Introduction to Public Law:

A Comparative Study

Elisabeth Zoller

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Foreword

This book is about public law, in the sense first defined by the Romans, that is, the law of the *res publica*—literally ''the public thing''—the public interest or common good, predicated on a differentiation between the State and the government. Today, that definition has fallen into oblivion, largely replaced by more formalistic concerns, with public law governing the relations between the citizen and the State, and private law defined as the law that applies between the citizens themselves. This shift in definition would not be objectionable if the word ''State'' still meant what it did in the republican age, that is, the thing of the people, the common wealth, the common good—or, precisely, the *res publica*. But this is not the case. In most countries, the State is not differentiated from the government. The consequences of this amalgam are pervasively negative.

When the State is understood as nothing more than a group of people in power, public law is necessarily assimilated to the rules it enacts—thus the bedrock principle of a government by men, rather than by law. Viewed this way, public law is strongly opposed to the rule of law, even incompatible with it, or twisted in such a way that it becomes the law that protects the individual against public power. Under these conditions, its object is no longer the *res publica*, the public interest, but rather the private interest, under which all legal rules and institutions can be subsumed.

But law is not concerned with private interests only. Law is concerned with justice, and justice implies both public and private interests. That the law is concerned with the protection of everyone's rights is a self-evident truth. Modern law began with this premise, both in the United States, where the Declaration of Independence of 1776 asserted, with ''respect to the opinions of mankind,'' that ''to secure [certain unalienable] rights, governments are instituted among men,'' and, in France, where the Declaration of the Rights of Man of 1789 proclaimed ''in the presence and under the auspices of the Supreme Being'' that ''[t]he aim of all political association is the preservation of the natural and imprescriptible rights of man.'' Regardless of its common law or civil law foundations, then, law is always deeply interested in dispensing justice

among private interests. These private interests include relations between landlords and tenants, debtors and creditors, victims and tortfeasors, and employers and employees, to name just a few examples.

If law is primarily concerned with private interests, and is thus intrinsically private, what do we need public law for? The answer, I believe, is this: We need a yardstick to evaluate the respective legitimacy of private interests and to distinguish among them whenever they come into conflict. To adjudicate between private interests, we must have rules with appropriate guidelines, so that each is given its due and just share. There is no possibility of doing that fairly in our contemporary democratic societies except in accordance with the *res publica*, the enduring common interests of a people: in other words, the object and purpose of public law. Otherwise, ‘‘the government of the people, by the people and for the people’’ would become meaningless.

* * *

The present book is the English version of a work first written in French and published by the Éditions Dalloz in the collection ‘‘Précis Dalloz’’ under the title *Introduction au droit public* in 2006. I acknowledge with gratitude the permission given to me by the Éditions Dalloz for writing the English version of that work.

The English version closely follows the initial French version, without however being a word-for-word translation. On several occasions, I departed from the French text, whenever public law concepts called for more or different explanations. One of the greatest difficulties I encountered was how to convey in English the positive meaning that the word ‘‘*loi*’’ (statute) has in the French language, as opposed to its somewhat inferior, if not negative, connotation in the English language, where a statute is not to be confused with the law. The French language, unlike English, possesses two words to talk about law, *droit* and *loi*. The sum of ‘‘*lois*’’ forms the ‘‘*législation*’’ (legislation), which is distinct from ‘‘*droit*’’ (law). This distinction was explained by Portalis in the Preliminary Address on the *First Draft of the Civil Code* (1799) as follows: ‘‘Law (*droit*) is universal reason, supreme reason based on the very nature of things. Statutes (*lois*) are, or ought to be, law reduced to positive rules, to specific precepts. Law is morally imperative, but in itself not constraining. It guides; statutes command. It is the map; and statutes, the compass.’’ What Portalis means here by ‘‘*loi,*’’ is the statute no more, no less, that is, a ‘‘law’’ enacted by a legislative body. ‘‘*Loi*’’ is absolutely central to a proper understanding of public law, because *loi* is the act of public law, par excellence. To avoid any confusion between ‘‘*loi*’’ and law, I have used the English words ‘‘statute,’’ or ‘‘statutory law’’ or ‘‘legislation’’ to translate the French concept of ‘‘*loi.*’’

* * *

This book has benefited from many comments and explanations made by foreign colleagues on the status of public law in the common law world. My intellectual debt goes in particular to Alfred C. Aman, Jr., Patrick L. Baude, Yvonne Cripps, Robert C. Post, Lauren K. Robel, Cheryl A. Saunders, Michael Taggart, David C. Williams, and Susan Hoffman Williams. The usual disclaimer applies.

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About the Author

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She has authored several books in French and English on international law, constitutional law, and more recently comparative law. Her English publications include *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984) and *Enforcing International Law through United States Legislation* (1985). Her award-winning French publications include *De Nixon à Clinton, Malentendus juridiques transatlantiques* (1999), which won the Prix Charles Lyon-Caen in 1999, and *Grands arrêts de la Cour suprême des États-Unis* (2000), which won the 2001 Prix Maurice Travers (both prizes of the Académie des sciences morales et politiques (Institut de France)).

In the United States, she was a visiting professor at Cornell University (1984), Rutgers University (1987-1988), and Tulane University (1994). Since 1996, she regularly visits Indiana University Law School-Bloomington where she teaches and researches in comparative constitutional law. She is a Senior Fellow in the Law School of the University of Melbourne where she teaches comparative constitutional law.

Elisabeth Zoller was Counsel and Advocate for the Government of the United States of America before the International Court of Justice in the Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at *Lockerbie* (1998) and in the Case concerning Avena and Other Mexican Nationals (2004).

Abbreviations

AC	Appeal Court (United Kingdom)
AJCL	American Journal of Comparative Law
AJDA	Actualité juridique de droit administratif
AP	Archives parlementaires de 1787 à 1860, Assemblée nationale constituante (1789-1791)
APD	Archives de philosophie du droit
Cahiers CC	Les cahiers du Conseil constitutionnel
Cambridge L. J.	Cambridge Law Journal
Cleveland St. L. Rev.	Cleveland State Law Review
CMLR	Common Market Law Reports
Columbia L. Rev.	Columbia Law Review
Cornell L. J.	Cornell Law Journal
Cornell L. Q.	Cornell Law Quarterly
D.	Recueil Dalloz
DAR	Dictionnaire de l'Ancien Régime [L. Bély (Dir.)], PUF, Quadrige, 2002
DCJ	Dictionnaire de la culture juridique [D. Alland & S. Rials (Dirs.)], Lamy / PUF, 2003
DCRF	Dictionnaire critique de la Révolution française [Furet & Ozouf (Dirs.)], Coll. Champs no. 264-267, Flammarion, 1992, 4 volumes: Acteurs, Institutions et créations, Événements, Idées
DPP	Dictionnaire de philosophie politique [Ph. Raynaud & S. Rials (Dirs.)], PUF, 3rd ed. 2003
ECSC	European Coal and Steel Community
EEC	European Economic Community
EJIL	European Journal of International Law
Harv. L. Rev.	Harvard Law Review
Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
Hastings L. J.	Hasting Law Review
IJGLS	Indiana Journal of Global Legal Studies
JCP	Juris-classeur périodique (Lexis-Nexis)
Mich. L. Rev.	Michigan Law Review

N.Y.U. L. Rev.	New York University Law Review
PPS	Problèmes politiques et sociaux (La Documentation française)
RA	Revue administrative
RCADI	Recueil des cours de l'Académie de droit international de La Haye
RDP	Revue du droit public en France et à l'étranger
Rec.	Recueil des décisions du Conseil constitutionnel
Rec. Lebon	Recueil des décisions du Conseil d'État
RFDC	Revue française de droit constitutionnel
RFDA	Revue française de droit administratif
RUDH	Revue universelle des droits de l'homme
South Calif. L. Rev.	South California Law Review
Stanford L. Rev.	Stanford Law Review
Syracuse J. Int'l L. & Comm.	Syracuse Journal of International Law and Commerce
Texas L. Rev.	Texas L. Review
U. Penn. L. Rev.	University of Pennsylvania Law Review
US	United States Reports
Virginia L. Rev.	Virginia Law Review
Wm. & Mary Q.	William & Mary Quarterly
Wm. & Mary L. Rev.	William & Mary Law Review
Yale L. J.	Yale Law Journal

