

THE GENESIS AND EVOLUTION OF EUROPEAN-AMERICAN CONSTITUTIONALISM: SOME COMMENTS ON THE FUNDAMENTAL ASPECTS

Por KLAUS STERN*/**/**

1. THE CONSTITUTIONAL STATE AND THE NOTION OF CONSTITUTION.—
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1. THE CONSTITUTIONAL STATE AND THE NOTION OF CONSTITUTION

The absolute state that emerged from the religious wars in Europe during the 16th and 17th centuries was to undergo a profound transformation. In a long and difficult political, social and legal process it evolved into a constitutional state, that is to say, a state whose structure and functions and whose boundaries in relation to the individual citizen were determined by a legal system based on specific fundamental principles. That constitutional state has over the past two hundred years become the quintessence of many bodies politic, a natural element of our political philosophy. It is with good reason that we strive to make it part and parcel of the organisational structure of the community of nations, even though we are aware that the world about us attacks many of the principles underlying this concept of a state based on freedom and the rule of law. As we are convinced that the con-

* Catedrático de la Universidad Libre de Berlín (1962-1966) y de la Universidad de Colonia, de la que fue Vicerrector y Rector, como también Decano de la Facultad de Derecho. Entre los años 1976 y 2000, fue Juez del Tribunal Constitucional del *Land* de Renania del Norte-Westfalia. Entre otras muchas publicaciones se ha de destacar su Tratado en cinco volúmenes, *Staatsrecht der Bundesrepublik Deutschland*.

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stitutional state is the best possible framework for a society, we must constantly be at pains to justify its essential features.

To old nations, like those of Europe, a constitution is, in the words of Hegel, «the work of centuries, the notion and the consciousness of the rational to the extent it is developed in a nation». In the New World, the architects of the constitutional state could not build on the historical substance of the people. They had to resort to the ideas, knowledge and achievements of the Old World. But it was no doubt that very chemistry of state-building *élan vital* on virgin territory and measured European political tradition that infused into the conception of the constitutional state the virility to emerge as the great perspective for the future. The constitutional state was to become, as James Madison wrote in the Federalist Papers which appeared concomitantly with the constitutional process in America and also dealt with the theoretical aspects of constitutionalism, «the greatest of all reflections on human nature». It is in any case certain that, from the inception of the American constitutional state onwards, the written code of law based on specific principles became, in the words of Immanuel Kant, the «irresistible idea», the notion that executive power should be tied to the rule of law and that its legitimacy should be of a constitutional nature. Although the constitutional state resting on this premise first saw the light of day in the United States, most of those who contributed to its conceptual development had their origins in nearly all the nations of Europe. From ancient Greece down to the present, the evolution of the constitutional state proves to be a history of attempts to establish a legal basis for the indispensable authority of the state and to secure for the citizen a life in freedom in a society governed by the rule of law. The *imperium absolutum* was to be superseded by the *imperium limitatum*.

Crucial for the genesis of the constitutional state is the concept of the constitution as the supreme body of fundamental rules that are normally enshrined in a special constitutional instrument.

Much shrewd thought has gone into attempts to identify the modern notion of constitution in the writings of classical philosophers dating back to Aristotle. Although in his as in Plato's thinking there certainly existed a distinction between the concept of the state as a legal principle governing the order of society and the «normal» laws, to Aristotle «constitution» denoted first and foremost the *form* of government. But there were many forms of government. He was not conscious of the uniqueness of the species «constitutional state». The Roman lawyers, too, as Cicero's *De Republica* in particular shows, were primarily concerned with forms of government, with establishing the best material constitution, but they did not become aware of the special quality of this legal precept as being fundamental to the constitution of a specific kind of state.

