The [European] court held that the techniques did
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

8. 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 has led to the creation, in 1979, of an Inter-American 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

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 practice, 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 decision 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.

70 See "Mighty Problem," supra note 42, at 424-430.
71 See the Uppsala report by Elvind Smith on the Scandinavian countries, supra note 8; see also, e.g., G. Hahn, "Verstärkter Grundrechtschutz und andere Neuerungen im Schwedischen Verfassungsrecht," Archiv des öffentlichen Rechts, 1986, 400-427.
73 An encouraging sign is the recent landmark decision by the Inter-American Court which unanimously held that a Costa Rican law requiring the compulsory licensing of journalists violated the freedom of opinion and expression guaranteed
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 countries, 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


75 See generally H. FIX-ZAMORO, Veinticinco años de evolución de la Justicia Constitucional 1940-1965, México, UNAM, 1968, esp. ch. 2.

76 See the Uppala reports by Nwabueze, supra note 16, at 18-23, and Carpio & 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 15, 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— 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, 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. A sound product of our freedom of speech, moreover, is the fact that judges, too, day after day are subject to public criticism. When we

79 See "Law-Making Power," supra note 74, expec. 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 realitics, 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
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 then with important limitations in case of serious abuses; it is not, however, a societal nonaccountability. 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 corpus 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. 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.


82 Applying the teaching of the great historian-philosopher Vico, "verum factum," the comparativist 'speculates' on the significance of facts, trends, and developments, not of abstractions, Giambattista Vico, Principi di Scienza Nuova (1744); English transl. by T. G. Bergan and M. H. Fiske, The New Science of Giambattista Vico, Ithaca, N.Y., Cornell University Press, 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.


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 government 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 dis
individuals and groups that would be otherwise marginalized or oppressed can be better protected; and, more generally, the fairness and the permanent representativeness of the political process itself can be better assured. 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. 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.

9. 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

sent, 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,


International Convenants of 1966 in force since 1976. But unfortunately these documents have not been accompanied by legal processes and institutions strong enough to give even an initial degree of effectiveness to the rules incorporated in them. 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." And this reality demonstrates that, as Professor Louis

\[\text{\textsuperscript{13}}\text{ee, e.g., L. Henkin, ed., The International Bill of Rights, New York, Columbia University Press, 1981; id., supra note 19, at 89-101. Another major development of our time, the drive against colonization, which brought about the creation of dozens of new nations in the post-World War II years, can be seen as an expression of the trend mentioned in the text. As Professor Henkin says, it was that drive that "brought a mass of new states and governments that looked to the idea of human rights to achieve \textquoteleft self-determination\textquoteright and the elimination of racism." Id., supra note 19, at 18.\]


\[\text{\textsuperscript{15}}\text{Hume, \text{An Enquiry Concerning Human Understanding, Sect. XII, Part I (in Enquires Concerning the Human Understanding and Concerning the Principles of Morals by David Hume, reprinted from the Posthumous Edition of 1777, L. A. Selby-Bigge editor, 2nd ed., Oxford, Clarendon Press, 1902, reprint 1963, at 149). Although teaching that human knowledge is limited to experience of ideas and impressions, and excluding the possibility of any definitive verification of their truth, Hume severely condemned what he called \textquoteleft excessive\textquoteright or \textquoteleft Pyrrhonian\textquoteright skepticism:}\]

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, where his principles universally and steadily to prevail... [However] nature is always too strong for principle... [That] the 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 this 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 (\textit{Ibidem}, Sect. XII, Part II, at 158-169).
Henkin affirms and amply documents, there has been an "explosion" of human rights in the "libertarian democracies" of our contemporary world.\textsuperscript{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 lay. Not to recognize the historical importance and the unprecedented character of this ongoing development is to be deaf and blind to, perhaps, the most phenomenal societal transformation trend that has ever occurred in human history.\textsuperscript{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

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.

87 L. Henkin, supra note 19, espec. at 43-55, 156-161.

89 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, 43-44, 46)
their judicial enforcement will have a good share of the merit. Let me make this statement very clear—that I see no future for human-kind, 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,\(^1\) seems to prove my point. For only in our epoch has the time become 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.\(^2\) 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, even fight against, certain determination 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”? Ma-

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2 Luigi 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 thy 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.


45 See Jean Rivera, "Rapport de synthèse," in Cours constitutionnelles, supra note 7, 517, at 525-526.