Introduction
Thinking About Public Law

Public law in national legal systems. No matter the diversity of legal systems, they all take into account, in one way or another, a necessary distinction between public law and private law. Every country has its own way of conceptualizing this distinction and putting it into practice. In general, the manner in which they do so bears witness to the ‘‘prejudices, habits, dominating passions, of all that finally composes what is called national character.’’[1]

In some legal systems, the distinction is blurred or barely discernible; it can be intuited only from specific rules or particular institutions embedded in the larger body of the law in force. Such is the case in England and in the United States. Both countries possess some public law rules or institutions—for instance, in England, the so-called ‘‘public law remedies’’ which are distinct from those available in private law[2] or in the United States, the ‘‘cases of private right and those [of public rights] which arise between the government and

[1] A. de Tocqueville, *Democracy in America* [Translated by Harvey C. Mansfield and Delba Winthrop], 2000, University of Chicago Press, I, I, chap. 2, p. 28

[2] *O'Reilly* v. *Mackman*, [1983] 2 AC 237, 255-6 (Lord Denning, J.):

> In modern times we have come to recognise two separate fields of law: one of private law, the other of public law. Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of subjects vis-à-vis public authorities. For centuries there were special remedies available in public law. They were the prerogative writs of certiorari, mandamus and prohibition. As I have shown, they were taken in the name of the sovereign against a public authority which had failed to perform its duty to the public at large or had performed it wrongly. Any subject could complain to the sovereign: and then the King's courts, at their discretion, would give him leave to issue such one of the prerogative writs as was appropriate to meet his case. But these writs, as their names show, only gave the remedies of quashing, commanding or prohibiting. They did not enable a subject to recover damages against a public authority, nor a declaration, nor an injunction. [. . .] But now we have witnessed a breakthrough in our public law. It is done by Section 31 of the Supreme Court Act [. . .]. Now [. . .] judicial review is available to give every kind of remedy.

persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.''[3] In both countries, however, cases concerning these remedies or rights are adjudicated in the last resort by ordinary courts, remaining within their jurisdiction rather than withheld for another court's purview on account of their public law component.

Sometimes, though, the distinction between public law and private law is glaring. Rather than being deduced in the legal system through various rules or institutions, the distinction structures the whole legal system, constituting its very backbone.[4] Such is the case in France, where public law is radically separate from private law: Two different high courts exist, one to adjudicate private law disputes (*Cour de cassation*) and one to hear public law cases (*Conseil d'État*). This division between two court systems has important consequences for French legal education. All students take common courses during the first three years of their legal studies, but then the curriculum splits,[5] and the students graduate from law school with a specialization in either private or public law.

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[3] *Crowell* v. *Benson*, 285 US 22, 50 (1932); *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How (59 US) 272 (1855). Another example of public law institutions is the so-called *public law litigation*, an expression coined by Abram Chayes, which refers to cases in which the federal courts are no longer called upon to resolve private disputes between private individuals according to the principles of private law, but instead, they are asked to deal with grievances over the administration of some public or quasi-public program and to vindicate the public policies embodied in the governing statutes or constitutional provisions, A. Chayes, ''The Role of the Judge in Public Law Litigation,'' 89 *Harv. L. Rev.* 1281 (1976); A. Chayes, ''Public Law Litigation and the Burger Court,'' 96 *Harv. L. Rev.* 4 (1982). On the public/private distinction in the United States, see Morton J. Horowitz, ''The History of the Public/ Private Distinction,'' 130 *U. Penn. L. Rev.* 1423 (1981-1982).

[4] On the distinction between private law and public law in French law, see J.-B. Auby (Ed.), *The Public Law / Private Law Divide: Une entente assez cordiale*, Oxford; Portland, Or., Hart, 2006 [previously published in 2004 by LGDJ, Paris]; G. Chevrier, ''Remarques sur l'introduction et les vicissitudes de la distinction du '*jus privatum*' et du '*jus publicum*' dans les œuvres des anciens juristes français,'' *APD* (1952), p. 5; O. Beaud, ''La distinction entre droit public et droit public: un dualisme qui résiste aux critiques'' in J.-B. Auby & M. Friedland [Eds.], *La distinction du droit public et du droit privé: regards français et britanniques*, Ed. Panthéon-Assas, 2004, p. 29; J. Caillosse, ''Droit public—droit privé: sens et portée d'un partage académique,'' *AJDA* 1996, p. 955; E. Desmons, ''Droit privé, droit public,'' *DCC*, p. 520; D. Truchet, *Le droit public*, PUF, Coll. Que Sais-je?, 2003.

[5] After three years, students earn a ''licence,'' or undergraduate diploma. In order to practice, they must earn at least a master's degree, which takes another two years. A doctorate requires at least three years further study.

These preliminary notes yield a first observation: Public law is to be found everywhere. There are no States without *some* public law.

Public law as law of the res publica. Notwithstanding the diversity with which the various legal systems of the world apply the distinction between public and private law, some generalizations are in order. For instance, everywhere, civil or commercial law regulates social relationships by taking into account the fact that the state may be a party to such relationships; nowhere are provinces, counties, or cities legally considered mere associations of citizens; nowhere may a creditor of the State attach the funds held by a tax collector.[6] Everywhere, special rules have been developed to deal with such situations because, everywhere, common sense supports a *res publica*, a ''public thing,'' a common wealth, existing alongside, or even above, the multitude of private things. Each country has special rules to deal with situations that are of concern for the ''public thing,'' the *res publica*. These rules form public law.

A. THE ROMAN FOUNDATIONS OF PUBLIC LAW

The Roman origin of the res publica. The concept of *res publica* is the *raison d'être* of public law. Without a ''public thing,'' there would be no need for legal rules to protect and develop the wealth of physical resources (territory, population) and spiritual values (liberty, human rights) that a people inherits from its ancestors and wishes to bequeath to its descendants.[7]

The *res publica* was created by the Romans to solve problems arising from Roman domination of the Mediterranean basin. Rome's urban institutions were modeled after those of the ancient cities; it had a Senate and an assembly of citizens that elected the magistrates. With the legions' conquests, these institutions became inadequate. Actually, they were already out of date when the republic extended its government over the Italian peninsula. In order to avoid a return to the Oriental tradition of power personified in a single man, such as the Egyptian Pharaoh, the Romans invented the notion of *res publica*—the goods,

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[6] R. David, ''Introduction,'' *International Encyclopedia of Comparative Law*, Vol. II: The Legal Systems of the World, Chapter 2: Structure and the Divisions of the Law, JCB Mohr / Mouton, Tübingen / Paris, 2-19, p. 11.

[7] To that extent, the *res publica* is the other side of the public good and it is felt instinctively by the citizen. See R. N. Bellah, R. Madsen, W. M. Sullivan, A. Swindler, S. M. Tipton, *Habits of the Heart, Individualism and Commitment in American Life*, University of California Press, 1985, p. 193: ''What is the content of the public good? [T]he public good is based on the responsibility of one generation to the next, and [. . .] an awareness of such a responsibility is a sine qua non for an understanding of the public good.''

affairs, and institutions that are the ''thing of the people,'' a sort of property held in common. The power of the people over their property is abstract and general; no one possesses or exercises it personally or exclusively. The foundation of the power is distinct from its exercise; the *res publica* belongs to everyone in general and to no one in particular; everyone participates in it, but no one has ownership of it.[8]

Cicero was the first author who defined the public thing as the thing common to all, the thing of the people, a notion that eventually would turn into the common good or the public good: *res publica, res populi*. ''The public thing is the thing of the people; and by people, I mean not just any gathering of people, but a large group of people forming a society and united by their adherence to a pact of justice and the sharing of common interests: *juris consensu et utilitatis communione sociatus*.''[9] This ''pact of justice'' and the ''community of interests'' born of the solidarities between men are the two pillars of the ''public thing''—the thing of the people, which later was viewed as the common or public good, or the general interest, all these terms being different expressions of the *res publica*. There is no polity without a ''public thing'' because, as Sieyès put it in 1788 on the eve of the French Revolution: ''It is impossible to conceive of a legitimate association whose objects are not common security, common liberty, in a word, the *res publica* (*chose publique*).''[10] The *res publica* is what ties the people together; it forms the raison d'être of their will to live together, in short, to form a society.