Clearer indications of this consciousness are to be found in the theories expounded during the Middle Ages. The idea of the sovereignty of the people, which had been inherent in the Germanic cooperative, and of a society in which government, too, should have a legal foundation and in which secular (as well as ecclesiastical) power should be restricted by law, had never totally vanished. In subsequent epochs, however, this sense of government bound by *a jus naturale* or *ius divinum* (later also *a jus gentium*) had to yield to the state absolute, the omnipotence of despotic rule. Sovereign authority simply arrogated to itself unlimited powers.

Nevertheless, two great modernists of the Middle Ages, whose doctrines made them conceptual forerunners of constitutionalism, cannot go unmentioned: Marsilius of Padua and Nicholas of Cusa.

For the *Defensor Pacis* there already existed a *lex* which permanently governed the mode of conduct of autocratic authority. Nicholas was more explicit, declaring that the Pope was bound by the *canones*, the Emperor by the *leges imperiales*. But these laws were still primarily contracts or natural law, at any rate not law created by a special institution of state authority. Once born, however, the concept of a superior fundamental law was to point the way.

Christian Wolff, in his *Jus Naturae methodo scientifica pertractatum*, described the *leges fundamentales* as statutes which lay outside the jurisdiction of the legislature and which *ad modum habendi et tenendi imperium pertinent*, ie were binding on the ruler in his exercise of governmental authority. Nonetheless, the fundamental laws, as the use of the plural itself indicates, did not yet represent a concerted decision on the basic structure of society, taken in awareness of the state as the crystallisation of the constitutional theory. They were in fact a network of guarantees of the rights and privileges of the estates of the realm, rules governing succession to the throne, organisational models and religious freedoms, which owed their existence to the accidents of history rather than to any methodical plan, and in which, above all, no systematic arrangement of matters requiring basic rules was perceptible. This was true as regards not only the *leges fundamentales* of the old German Empire but also significant guarantees of specific rights which had been established in other countries and which have been traditionally celebrated as the first constitutional documents. These include the Charter of León of 1188, the Magna Carta of 1215, the Kulmer Handfeste of 1233, and the Joyeuse Entrée of the Netherlands, 1356.

Only two such instruments were to some extent an exception: the «agreement of the people» and the «instrument of government» of Cromwellian England. Although these covenants were shortlived, the concept of the modern constitutional state shone through — over a hundred years before the dawn of the constitutional struggle in the United States. Such a constitution was seen as the concrete expression of the ideal of a society

ruled by laws, not men, as James Harrington put it, thus reflecting the viewpoint of classical philosophers.

At that time, constitutional theorists had not immediately recognised the purport of this concept. Gregory of Tours, it is true, had already used the term «*Constitutio*» for *leges fundamentales* in his *De Republica*, published in 1578, but his form of government, like Locke's, Pufendorf's and others in later times, remained the kind of basic law that was binding in the natural or contractual sense.

The constituent authority and those in whom it was vested had not yet been «discovered» as creators of the constitution.

In my view that crucial point, in some respects following Montesquieu's line of thought, was *arrived* at principally in the theory of the Genevese jurist Emerich de Vattel who, in the famous chapter three of the first volume of his widely read *Droit des gens ou Principes de la Loi Naturelle* of 1758, defined the notion and essence of the constitution in the modern sense, subordinated all other state authority to it, and described the «nation» as the creator of the constitution: «Il est ... manifeste que la nation est en plein droit de former elle-même sa Constitution...».

Thus, the idea of the modern constitution and its emergence from a special *pouvoir constituant* had been expressed in theory but not yet applied in practice. This was accomplished in the New World, before the proclamation by the Abbé Sieyès in the French National Assembly.

Now and then one is inclined to credit the very first colonial charters of the 17th century, such as those of Connecticut, New Jersey, Rhode Island, Pennsylvania, Maryland, Massachusetts and Delaware, with the breakthrough. This, in my view, is true only to a limited extent. Upon closer study we find that they are of a constitutional character on the surface only. There was a formal kind of basic law which was in part the result of decisions involving the people, but English law remained superior, which meant in effect that the colonies recognised the sovereignty of the English parliament. The concept of the constitution as we know it today did not become definitively established in these New England states until after 1776.

In the last third of the eighteenth century unrestricted constituent power was claimed by the colonists themselves. At the same time, their basic rights were no longer understood as rights of the English citizen but as human and civil rights with a special, judicially sanctioned status in the constitution. Not until this point did the concept of the modern constitution acquire substance. With the colonies wanting to become independent states, it was, so to speak, a logical consequence of history that these three great ideals, partly harking back to old traditions, should become reality in America.

Most of the state constitutions, as well as the Union constitution of

1787, introduced the people «speaking» as the creator of the constitution which defines the duties and limits of governmental powers. «The express authority of the people alone could give due validity to the constitution», was James Madison's comment in the Federalist Papers. The state was constituted as a power-sharing democracy and the constitution itself understood as a law-making act of superior quality and authority because it originated directly from the people. The establishment of a constitution is the exercise of popular sovereignty and, since it comes from this source, ranks higher than other authority. Government by constitution supersedes government by will. But the whole is not sovereignty of the people pure, but sovereignty of the people constitutionalised, that is to say, limited first and foremost by the basic rights.

2. HUMAN AND BASIC RIGHTS

The constitutions that existed up to the beginning of the 18th century had been conceived from the point of view of the ruling powers, and the fact that the *leges fundamentales* or freedom charters contained «well-deserved rights», class privileges or other guarantees, made no difference. Those rights were not supreme subjective rights but for the most part individually tailored warranties which those holding governmental authority could ultimately set aside. The «true» and perfect constitution does not exist, however, until it sets out the basic status of the individual in society, and in particular, his fundamental subjective rights in relation to state authority. The statehood constituted out of the sovereignty of the people had to be permeated with freedom and the rule of law as the basic ingredients of democracy. In the modern constitution the general postulates of man as a human being and citizen had to become reality.

This step to incorporate in positive law the rights of man as reflecting his personality and dignity also came for the first time with the American constitutions. What mattered, however, was not so much the actual codification of the fundamental rights — that had already been done to some extent with the English Bill of Rights — as the fact that the principles of state organisation and those underlying individual freedoms were, in essence, bound together and based upon one another. Constitution and fundamental rights became, in like manner, normative limitations of governmental authority. It is the synthesis of the two that first confers upon the constitution the true dignity of *fundamental* law because they are construed as the foundations of the state.

The idea of the *pouvoir constituant* of the people and the codification of human and civil rights are often regarded as, in the words of E. Zweig, «two emissions from the same spiritual atmosphere». It is probably more

appropriate, however, to seek explanations for the basic rights in many different religious, philosophical, anthropological, ethical and political ideas, as Christianity, natural law, Humanism, Enlightenment, individualism and, of course, liberal and democratic constitutionalism, played a decisive role.

In the early stages of the evolution of the relationship between the basic rights and society, the state was, if anything antagonistic — a part of the ebb and flow process of man versus the state — in the words of Richard Thoma, this changed visibly with the institutionalisation of those rights as positive law in the constitutions of states. Basic freedoms and rights have become fundamental expressions of constitutionality. Although by origin «antérieurs et supérieurs aux lois positives», they have become an essential element of national constitutions. Without them, according to article 16 of the French declaration of human and civil rights of 26 August 1789, the state has no constitution. Those rights became, as expressed in the famous Virginia Bill of Rights, the «basis and foundation of government». This astonishing transformation from anterior and superior statehood to the positive laws of the constitution (the maxim being no protection of basic rights without a constitution, no constitution without basic rights) calls for closer study.