[8] On the discovery of the *res publica* by the Romans, see J. Ellul, *Histoire des institutions, Le moyen âge*, PUF, Quadrige, 1999, p. 19.

[9] Cicero, *De la République*, edited by A. Fouillée, Paris, Delagrave, 1868, p. 12.

[10] E. Sieyès, *Qu'est-ce que le Tiers État?* PUF, Quadrige, 1989, p. 85. Sieyès's phrase in French reads as follows: ''Il est impossible de concevoir une association légitime qui n'ait pas pour objet la sécurité commune, la liberté commune, enfin la chose publique.'' The English translation for ''*chose publique*'' (literally ''public thing'') is no easy matter. Neither ''common welfare'' [E.-J. Sieyès, *What Is the Third Estate*? [Translated by M. Blondel and edited, with historical notes, by S.E. Finer], Praeger Publishers, New York,1964 pp. 156-57: ''It is impossible to imagine a legitimate association whose object would not be the common security, the common liberty, and, finally, the common welfare''], nor ''public establishment'' [E.-J. Sieyès, *Political Writings: including the debate between Sieyès and Tom Paine in 1791* [Translated by M. Sonenscher], Indianapolis / Cambridge, 2003, p. 153: ''It is impossible to conceive of a legitimate association whose objects are not common security, common liberty, and a public establishment''] conveys the real meaning of *chose publique*, the French expression for *res publica*, that is, according to Webster's Dictionary, ''the commonwealth, the State.'' Instead of an impossible translation, I have chosen to keep the Latin expression as the best word to convey the object of public law.

Treatment of the res publica *in Rome*. Romans not only identified the ''public thing.'' Experts in legal matters, they also understood that the survival of the ''public thing'' depends on its distinction from private things. The ''public thing'' must be subject to special rules, because it deals with things that are common to all. There is, on the one hand, what is useful to one person (*singulorum utilitas*) and, on the other, what is useful to a multitude of people. What is useful to a multitude of people forms the ''public thing,'' the thing collectively owned by the people, the *res publica*. It is distinct from the multitude of other things that are privately owned and useful only to one person or a small group of people such as a family or an enterprise. Notwithstanding the variety of the criteria advanced to justify a distinction between public law and private law, the fundamental criterion remains that of the persons and situations to which the general notion of *utilitas* (utility) applies.[11] Private utility

[11] N. Bobbio, *Democracy and Dictatorship* [Translated by P. Kennedy], Minneapolis, University of Minnesota Press, 1989, p. 3. Max Weber in his treatise *Economy and Society*, particularly in the section on Sociology of Law, offered another criterion of distinction between public law and private law [*Economy and Society*, Edited by G. Roth & C. Wittich, University of California Press, 1978, vol. II, p. 642]. He suggested: ''[P]rivate law might be contrasted with public law as the law of coordination as distinguished from that of subordination.'' As Bobbio noted (*supra,* at pp. 3-9), this distinction between two types of social relationships (between equals and between unequals) is often used as a template for supporting other academic oppositions such as law and contract, the State and the market, the citizen and the bourgeois, natural law (private law), and positive law (public law), the commutative justice that governs exchange (private law), and the distributive justice that guides public authority in the distribution of honors and duties (public law). These oppositions have to be handled with care; they do not describe reality with exactitude if only because they are not mutually exclusive and often overlap; rather they must be viewed as signposts that help to organize reality without ever explaining it completely. Two criticisms have been articulated against the dichotomy between the private and the public viewed as an opposition between consent and coercion, coordination and subordination, agreement and domination. On the one hand, ''in the first third of the twentieth century, American legal realists argued that private rights between individuals should always be conceptualized as state legal interventions designed to serve ends of public policy'' [R. Post, ''The Challenge of Globalization to American Public Law Scholarship,'' 2 *Theoretical Inquiries in Law*, 323, 324 (2001)]. Under a legal realist approach, all law, at the end of the day, may be viewed as ''coercive''; it always carries with it elements of subordination because it may always be enforced by the state apparatus. As Post rightly puts it: ''We might reformulate the difference between public and private law as one of enforcement; as a question of whether the state pursues its ends by directly mandating compliance with legal norms through its own criminal or administrative interventions or whether it decentralizes the power to initiate such enforcement to private parties by affording them access to judicial power. In either case, the content of legal norms will express a public vision of desirable social relationships'' (*id*, pp. 324-325). On the other hand, reducing public law to a law of

(*singulorum utilitas*) is the one that individuals may pursue for their own advantage. The *res publica* involves the general public utility (*utilitatis communione*), which brings the people together in a society bound by common objectives (the public good, the general welfare) as well as by legal bonds (the Constitution). The conceptualization of the *res publica* as distinct from private interests is one of the greatest legacies of Roman civilization. It is well articulated in the opening statement to the great compilation of Roman laws that form the Digest elaborated by order of Emperor Justinian in 530-533 B.C. The Digest begins with the following definition of law:

> The law obtains its name from justice; for (as Celsus elegantly says) law is the art of knowing what is good and just.
>
> (1) Anyone may properly call us the priest of this art, for we cultivate justice and profess to know what is good and equitable, dividing right from wrong, and distinguishing what is lawful from what is unlawful; desiring to make men good through fear of punishment, but also by the encouragement of reward; aiming (if I am not mistaken) at a true, and not a pretended philosophy.
>
> (2) Of this subject there are two divisions, public and private law. Public law is that which has reference to the administration of the Roman commonwealth; private law is that which concerns the interests of individuals; for there are some things which are useful to the public, and others which are of benefit to private persons. Public law has reference to sacred ceremonies, and to the duties of priests and magistrates. Private law is threefold in its nature, for it is derived either from natural precepts, from those of nations, from those of the Civil Law.[12]

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subordination is somewhat inaccurate insofar as there are many public law situations in which there is not the slightest trace of coercion: for instance, no one is obliged to take advantage of a fiscal incentive, no one is obliged to run for a public office and, in most countries, no one is obliged to go to the polls (voting is entirely voluntary). Moreover, in those countries such as France where public law is distinct and separated from private law by separate courts, private law courts may adjudicate many situations in which public authorities are parties to the case, for example, when a public authority enters into a private law contract with a private business (as in a sales contract).

[12] Original text:

> *Hujus studii duae sunt positiones, publicum et privatum. Publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilatem: sunt enim quaedam publice utilia, quaedam privatim. Publicum jus in sacris, in sacerdotibus, in magistratibus constitit. Privatum jus tripartum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus* (D, I, I, 2).

The celebrated paragraph on the distinction between public and private law is a quotation drawn from the *Institutes* of Ulpianus written three centuries before. Ulpianus held the highest imperial office, the position of praetorian prefect (the emperor's principal legal officer). In 212 CE, the Emperor Antoninus Caracalla enacted an edict that turned most of the residents of his empire into Roman citizens. Known as the *Constitutio Antoniniana*, the edict was probably adopted for fiscal reasons (*i.e.*, to apply the inheritance tax levied on the estates of citizens to more people), and it was, of course, of a public nature. Apparently moved by the desire to reassure these new citizens to whom the new public law now applied, Ulpianus elucidated the distinction between public law and private law. Perhaps his goal was to convince these new taxpayers that civil law—the law that concerned their interests as private individuals—was distinct from public law.[13] The civil law, henceforth applicable to them as Roman citizens, could not be modified by the Emperor at will; it would therefore protect them against imperial interference. The idea that private law is a shield against governmental powers became foundational for modern freedoms. The ''barbarians'' who overthrew the Roman Empire had no concept of the ''public thing''; they knew nothing but the private spoils of war lords. With them, public law fell into oblivion until the beginning of the Middle Ages, when it was born again through the institution of monarchy.

B. THE GOVERNMENT OF THE *RES PUBLICA*

Presentation. Public law is based on the abstract idea that the public thing cannot be treated like a private thing. Concretely, what does that mean? What consequences are to be drawn from this principle? How special is—or should be—the treatment of the public thing? For a long time, the treatment of the public thing was very special indeed, because it was in the orbit of religion. Modern public law came into being when the *res publica* freed itself from the control of priests and pontiffs.