If I see the historical and conceptual line of development of the basic rights correctly, there are three distinct main periods: an early phase lasting until about 1600, an interim period ending with the Declaration of Rights at the Continental Congress in Philadelphia in 1774, and another culminating in the declarations of rights in the New England states. Up to the 17th century we discover only the faint contours of fundamental rights in the form of objective restrictions of royal powers, privileges, rights of the estates, and at best a few liberties. Even the famous deeds and charters did not know individual freedom as a principle. The interim period of the 17th century is marked by the laying of the spiritual, religious and philosophical foundations of the freedom and natural rights of man. From them emerged those significant guarantees of the fundamental rights and liberties of the English estates, and in some respects of all English citizens: the Petition of Rights 1628; the Habeas Corpus Act 1679, and the Bill of Rights 1689. The attendant studies, treatises, fighting publications and theoretical discussions established the intellectual and scientific basis for the creation of fundamental rights. One need only mention Hobbes, Milton, Coke and Locke in this regard. Also important in this period were the natural law insights of Dutch, German and French writers such as Hugo Grotius, Samuel Pufendorf, Christian Wolff, and the French monarchomachs.

The development of conceptual theories in this epoch became crucial for the constitutional struggles that were to emerge in the latter part of the 18th century. They paved the way for the connection emerging in the main

period after 1776 between a catalogue of basic rights and the fundamental structure of the state in the form of a written constitution superior to the statutes and all executive authority.

As we know, a lively dispute arose between Georg Jellinek and Emile Boutmy as to which deserved credit for the great original document which launched the fundamental rights on their triumphal march into the constitutions of the world, the Virginia Bill of Rights enacted on 12 June 1776, or the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789.

In retrospect, that argument over priority no longer merits the importance which contemporaries attached to it. Maybe the French *Déclaration* generated stronger impulses for Europe, but in terms of historical development and, above all, their juridical relevance, the American constitutional acts became far more conclusive. They brought forth what I would term «basic-right constitutionalism». It was to this constitutionalism and not the French basic-right abstractions that the future was to belong.

The French were mainly concerned with creating political maxims of abstract purity which, on account of their absolute truth, first had to be expressed in concrete terms by the legislative bodies. The majority of deputies in the National Assembly did not want to formulate any «juridical» catalogue of fundamental rights. They felt that this would come automatically if one recognised the philosophical and natural theory underlying those rights. They had no intention of establishing legal standards which could be applied by courts of law or invoked in support of claims.

The fathers of the American constitution took an entirely different view. They wanted to replace abstract theories or philosophies of fundamental rights and the natural rights or birthrights of Englishmen with constitutional rights for everybody which could easily be understood, interpreted and applied, and above all invoked as valid principles of law in contrast to the demands of executive authority. In some cases such rights were incorporated in the actual constitution, in others they were linked with it by a special bill of rights. The aforementioned Virginia Declaration of Rights became very famous, but perhaps the most completely structured was the constitution of Massachusetts. The first part contained a Declaration of Rights, the second a Frame of Government. When it was introduced its authors expressed their intentions as follows: «We conceive that a constitution in its proper idea intends a system of principles established to secure the subjects in the possession and enjoyment of their rights and privileges, against any encroachments of the governing part».

In attempting to answer the question how it was that, of all peoples, this young nation of Americans came to render such a major contribution to this magnificent event in the evolution of the modern constitutional state, it is, in my view, important to consider the following points.

Originally, the colonists regarded themselves as loyal English citizens and invoked their English birthrights deriving from the fundamental laws. The first American lawbook appeared in 1687 under the significant title «The Excellent Priviledge of Liberty and Property, being the Birthright of the Free-born Subjects of England». The «principal absolute rights», that is to say, the right to security and freedom of the person as well as the right to property, as recognised in William Blackstone's *Commentaries on the Laws of England*, played a major role. We should of course remember that these rights were not of a higher order but «ordinary law of the land» which parliament could overrule by virtue of its sovereignty.

All English rights remained valid, however, only so long as the people remained loyal to England and did not violate her laws. From the instant they set out to establish their own state, those rights no longer had any foundation. They were in any case of no help when the crown encroached upon them by arresting colonists, imposing trade restrictions, or raising taxes. If the aim was to create a state independent of England in which those rights could be upheld it was necessary to develop from the English rights rights which could be exercised by every individual and which were superior to statutory law. An old European idea proved to be conducive to this transformation: natural law as the supreme law of the land binding upon all governmental authority, and the «natural» rights of every citizen derived from it, including the right to resist the illegitimate use of executive power.

The way the European concept of natural law was received in America was astonishing, considering its loss of terrain in Europe, but it is easily explained. America's jurists knew Althusius, Grotius, Locke, Pufendorf and Wolff, to mention only the most important names. Later they quoted from Otto von Gierke's magnificent work on medieval law. This enabled them to make concepts of natural, rational and corporate law comprehensible to their countrymen because the colonists had a much more open-minded approach to these views than the Europeans, whose thinking was shackled by many interwoven obligations. Moreover, all the religious denominations were able to find common ground in natural law. And the American courts were in any case inclined to invoke the laws of nature and reason for want of any statutory precedent. The Americans were therefore able to deduce from natural law the convincing argument that the rights which had been violated were ancient rights of every individual deriving from the nature of man and which no power could set aside, whether it be the English crown or the new American state that was to be founded. By declaring their faith in natural law the colonists were able at the same time to imbue human rights with a spiritual vigour which spread their influence beyond the shores of America and in this way recruited support elsewhere.

The old European tradition was, in itself, not sufficient to make basic-right constitutionalism manifest, as it were. This required a second step, which in fact was the one to trigger the constitutional revolution: the anterior and superior rights of man to be codified in such a way as to be unambiguous and beyond doubt. They had to become rights of the individual which, because they were higher law and had constitutional force, became legally binding on all executive authority. The human rights deriving from natural law had to become genuine fundamental laws as the foundations for the body politic. The object, therefore, was to confer upon these rights the quality of being «the foundation of the government», as had already been expressed in the «Great Charter of fundamental rights» established by West New Jersey in 1677, though it was valid for only ten years. These elementary rights had to find their source as rights of the highest order in the constitutional authority of the nation and themselves became rights of the constitution.

If the constitution was to be law for the legislature as well, all principal rights had to become integral parts of the constitutional instrument in order that they too would acquire the quality of supreme law. Rights which had previously been mere natural rights had to become rights with constitutional authority, rights constitutionally established and moulded as positive rights which the government, itself existing by virtue of the constitution, could not dispose of. Apart from defining the basic structure of the state, the constitution incorporated the proclamation, guarantee and protection of the rights of the individual and citizen in his fundamental personal, social and political existence in relation to the authority of the state. In this way, the fundamental rights underwrote the fundamental material principles of the constitutional state. They guaranteed the fundamental and for the most part individual, subjective rights, especially the freedoms, of the citizen, which were the ones most at risk and therefore required most protection, and being constitutional rules they at the same time represented the basic material principles of a society based on objective law and oriented to normative values. Through the incorporation of fundamental rights in constitutional law, constitutionalism hitherto natural in terms of society's values was transformed into a constitutionalism of fundamental rights and gave the state a (new) material basis for its legitimation. From then on, the guiding principle for all constitutions was that they should incorporate fundamental rights. They should be the «heart of every constitution», as Chief Justice Earl Warren put it later, or, in the language of the German Federal Constitutional Court, «essential elements of the constitutional structure ... which cannot be relinquished». Natural law, theology, philosophy and theory were superseded by juridical currency. The human rights as a metapositive category were transformed into basic rights as institutions of positive law.

With the establishment of a constitution embracing fundamental rights and having supreme legal authority in the state, the state truly has become the constitutional state, that is to say, a state which may only exercise authority in accordance with and within the bounds of the constitution and in so doing must respect the fundamental rights of the individual. It is not the constitutional existence of the state as such that is the epoch-making act but the specific character of the constitution and its material content as a basic legal system which determines the body politic *in toto*. In the constitutional state, statehood has been brought to a level of maturity far above that of any previous form of government.