An English translation of the Digest by S. P. Scott (1932) is available at http://www.constitution.org/sps/sps02.htm Another English translation by Alan Watson is available in Th. Mommsen, P. Krueger, and A. Watson (Eds.), *The Digest of Justinian* [5 volumes] University of Pennsylvania Press, 1985, vol. 1, p. 1. For the purpose of defining public law, the key words are ''*quod ad statum rei Romanae spectat*.'' S. P. Scott suggests ''the administration of the Roman government'' and A. Watson, ''the establishment of the Roman commonwealth.'' Watson's translation is more in line with what constitutes the core element of public law in Roman law (*i.e.*, the *res publica)*.

[13] P. Stein, *Roman Law in European History*, Cambridge University Press, 1999, p. 21.

1. The Ancient World

Supremacy of religion. Originally, the public thing was governed by religion, not by law. In ancient times, the rules regulating common life in the city-state were inspired by religious commands and precepts. This is evidenced by the Digest, which defines public law (*jus publicum*) as the law relating to the Roman public things (*statum rei Romanae*): ''Public law has reference to sacred ceremonies, and to the duties of priests and magistrates.''[14]

The definition of public law by the Digest is a perfect illustration of what public law could mean for the Ancients. The basic tenet of the ancient world was that the public thing was under the purview of religion and of religious officers. Religion and the public thing were two sides of the same coin. Each city worshiped its god and each god governed his city. The same code of rules applied to the relations between men and their duties toward the city's gods. Religion governed the city-state, particularly, in determining its rulers through drawing lots or by divination; in return, the State intervened in religious affairs by directing individual consciences and punishing any departure from the rites and the cults of the city.[15] As Benjamin Constant said of the democracy of the Ancients: ''Nothing was left to individual independence, neither as a matter of opinions nor as a matter of undertakings nor—still less—as a matter of religion. The free choice of our beliefs which we hold to be one of our most precious rights would have been regarded by the ancients as a felony and a sacrilege.''[16] If it is appropriate to refer to the concept of ''State'' in that period, the State was in religion, and the religion was in the State. In practice, the common good of the city was defined by prophesies and oracles. Public law, as we now understand it, did not exist; or, to oversimplify, religion held what later became law's place.[17] The substance of public law was therefore outside the law.

[14] See *supra* note 12.

[15] N. D. Fustel de Coulanges, *La cité antique*, Paris, Durand, 1864, pp. 517-518.

[16] B. Constant, ''De la liberté des anciens comparée à celle des modernes, Discours prononcé à l'Athénée royale de Paris en 1819,'' in *Écrits politiques*, Paris, Gallimard, Folio Essais, 1997, p. 594.

[17] In Roman law, criminal law is a matter of private law. Punishment of the crimes is made in the interest of the victims. See P.-F. Girard, *Manuel élémentaire de droit romain*, Rousseau, 1918, new edition Dalloz, 2002, p. 4; W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, 2nd ed., Oxford Clarendon Press, 1972, pp. 27-29. Rules of criminal law are a rationalization of private vengeance. Their aim is to control and limit the disastrous consequences of the vendetta system. Crimes against the public good amount to crimes against the gods; they belong not to criminal law, but rather to religion.

Genuine law was ‘‘private law’’ which was not designated as such, but simply by the word ‘‘law.’’

2. The Medieval World

The Christian doctrine. Christianity turned the ancient vision of a fusion between religion and public good upside down. In teaching that his realm was not part of this world, and in instructing his disciples to give to Caesar what belongs to Caesar and to God what belongs to God, Jesus severed religion from government. As the French historian Fustel de Coulanges pointed out in his classic study on the city-state, the Christian religion was the first one that did not claim that the law depended on it, the first concerned with duties rather than rights and interests, and the first that did not attempt to regulate property, estates and wills, torts, or procedure.[18] Christianity as taught by the Catholic Church paid no attention to property law—in other words, the core private law. It only regulated some aspects of private law, in particular family law, because of the important functions of the Church in matters of civil status, birth, and marriage registration. The concern of the Catholic Church for public law followed a completely different (or much more comprehensive) path.

The influence of the Catholic Church. The Christian religion, as institutionalized in the Catholic Church, paid very close interest to the ‘‘public thing’’ and the government of men. In France, it was the Church that endowed the French monarchs with sacred status through the ceremony of consecration. Consecration turned the royal function into a duty to serve rather than a right to rule. The Church completely transformed not only the monarch’s status, but also the function of political power by redefining the role of government. Cicero had underlined the need for government to preserve the public good in time and space; the Church went even further. ‘‘Any people,’’ Cicero wrote, ‘‘that is to say, any gathering of a multitude under the conditions I previously explained, in short, any public thing, and by this, I mean, as I said before, the thing of the people, needs in order to persist and last over time to be ruled by an intelligent authority.’’[19] This intelligent authority is political power in action (*i.e.*, the government).

The new idea the Church brought to government was that of the common good. A ruler must govern, the Church said, not for his own private advantage, but for the common advantage of the whole. It seems that the notion of common good was introduced, first, to limit recourse to war in the barbaric, violent, and

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[18] Fustel de Coulanges, *supra* note 15, at pp. 517-522.

[19] Cicero, *supra* note 9, at pp. 12-13.

merciless world of the high Middle Ages. Later, it came to encompass the totality of powers and rights exercised by the political authority. In the end, it completely transformed the function of government.

The invention of modern government. By investing the medieval kings with a general duty to rule over their estates and people for the common good, the Church changed the nature of government. Striving for the common good cannot be undertaken in the same ways as maintaining law and order; other means than courts of law are called for. More specifically, securing the common good calls for administrative structures such that the judicial State, the original form of the royal State, is supplemented by an administrative State.

With the transformation of a judicial State into an administrative State, we are at the heart of the radical novelty that the Church introduced in the bringing into being of the idea of the common good. Michel Foucault called it ‘‘governmentality,’’[20] a neologism he coined to convey the idea that, during the sixteenth and seventeenth centuries, political power underwent dramatic changes as a new doctrine emerged that political power was no longer in charge of the *res publica* only, but also in charge of ‘‘men,’’ or rather, in charge of ‘‘souls’’—to use the language of Saint Thomas Aquinas, the initiator of the new theory.[21] In teaching that government means leading the governed towards the end they are made for, the Church reinvented government and the practice of governing; it created governmental power, a kind of collective soul.

The medieval *regimen animarum*, the ‘‘government of souls,’’ this ‘‘art of arts’’ (*ars artium*) as the Church Fathers called it, laid down the basis for the structure and proper working of the mechanism that, once secularized, turned into modern government.[22] During the Middle Ages, the management of the *res publica* took a new turn; it became a mission, a duty, akin to service by a religious minister. Traces of the change can still be found today in French public law, with the so-called ‘‘missions of public service’’ (*missions de service*

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[20] M. Foucault, ‘‘La ‘gouvernementalité’,’’ *Dits et écrits II, 1976-1988*, Paris, Gallimard, Quarto, 2001, p. 635. See also M. Foucault, ‘‘Governmentality,’’ in G. Burchell, C. Gordon, and P. Miller (Eds.), *The Foucault Effect: Studies in Governmentality*, Chicago, University of Chicago Press, 1991, p. 87.

[21] On the Thomism doctrine, Saint Thomas Aquinas, *On the Governance of Rulers* (De Regimine Principium), revised ed., translated from Latin by G. Phelan, Institute of Medieval Studies, Sheed & Ward, London & New York, 1938. Adde M.-P. Deswarte, ‘‘Intérêt général, bien commun,’’ *RDP*, 1988, p. 1289.

[22] On the coming into being of the modern government, M. Senellart, *Les arts de gouverner, Du* regimen médiéval *au concept de gouvernement*, Paris, Seuil, Collection Des Travaux, 1995, pp. 22-31; ‘‘Gouvernement,’’ *DCJ*, p. 768 and ‘‘Gouvernement,’’ *DPP*, p. 293.

public), ‘‘burdens of general interest’’ (*charges d’intérêt général*), or ‘‘duties of solidarity’’ (*devoirs de solidarité*)—all obligations imposed on public authorities.[23] So long as the Church was sufficiently respected and powerful to influence kings in their exercise of power—and, thus, to render them subject to the law (for a long time imagined to be the word of God)—public law could not emancipate itself. It remained under the purview of religious officers.