One may doubt whether there ever will be a socio-political system of absolute, universal and timeless validity, but the democratic constitutional state oriented to basic rights and freedoms has been the source of so many positive achievements in its 200-year evolution that it has become a valid framework for safeguarding traditional principles and values capable of establishing consensus among the members of a society based on historical experience and rational concepts. This therefore justifies the provision of article 79(3) of the Basic Law for the Federal Republic of Germany, which declares the country's constituent parts inviolable.

The normative constitution that emerged in the last thirty years of the 18th century is, in the words of W. Kägi in his *Die Verfassung als rechtliche Grundordnung des Staates*, «the expression of a state ethic which takes the individual seriously, not only in terms of his life in society as distinct from the state but also in his political existence, as a person sharing responsibility with others and involved in decision-making processes, and which does not simply regard him as an object of politics. But it is at the same time evidence that state authority, too, is seen from a human point of view, in other words as public office to which the individual is appointed only as trustee of society as a whole and which he cannot regard as his own property, an attitude which uncontrolled power unhampered by rules and standards ultimately leads to by dint of its own fatal destiny».

3. SAFEGUARDING CONSTITUTIONAL LAW

Obviously, the constitution can only be the fundamental law of the constitutional state if expressions of governmental authority that conflict with it do not acquire validity. A constitution with the status of supreme authority inevitably raises the question as to the endorsement and safeguarding of the principles of constitutional law. A guardian of the constitution is needed to assert its authority. Where can we find it without falling into the vicious circle which concerned even the ancient philosophers: *Quis custodiet ipsos custodes?*

According to more recent European and American constitutional law scholars, the judicial guarantee of the primacy of the constitution is the *logique de la constitution*. «A constitution under which unconstitutional acts, and especially unconstitutional laws, also have to remain valid because precisely their unconstitutionality stands in the way of their abrogation (means) ... little more than a non-committal hope», is the view expressed with unassailable juridical logic by Hans Kelsen, and much the same position is taken by the Frenchman Maurice Hauriou and the Italian Giorgio del Vecchio. Under the constitution as we see it today, the notion of judicial pronouncements of unconstitutionality is taken for granted. But where lies the original of that notion, where was it first established? In Germany, after all, it was for a long time by no means obvious since, initially, the constitution was not acknowledged to be above the law.

In the opinion of one of the great American authorities on constitutional law, Charles Howard McIlwain, «Judicial review, instead of being an American invention, is really as old as constitutionalism itself, and without it constitutionalism could never have been maintained». However, true constitutionalism, as we have seen, did first emerge in the United States of America. The basic concept of European monarchic or parliamentary constitutionalism was different. For a very long time, primarily the monarch, the President of the Republic, or parliament, was the guarantor of the constitution, despite the fact that from time to time juridical legitimacy enjoyed, in theory, priority over political sovereignty. Here we undoubtedly have a fundamental question regarding the constitutional state, a question which greatly affected constitutional government and Weimar constitutional law in Germany (similarly elsewhere in Europe): Are the courts guardians of the constitution?

In the mid-19th century, Robert von Mohl conducted a highly scientific and comparative study on the legal significance of unconstitutional laws and on whether the courts had jurisdiction to review acts of parliament as to their constitutionality. He noted that «until recently, it has been almost exclusively American legal experts who have spoken out on this subject ... Only gradually have Europeans, notably in Belgium and Germany, been taking a closer look at this question...».

In the famous Federalist Paper No 78 published in 1788, Alexander Hamilton set out the main reasons why the courts should be guardians of the constitution and have the power to declare void any laws that were inconsistent with it. To him this lay in the «nature and reason of the thing». Hamilton gave no sources except the «celebrated» Montesquieu, but mentioned him only to illustrate that judicial authority was the weakest which one could confidently entrust with the task of protecting the constitutional rights of the citizen. However, Hamilton did not make himself out to be the discoverer of the consequence deriving above all from the primacy of

the constitution. He frequently mentioned that he was merely presenting the obvious arguments and doctrines of others. And we do in fact have to look further back in time.

In 1610, the English judge Sir Edward Coke ruled in an otherwise unimportant case concerning a Dr. Bonham, that common law controlled acts of parliament and that if such acts were against common right and reason they had to be adjudged void. In making his judgment, Coke invoked «our books», but without naming his sources. With the exception of a few earlier court rulings, he probably meant those medieval writings according to which sovereign acts which did not observe the limits of natural law were null and void and binding on no one. He argued that such laws would be invalid if they were inconsistent with common right and reason or if they were «repugnant or impossible to be performed», but he did not refer to their unconstitutionality. So we see, common law was considered the embodiment of right and reason, but not as the constitution.

Coke's famous dictum did not gain acceptance in England, however, although it was revived a hundred year later in the dispute over the Septennial Act. The reason for this lay perhaps in the fact that Coke swapped the judge's wig for that of the parliamentarian (a role inversion that would most likely be the other way round in Germany), so that his own idea no longer appealed to him. (As a member of the opposition, however, he became a much bigger threat to the King, who aspired to absolute monarchy.) As it was, the crucial point is that English law does not accept a difference in status as between constitutional and statutory law. Parliament holds supreme power. «Sovereignty and legislature are convertible terms», is the phrase used by William Blackstone in his famous *Commentaries on the Laws of England*.

Once in existence, however, Coke's ruling was to be triumphantly resurrected on American soil. «It was the resistance to English authority which culminated in the American Revolution, that rendered the conception of a fundamental law and of individual natural rights popular and encouraged judges to regard it as their peculiar duty to guard and defend the superior laws. The doctrine that there were superior laws to which all legislation must conform was eloquently defended by James Otis», as noted by Charles Grove Haines in his 1914 study on the origin, foundations and evolution of the American doctrine of judicial review. Otis, a Boston attorney, defended merchants against the customs authorities some 150 years after Coke's judgment, invoking, *inter alia*, the ruling in the Bonham case and submitting that «acts against the constitution are void». The term «unconstitutional» was soon after to be used by him and other American lawyers, especially with reference to the Stamp Act of 1765. It was suddenly *en vogue* in the New England states and was an important instrument in the fight for American independence. It is true that independence was won

by force of arms, but the struggle proved to be more of a constitutional revolution — to be more exact, the evolution of the significance and status of the constitution in the life of a nation. At any rate, legal arguments played a major role and the theory of judicial review became extremely popular. Although earlier developments had pointed in this direction, judicial review was, all in all, a product of the latter part of the 18th century and was asserted for the first time in the United States without any disavowal of the European ingredients.

James Otis, a student of Harvard College, was an educated man who, as his publication «The Rights of the British colonies asserted and proved» indicated, was conversant with Grotius, Locke, Pufendorf, Montesquieu, and Vattel. He is even said to have hammered it into his clerks that a legal scholar should always have a volume of natural law and of moral philosophy on his desk. Not surprisingly, therefore, he regarded the principle of the nullity of unconstitutional laws as a law of nature, of peoples, and of divine reason.

Some of the colonial courts had adopted Otis's line of thought and declared the Stamp Act unconstitutional and non-applicable, but the principle had not yet been fully asserted. First, the constitutions, the recognition of the supremacy of the constitution and of the constitutional authority of the people, had to be established and the fundamental rights enshrined in the constitutions of the founding states of the Union as the constitutional rights of the citizens. That principle became established roughly in the period between 1774 and 1803. To quote Haines again. «It was in this period that the American doctrine of judicial review of legislation was formally announced and accepted as a feature of the public law of the states and of the nation. The gradual emergence of the principle that constitutions are fundamental laws with a peculiar sanctity, that legislatures are limited and receive the commission for their authority from the constitution, and that courts are to be considered the special guardians of the superior written laws, may be observed in the evolution of political ideas which accompanied the separation from the British Empire and the establishment of an independent state in America».