3. The Modern World

Appearance of the notion of interest. In the sixteenth century, the content of the *res publica* took yet another new course. The influence of the Church was by then on the wane; ethics of charity, love for one’s neighbor, and self-sacrifice were progressively abandoned. Another value—interest—won the day. In 1515, Machiavelli set the tone in *The Prince*: ‘‘Love is lasting by virtue of a link of recognition too weak for human perversity and prone to break apart at the slightest call of personal interest.’’[24] By stressing the shift in values that eventually brought an end to medieval Christianity, the Florentine laid the foundations for the autonomy of politics (*i.e.*, the liberation of politics from religion). He demonstrated that, in order to hold onto power, and govern, the *seigneury* (as medieval parlance put it) must perpetuate itself, maintain itself in state—eventually becoming a ‘‘State,’’ stable and permanent. To accomplish this, the prince had to free himself from the Church’s commands. Rather than work at making himself loved, he had to become feared. In other words, he had to behave in conformity with rules and standards of virtue other than those directed by the Church. Modern politics came of age, and public law accompanied it.

Starting with the Renaissance, the management of the *res publica* was organized according to political and moral standards different from those implied by the notion of common good. Due to the triumph of nominalism, ‘‘common good’’ soon became just a word without substance. The old notion of common good waned with the rise of individualism. Common sense limited the former ‘‘common good’’ to a ‘‘public good,’’ necessarily implying a ‘‘private good’’—and the old notion was diluted even further with the shift from the ‘‘public good’’ to the ‘‘public interest.’’ With the notion of ‘‘public interest,’’ public law definitively entered the secular age.

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[23] G.-J. Guglielmi and G. Koubi are right in pointing to the ‘‘links between religious concepts and the coming into being of key notions of French administrative law,’’ *Droit du service public*, Paris, Montchrestien, 2000, p. 18.

[24] Machiavelli, *The Prince*, Chapter XVII: Cruelty and Clemency, available at http://www.constitution.org/mac/prince00.htm.

Since the ''public thing'' is today equated with the public interest, the first step in the study of public law is to define the criteria by which this public interest is identified as distinct from the private interest. The problem goes further than the study of public law strictly speaking; it touches upon political philosophy and jurisprudence. But it is impossible to have a clear idea of the major legal systems of the world, to understand where they come from and where they are going, without analyzing the general philosophy of the public interest on which they are built. In brief, it may be said that since the fall of communism,[25] two major philosophical trends pervade the discourse on the

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[25] Communism was a unitary theory that realized a complete fusion between public and private interest in line with the ideal of the ancient republic of the city-state and the ideas of Plato [see V. Held, *The Public Interest and Individual Interests*, New York, Basic Books, 1969, pp. 135-162]. The communist society like the ancient democracy made no distinction between the private good and the public good (good amounting in this case to happiness), the good of everyone being the condition for the good of all. No distinction was made between the public and the private; there was no public interest per se; there was one common good only under which all society's interests were subsumed. In the middle of the nineteenth century, Marxism reactivated the ancient conception of the public good as it was understood and practiced in the ancient city-state. Hence, its failure; the doctrine it professed was no longer in harmony with the mores and social evolution.

The unitary conception of the public good has its foundations in a very tight social unity. In these societies, what turns out to be in the interest of the community is necessarily in the individual interest of its members too. The greatest good of the ancient society (as well as that of the communist society) is that no one feels a need to cultivate an individual interest contrary to the interest of everyone, with the result that the question of the public good as an autonomous concept is irrelevant since the greatest happiness is made of a complete fusion between the public good and the private interest of each member of the community. In the societies where public interest is subordinated to common interest, the individual interest is sacrificed to the collective interest. The collapse of European communist societies at the end of the twentieth century demonstrated the inadequacy of a unitary conception of the public good in the modern age. The official survival of communism in China in the twenty-first century does not run contrary to this. From communism, China actually kept the authoritarian structure of political power that enable the ruling class to stay in power and whose origins go back to the Marxist-Leninist theories relying on the one party's dictatorship as a token for unity of the State power. This being said, China no longer entertains a unitary conception of the public good since private property, hence private interest, is officially recognized. From the unitary conception of the public interest, which is nowadays much asleep, it appears that modern public law cannot be the law of the common interest, a law based upon the common good. Today, the word ''common good'' when still in use (a rare occurrence) is a synonym for ''public good.'' Public law in the modern age is inconceivable without a distinction between the private and the public.

public interest today: liberalism and republicanism.[26]

Liberalism. Authors who support liberalism regard the public interest as the total aggregation of private interests. Liberal theory is characterized by the belief that the public interest can never be different from the sum of private interests; the public good is identified with the maximum aggregation of individual preferences. It is inseparable from the satisfaction of all individual interests. The liberal theory of the public interest aims at ensuring the greatest protection to individual interests; it therefore gives priority to liberty and considers that ''if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.''[27]

Liberalism claims, in substance, that a measure meets the requirements of the public interest if it satisfies all private interests. Under an economic analysis of the law, in order to qualify as a measure of public interest, a law or a regulation must meet the criterion of the so-called Pareto efficiency or Pareto optimum. A measure is said to meet this test if it makes someone better off without making someone else worse off, or, to put it differently, if it improves someone's situation without injuring anyone else. Inasmuch as, in reality, this test can be met only in exceptional circumstances, liberalism is likely to consider measures of alleged public interest—in other words, the laws—with a skeptical, if not hostile, eye. Liberals tend to doubt that laws can be made so as to satisfy the criteria of a true public interest. Thus, they eventually come to associate less law with the citizens' well being. Much inspired by the economic theories of law, today's liberalism opposes governmental power on the ground that it is useless except to ensure public peace. They defend minimalist approaches to legislation within the general framework of an economic theory of law.

Republicanism. For those who defend republicanism, the public interest is not reducible to an aggregation of private interests. Instead, the public interest is the aggregation of the private interests that members of the society share in common or, to be more precise, that members of a society decide to regard as common in the social contract that forms the republican compact.

In this sense, the republican theory of the public interest is the opposite of the liberal theory. It does not question for a moment the existence of a public

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[26] Both trends are still subject to intensive debate in the United States. See M. J. Horowitz, ''Republicanism and Liberalism in American Constitutional Thought,'' 29 *Wm. & Mary L. Rev.* 57 (1987-1988)

[27] R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977, p. 269 and the comments by F. Wieacker, ''Foundations of European Legal Culture'' [Translated and annotated by E. Bodenheimer], 38 *AJCL* 1, 22, note 67 (1990).

interest in itself; it believes in the existence of a public thing, a *res publica*, autonomous and independent from private things. It defends the idea of a public interest as distinct from the total aggregation of private interests. It aims at ensuring the greatest protection for common interests, even, if necessary, against private interests, because it operates on the premise laid down by Jean-Jacques Rousseau: ''The common element in these different interests is what forms the social tie; and, were there no point of agreement between them all, no society could exist.''[28] The public interest is the sum of the interests held in common by society; it means ''common security, common liberty,'' or, as Sieyès put it in one word, ''the *res publica* (*chose publique*).''[29]

The republican approach to the public interest is at the heart of the French republican model. Its founding idea is simple and can be enunciated as follows: Any gathering of people that forms a nation necessarily forms an association whose object is a ''public thing.'' There exists therefore a public interest, separate from private interests and forming a reality *sui generis*. Under this model, the public interest, or the *res publica*, becomes the State.

The State is made not by the aggregation of all private interests, but by the aggregation of those interests that men have decided to put in common by an act of free will. The republican theory thus makes a sharp distinction between the civil society and the State. Regarded as a fundamental guarantee of individual freedom, this distinction leads republican authors to defend the autonomy of public law. Their defense is based on their belief that the State (*i.e.*, the *res publica*) cannot be regulated by the same rules that regulate civil society, each entity being driven by different goals.