The famous unanimous decision of the Supreme Court in February 1803, written by Chief Justice John Marshall, is commonly regarded as the beginning of the judicial review of laws as to their constitutionality and their nullification where they conflicted with the constitution. But that decision in fact marked the end of a development which began almost thirty years earlier and had to prevail in the face of the established English legal standpoint. All the same, Marshall did give judicial review the character of a fundamental principle of future American constitutional law.

The courts of the states that were later to form the Union had already reviewed legislative acts as to their compatibility with the state constitu-

tions. A number of such cases were handled by the Supreme Court of Virginia, New Jersey, New York, Connecticut, Rhode Island, North Carolina and Massachusetts, and American constitutional literature does not rule out the possibility of further similar instances being found. No detailed study is necessary as to whether such decisions in all cases supplied convincing reasons. The point was that the judges no longer accepted acts of parliament without review. This trend continued after the entry into force of the Union Constitution of 1787 and the Judiciary Act of 1789. The courts of other states followed suit, giving different reasons.

Thus, although the state courts exercised the right of judicial review, and although the Supreme Court, too, emphasised on several occasions prior to 1803 that acts contrary to the constitution were absolutely void, the ultimate and decisive arguments were formulated in 1803 by John Marshall. They are still authoritative today and are based in essence on two simple but excellent insights:

Because the constitution is the supreme law based on the will of the people and limits all governmental authority deduced therefrom, the lower ranking laws must, where the two conflict, give way. It is juridically invalid, it is not a law, and therefore may not be applied by the courts as the authoritative interpreters and guardians of the law, and in particular of the constitution.

In the extremely fierce political dispute over that Supreme Court decision, it was pointed out on various occasions that the aspect of the judicial review of laws as to their constitutionality was superfluous or had been artificially created, or even that it had been a kind of political manifesto of the Chief Justice, who earlier had been involved in party politics. There may be some evidence to support this view, but the judgment gained authority both in case law and in government practice and was the most influential factor in shaping American constitutional law, though it was never without opposition. It is today considered one of the nuclei of American constitutional law: «That opinion is the beginning of the American constitutional system» is the general view. Today, there is no longer any disagreement over the principle, merely over the criteria governing its application.

Almost a century was to pass, however, before legal scholars devoted greater attention to the subject of judicial review and judges as guardians of the constitution. The reason may perhaps be seen in the fact that for some it was a matter of course, whilst for others it was too rare an occurrence since more than fifty years passed before the Supreme Court again exercised its right of judicial review and declared an act void. But judicial power reached its climax in the thirties in connection with the New Deal legislation of Franklin D. Roosevelt, it then passed through a critical phase, declined sharply, and came back strongly in the sixties and seventies.

In Germany, more than a century was to pass after the introduction of modern constitutions before the judicial review of acts of parliaments as to their constitutionality became the established practice. The evolutionary process from the time of its inception to the unequivocal ruling of the Supreme Court of the Reich on 4 November 1925 was much slower and received far greater impetus from legal scholars. The degree of consistency between the explanatory opinions of American judges and the arguments put forward in Germany is sometimes considerable, without our being able to conclude from this a similarity of comparative law research as would be possible (though it is not yet customary) under present-day conditions. Our Basic Law has confirmed *expressis verbis* in the constitution the nullity of unconstitutional enactments and has vested the constitutional courts with the authority to pronounce them null and void.

What in America was a mere inference from the constitution which will soon be celebrating its bicentennial and which was based on many arguments and principles, has been written into the constitution of our country and those of other West European countries, such as Austria, Italy, Spain, Portugal, and France. In this way, constitutional jurisdiction has led to the consummation of the constitutional state. It is not only a logic of the constitution and its supreme legal authority, as I said earlier, but also a logic of the relationship between the citizen and his state which is regulated by fundamental rights that have been bitterly fought for.