Republicanism believes in the public good and seeks to attain it. For a republican, the measure of public interest is that it satisfies the interests put in common in the social contract. In terms of economic analysis, a measure of public interest, for the republicans, is the Kaldor-Hicks concept of wealth maximization. Under that approach, a measure is said to be efficient if, and only if, those who benefit from the policy benefit sufficiently so as to compensate those who lose. The winners need not in fact compensate the losers, but it must be possible. This condition, which effectively transforms the public interest into

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[28] J.-J. Rousseau, *The Social Contract*, Book II, Chapter 1 [Translated by G. D. H. Cole], available at http://www.constitution.org/jr/socon.htm. Of course, these common interests may vary from State to State. All States will include in it, at the minimum, security and defense, a monetary system, justice for all; only a few will add to that social protection against sickness, old age, unemployment, or still, a free and secular system of education.

[29] Sieyès, *supra* note 10, at p. 85. See Section A.

the general interest—''general'' because it satisfies both public and private interests—may actually be easily realized in practice. Capitalizing on the optimistic prospects opened by this opportunity, republican authors attach much value to sovereignty as a principle of political action, and they give preference to the statute as an instrument for the public good. They often, but not always, defend maximal approaches to legislation in pursuance of a political theory of the statute.

C. PUBLIC LAW AND THE STATE

The coming into being of the State. Modern law is not severable from the State insofar as it came into being with it, in the aftermath of the Protestant reformation and its consequences across Europe. The invention of the State completely changed the law, because it revolutionized the exercise of both public and private power. The State united in itself all the dispersed powers of feudal society; everywhere, it meant a concentration of power. In doing so, the State freed men from oppression by private powers, by subjecting all private powers to its oversight. This marked tremendous progress for freedom.[30] By the

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[30] The progress realized by the emergence of the State for the affirmation of modern liberty was luminously explained by E.-W. Böckenförde. Commenting upon the consequences of the emergence of the State in the sixteenth century and the gradual evolution toward a separation between the State and the civil society, the great German legal scholar explains:

> The numerous intermediary powers and the statutory orders of the old society are piece by piece torn down, progressively eroded and deprived of the political character. Step by step, individuals are freed from the former political allegiances that knitted them to the old social structures of life and domination (landlords, villages, parishes, and especially monasteries). Alone remains—and, thus, acquires a special status—the relation of domination between the monarch (territorial prince) and the subject: that relation becomes direct and, at the same time that political theory endeavours to differentiate between the State's prerogative and the King's prerogative, transforms itself into an immediate relation between the State and the subject. The principle that tries to come to life can be enunciated as follows: the power of domination must no longer be exercised by certain individuals over some others, it must no longer be exercised by an order (the nobility) over another (the commons), it must be exercised by the holder of the State power only in an all-encompassing and equal manner over everyone; for the rest, the individual is free, that is to say, free from all power, but that of the State.

E.-W. Böckenförde, *Le droit, l'État et la constitution démocratique*, [Translated by O. Jouanjan], Bruylant / LGDJ, 2000, p. 179.

same token, in concentrating all powers, the State made it possible to conceive of the public good as being outside religion and the Church of Rome.[31]

As soon as the Church lost its former legitimacy to define the public good, to distinguish between good and bad, truth and error, justice and injustice, temporal powers—princes and kings—stepped into its shoes. They spoke and acted as the Church at the peak of its glory, when it sent thousands of faithful believers to conquer the Holy Land or threw kings and princes into anguish by the threat of excommunication. Now monarchs dressed in the same rich clothes and surrounded themselves with the same magnificence; they invested themselves with the same power the Church once had over the minds of the people. They did so through a concept that the Church had largely invented and which, once secularized, revolutionized public law—the concept of sovereignty. From sovereignty, monarchs drew a power identical to that of the Church before its collapse, when it ruled over souls by virtue of its infallibility. The true character of sovereignty is, indeed, to be infallible, because it has the power of the last word.

With sovereignty regarded as the source of all power on earth, kings and princes even surpassed the Church in the power of domination they exercised over men. They added to their dominion a particular power that the Church never considered its own, insofar as it had no place in the Church's spiritual realm. That power is the right to resort to armed force and physical constraint. Kings, who possessed that right in their feudal prerogatives from time immemorial, drew it into the concept of sovereignty, asserting that the power to resort to force fell within their exclusive jurisdiction. Armed force increased the reach of sovereign power to a great extent. This made it possible, during the century from Luther's preachings to the Peace of Westphalia (1648), for the sovereign State to become the compelling framework for thinking about and undertaking the public good.

The capture of the ''public thing'' by the State forced public law to develop first as an exclusively domestic branch of law. There is little doubt today that domestic public law is the most important and complete branch of public law. However, the encompassment of all things that are of public interest within the sole sovereign State has long proved insufficient, making it possible for an

[31] Both the State and the Church are forms of organizing social life as underlined by M. Gauchet, ''Primitive Religion and the Origins of the State,'' in M. Lilla (Ed.), *New French Thought, Political Philosophy*, Princeton University Press, 1994, p. 116: ''Since prehistoric times, man has striven for structured social organizations. The State is only one manifestation of this structure, just as religion is another.''

external or international public law to develop alongside and often above domestic public law.

Domestic public law. Every State has a public law, that is, once again, as we understand that term in the present book, the collection of rules that relate to the conceptualization and the management of the *res publica*. Public law contains the same disciplines; what varies, however, from State to State is the density and the thickness of these disciplines.

The fundamental disciplines of public law can be identified first by looking at the very object of the public thing (*i.e.*, the functions of the State). As a starting point of analysis, we may look at Adam Smith's groundbreaking work, *An Inquiry into the Nature and the Causes of the Wealth of Nations* (1776) in which he postulates ''the system of natural liberty.''[32] Since 1789, such a system—the system in which men are naturally free—is also the basis of French law, as stated in article 1 of the Declaration of the Rights of Man and the Citizen.[33] For the great English economist:

> According to the system of natural liberty, the sovereign has only three duties to attend to; three duties of great importance, indeed, but plain and intelligible to common understandings: first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain publick [sic] works and certain publick [sic] institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expence [sic] to any individual or small number of individuals, though it may frequently do much more than repay it to a great society.[34]

Adam Smith's enumeration provides a clear reader's guide for outlining the major disciplines of public law.

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[32] A. Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations*, IV, ix, Oxford University Press 1976, reprint Liberty Classics, Indianapolis, 1979, vol. II, p. 687.

[33] Article 1 of the Declaration of the Rights of Man and of Citizen of 26 August 1789: ''Men are born and remain *free* and equal in rights'' (emphasis added).

[34] Smith, *supra* note 32, at pp. 687-688.

From the first duty derives the necessity of a government endowed with the means (army, police) of protecting society, which implies a constitutional law and a financial law (taxes and budget). From the second duty derives the need for a system of law enforcement, that is, an administration and a system of law courts, both of which call for rules to ensure their regular functioning (rules of procedure, administrative law). Finally, from the third duty derives the necessity for the State to provide that which the market does not provide: in other words, the *res publica* must respond to the market's failures.

The foundational four disciplines of domestic public law are constitutional law, financial law, administrative law, and rules of procedure; they are the basis for the foundation of the *res publica*. They may be found in every country. On these common bases, a substantive public law, the content of which may be very diverse, developed. At a minimum, this substantive public law always includes the laws that punish felonies against the security of the State in attacks against the ''public thing,'' that is, the pact of justice and the common interests upon which the society is founded. Often, special jurisdictions are created to take cognizance of and adjudicate these felonies in contradistinction to the ordinary courts that are in charge of adjudicating all criminal cases. For instance, in the early 1960s, special tribunals were created in France to adjudicate the terrorists attacks linked to the war in Algeria; and recently, in the United States, military tribunals were established to adjudicate the cases of those suspected of involvement in the terrorist crimes of September 11, 2001. Such derogations to the private nature of criminal law[35] are to be explained by the fact that crimes against the *res publica* are crimes against public, not private, interests and may present peculiarities that make them unfit to be adjudicated by ordinary courts. In France, the fear in the early 1960s was that members of juries sitting in ordinary criminal courts could be subjected to blackmail or retaliation by the accomplices of those who were tried for terrorism. Substantive public law today also includes those laws that, due to the expansion of the objects regarded in the twentieth century as relevant to the public good, are considered to constitute the public law of the welfare State (educational law, health law, retirement and

[35] As undertsood in French legal tradition, criminal law pertains to private law because crimes against goods or persons usually involve private interests only; they are therefore adjudicated by ordinary courts. It is worth noting that the special tribunals that existed during the war in Algeria no longer exist. Terrorist crimes are nowadays adjudicated by ordinary judges, sitting however in special formation, with no juries; laymen juries are not available in cases of persons charged with terrorist activities.

pension law). The diversity of these rules is so great that one may speak of ''public law systems.''[36]

International public law. The end of the Middle Ages marked the decline, soon followed by the extinction, of the idea of a public good for the City of Men, akin to that of the City of God that the Church relentlessly tried to promote as a model to be followed by feudal lords. The common good became conceivable only within the framework of the State. In order to regulate the relations between the new sovereigns, a kind of code of conduct between them took shape beyond the State's borders. This code of conduct was first called the law between ''*gentes*'' (*law of nations*) in continuation of medieval usages, the ''*gentes*'' being in this case the Roman *gentes* (*i.e.*, families). For a long time, the law of nations was a law between families, regulating relations between Houses, that is, the dynasties that ruled over Europe. The law between these monarchies was originally freighted with personal feelings, such as good faith, respect for the given word, and the sworn faith. It was only in the eighteenth century that these personal elements faded away, as the State as an abstract entity made its way in the community of nations, thanks in particular to the writings of Vattel.[37] Only in the nineteenth century did the new expression ''international law,'' coined by Bentham, at last impose itself as the official terminology.

This international law (often supplemented by the adjective ''public'' to underline the fact that it applies to States only, not to private persons) regulates impersonal relations between States. It is more a code of conduct than a true law, inasmuch as each State is a judge in its own cause. Having no purposes other than the well-being of its subjects, public international law turned the ancient public thing common to all nations—the soul of Christian community—into a multitude of small private things particular to each State. Having no cherished object, other than the survival of the State, each with no ambition other than its own welfare, its conservation and, if possible, the aggrandizement of its wealth—formerly at the expense of other people (colonization), today at the expense of the common good of all nations with environmental torts and pollution—the former ''classical'' public international law, which reached its golden age in the nineteenth century, was a law without a public thing. It became a law whose unique object is the conservation of these small national

[36] See C. Larsen, ''The Future of Comparative Law: Public Legal Systems,'' 21 *Hastings Int'l & Comp. L. Rev.* 847 (1998).

[37] See E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, Paris, Pedone, 1998.

societies, private and closed, represented by nation-states within the large inter-State society.

One of the greatest changes in the twentieth century was the renaissance of the ''public thing'' outside the framework of the State. There is little doubt that the international public thing is not as rich and complete as the internal public thing, but it is not an empty word; it is a reality made of patrimonial resources (the common heritage of mankind that comprises the sea-bed beyond the limits of national jurisdiction, outer space and celestial bodies, Antarctica, and common goods such as the environment and resources of the high seas) and spiritual values (peace, nonuse of force, human rights, democracy, human dignity). Both patrimonial and spiritual values are protected by actors (intergovernmental and nongovernmental organizations), rules (*jus cogens*), legal techniques (unilateral acts of international organizations), concepts (crimes against humanity), and institutions (international courts) that do not belong to classical international law. These developments introduced ''elements henceforth fundamental in the international legal order.''[38] For a large number of international scholars, these elements are so fundamental that classical international law is already left behind. Instead of giving preference to the State in the exposition of international law, these scholars emphasize the solidarities between people and go as far as giving to international law, which they view as a law between the people of the United Nations another name, to contradistinguish it from classical international law. Thus, they often refer to ''world law'' or ''the law of peace.''[39]

When it seeks to put the emphasis on the solidarities between people rather than on the States, the French language refers to ''international public law.'' This terminology was used for the first time by Léon Duguit,[40] who did not believe in the superiority of the State over individuals and who put the individual first, before the State. The terms ''public international law'' and ''international public law'' cannot be interchanged. They stand for two different ways of thinking about international law. As opposed to the term ''public

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[38] P.-M. Dupuy, *Droit international public*, Précis Dalloz, 6th ed., 2002, § 520, p. 532. French legal scholars are deeply divided over the importance and the meaning of these developments. See the analysis of these divisions made by A. Carty, ''Conservative and Progressive Visions in French International Legal Doctrine,'' 16 *EJIL* 525-27 (2005).

[39] For instance, see the eight-volume encyclopaedia directed by the former Secretary-General of the United Nations, Javier Perez de Cuellar, continued, expanded, and updated by Y. S. Choue, *World Encyclopedia of Peace*, 2nd ed., Oceana Publications, Dobbs Ferry, N.Y., 1999.

[40] L. Duguit, *Traité de droit constitutionnel*, vol. I, 1927, § 67, pp. 713-733.

international law'' which ignores it and considers it as a chimera, the term ''international public law'' implies the existence of a ''public thing'' above the State. The expression ''international public law'' was enshrined in French law by the Preamble to the Constitution of 1946 (14th paragraph) that provides: ''The French Republic, faithful to its traditions, abides by the rules of international public law. It will not undertake wars of conquest and will never use its arms against the freedom of any people.'' The phrase ''faithful to its traditions'' stands as a reminder that France, because of the Revolution of 1789 and, in particular, the revolutionary concept of national sovereignty, which rules out the legitimacy of most classical international principles defining the foundations of territorial jurisdiction (occupation, right of conquest, annexation), introduced new ideas to international law and brought about a new conception of relations between people.[41]

From public international law to international public law: The European case. The transition from public international law to international public law is a slow-moving process that usually advances in a piecemeal fashion and with uncertain results. It has developed unevenly, sometimes prey to severe set-backs, as exemplified by the sad destiny of collective security at the universal level, today guaranteed only partially at a lower level with regional military alliances such as the North Atlantic Treaty Organization (NATO). However, it would be misleading to suppose from its imperfect realization at the world level that it can never be achieved. An instructive example in this respect is the evolution of public international law between European States in the second half of the twentieth century.

In 1950, the law that regulated relations between European States was a classical public international law in its purest form. Today, that law between European States is, if not dead, at least deeply asleep. In less than half a century, it has been replaced another law, community law, which is neither domestic State law nor public international law, although it is public law. The truth of the matter is that, to the extent that community law is public in nature, this is not because community law is State law (the European Union (EU) is not a State), but rather because community law is the law of a 'public thing'; it is the law of European ''public thing,'' the material and spiritual heritage of Europe. The European public thing is what makes ''the specificity of the Union'' as Jean-Paul Jacqué calls it;[42] it encompasses objectives (both economic and

[41] On the contribution of the French revolution to international law, see E. Zoller, *Droit des relations extérieures*, Coll. Droit Fondamental, PUF, 1992, § 256.

[42] J.-P. Jacqué, *Droit institutionnel de l'Union européenne*, 3rd ed., Dalloz, 2004, §§ 54-138, pp. 44-82.

political) and values (a community as such governed by the rule of law, respect for fundamental rights, democratic principles, social justice, and cultural pluralism) that makes it similar to a national ''public thing,'' although with less intensity.

The European integration process stands as a reminder that public law cannot be assimilated to State law. Lawyers realized this in the eighteenth century, when they started thinking about the possibility of a public law at the universal level, outside national borders. A good example of this way of thinking is to be found in the distinction between general public law and special public law made by the author of the entry ''*Droit public*'' (Public Law) in the great Encyclopedia by Diderot and d'Alembert, a distinction that is very close indeed to the current distinction between international public law and internal public law.[43] Public law is not the law of a State, nor can it be produced by and through the State only; public law is the law of the public thing, and the public thing is the result of solidarities between people; it begins to take shape when these solidarities are strong enough to give birth to a ''thing'' that men want to share, protect, and administer in common and that, because of this common management, becomes ''public.''

There is no doubt that this public thing, which then turns into a *res publica*, so to speak, may be placed under the protection of a State and may institutionalize itself in a sovereign State with sovereign power, as was the rule in Europe in the sixteenth century; but it may also take another institutional form than the State model, as the EU example amply demonstrates.

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[43] The entry ''*Droit public*'' (Public Law) was written by Boucher d'Argis, a lawyer to the Parliament (Court of Law) of Bordeaux, whose name has not left its mark in history. It begins as follows:

> Public law is that which is established for the common utility of people considered as body politics, in contradistinction to private law which exists for the private utility of people regarded as sole individuals, without consideration for other individuals. Public law is either general or particular. General public law regulates the foundations of civil society, which is common to most States, and the common interests that States have inter se. Particular public law to each State is . . . to establish and maintain the general police necessary to the public peace and tranquillity of the State, to provide what is the most advantageous for all members of the State whether collectively, or separately, whether for the well-being of the souls, or of the body and wealth.

M. Diderot & M. d'Alembert (Eds.), *Encyclopédie ou dictionnaire raisonné des sciences, des arts et des métiers*, Book V [Discussion—Esquinancie], 1755, p. 134, available at http://gallicabnf.fr.ark:/12148/bpt6k50537q9.

Conclusion and Outline. The foregoing developments have demonstrated that public law, at least as it is understood in French law, cannot be assimilated to the theory of the State. This finding runs counter to the nineteenth-century German scholarship articulating the so-called general theory of the State. Public law today is in a state of flux because it is no longer possible to conceive the public thing entirely within the sole sovereign State, as was the case in the sixteenth century. In order to think clearly about public law, one must shift gears and begin with its object, the *res publica*, or public thing—not with its subject, the State. The State may remain a privileged framework for bringing the public thing into being, but it is no longer the only one.

If the State plays such a crucial role in the bringing into being of the public thing, it is because it has a tremendous advantage over rival institutions. The State is the only subject of law considered to be legitimately vested with the ''monopoly of physical coercion,'' as Max Weber demonstrated.[44] In this sense, the State is the sole institution thus far through which the problem of violence has been addressed. From this point of view, there is little doubt that public law as the law of a public thing cannot begin to take shape before the problem of violence is solved. This is why international public law (as opposed to public international law) began to take form—at least as an idea—once war was no longer considered a normal mode of dispute settlement between States. The present work does not address international public law, nor does it address European public law; neither can be consolidated, except by following the developments that marked the progress of domestic public law. It is this progress that is the subject of the present work.

Domestic public law went through an evolution ordered by history, so to speak. It came into being in Europe in the continental monarchies where it developed within the matrix of sovereignty (Book I). It came of age, first in America, then in France, with the two revolutions that put an end to the monarchical age and opened the republican age (Book II). It still continues to evolve today, along two completely distinct republican paths in the United States and in France, each country having chosen its own way to realize the public good in modern society. In order to understand public law—to know where it comes from and where it is going—one must pay attention to history and comparative studies.

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[44] M. Weber, ''Le métier et la vocation d'homme politique,'' (1919), in *Le savant et le politique*, Plon (1959), Collection 10/18, no. 134, p. 101.

BOOK I
THE MONARCHICAL AGE

Sovereignty. The monarchical age is the founding era of modern public law. A European age par excellence, it began in the sixteenth century with the emergence of the modern State. It reached its apex on the continent during the seventeenth and eighteenth centuries thanks to the fruition of a concept that revolutionized both the sources of law and the exercise of political power—the concept of sovereignty.

Sovereignty completely changed the way of thinking about the *res publica* in that its first and most important consequence was to put in the hands of one single organ, the monarch, exclusive responsibility for bringing into being the common good. Before the development of the idea of sovereignty, the common good was a common concern; everyone in society had the duty and the responsibility of contributing to its realization. The nobles, the clerics, and the people all had to work for the common good. Starting in the sixteenth century, this common good became the exclusive responsibility of the sovereign. In fact, it ceased to exist as the common good, for it is at that time that the common good was divided into two distinct categories: the public good and those goods that were henceforth necessarily private. At the social and political level, sovereignty established a division between the State and the civil society, and it paved the way at the juridical level for a division between public law and private law, the former entrusted with the realization of the public good and the latter in charge of private goods.[1]

[1] Sovereignty imposed a new style of power, the power of the centralized monarchical State of the seventeenth and eighteenth century where a clear-cut distinction prevails between the sphere of the government and the sphere of private life. Public and private tend to become two very distinct spheres. The prince and his court dissociate themselves from the vast mass of subjects by emphasizing differences of ranks (titles, ceremonials, etiquette) and building a complex and sophisticated chain of command. From a general standpoint, the State became depersonalized and turned itself into ''a machine.'' This metamorphosis of personal power into a State apparatus domination is the most important change at the beginning of modern times according to Michael Stolleis, *Geschichte des*

Sovereignty may be defined as a supreme and absolute power that requires unconditional obedience. It rests upon the belief that there exists—rather, that there *must* exist—and that there has always existed in any polity from time immemorial, a final and absolute authority. Sovereignty implies a kind of omega point that everything comes from, and goes to; it is a power of last resort on which everybody and everything depends. Sovereignty is a mental image of power; it is a manner of distinguishing a power among the many powers in society, of investing it with special status, and of entrusting it with exclusive responsibility for the common good. Although this idea became institutionalized in the sovereign State, it is worth knowing that men have not always thought like this.

Power before sovereignty. In the Middle Ages, the idea of a final and absolute power over society did not exist. To be more precise, a power of this kind did not belong to the terrestrial, but rather to the celestial world; it belonged to the divine order. Only God could be conceived as vested with such a complete power over men and things. Human power, the power of man over his fellow men, was far from possessing such completeness; it was a mix of several powers. There was not one power, but several. Each terrestrial authority had fragments of power only, all meagerly counted and weighed, depending on the functions to be performed. There is no point, therefore, when studying the Middle Ages, in pondering where at that time the supreme and final authority of the State lay.[2] The question is an anachronism that makes no sense.

In France as in England, the king did not possess power in general, but several powers, rather a collection of powers that were called ‘‘droits régaliens’’ (*jura regalia*) in France, and prerogatives in England. *Jura regalia* and prerogatives were rights attached and linked to the power of the king; they were feudal privileges exclusively attached to the royal person.[3] Lawyers enumerated them by dozens in long lists that exemplified the consistence of royal authority. In the beginning of the sixteenth century, Chasseneux, a French jurist, had counted up to 208 of them. Similar accounting in England would have reached

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öffentlichen Rechts in Deutschland, Erster Band: Reichspublizistik und Policeywissenschaft, 1600-1800, Verlag C. H. Beck München, 1988, p. 70.

[2] F. Maitland, *The Constitutional History of England* (1908), Cambridge University Press, reediting 1946, p. 297.

[3] See J. Barbey, ‘‘Droits régaliens,’’ *DAR*, p. 445, and C. Combe, ‘‘Prérogative,’’ *DCC*, p. 1187. In the *Commentaries on the Laws of England*, I, 239, Blackstone says: ‘‘[T]he word prerogative [. . .] signifies, in its etymology (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others’’; see also O. Hood Philipps & P. Jackson, *Constitutional and Administrative Law*, 8th ed. [P. Jackson & P. Leopold], London, Sweet & Maxwell, 2001, § 15-003, no. 14, p. 305.

similar results. These *jura regalia*, or prerogatives, included, among many others, the power to give justice, the power of dispensation from the observance of the laws, the power for the common good of the realm to make new laws (but only in exceptional circumstances), the power of pardon, the power to designate the officers of the realm, the power to coin money, the power to raise taxes, the power to wage war for the defense of the realm, the power to order respect for the rights established by nature and time.[4] The Middle Ages had a Lilliputian vision of power that was subsequently engulfed by the theory of sovereignty, the major innovation of which was to combine the multiplicity of medieval powers into one power, and one only—the power to make the law.

Legislative power, first power of the State. The theory of sovereignty that propelled the power to make law as the first power in the State was expounded by the French Jean Bodin (1530-1596). In the *Six Books of the Commonwealth* (1576), Jean Bodin turned the medieval approach to power and law upside down by subsuming all powers of the king under the power to make law. His celebrated definition of sovereignty reads as follows: ''The first attribute of the sovereign prince [. . .] is the power to make law binding on all his subjects in general and on each in particular.''[5]

Before Jean Bodin, no jurist would have ever thought of making the power to make law the first attribute of the sovereign prince. At that time, legislative power came far behind the power to dispense justice. How can we explain the need that arose in the middle of the sixteenth century to turn this power into the first power of the prince? There is no easy answer to this question. True, in the Age of Exploration, society was evolving rapidly and visibly under everyone's eyes. It was important for the sovereign to be able to respond to the needs of the time with appropriate legislation. In the first place, there was a pressing need for regulation of increasingly competitive societies, treading into capitalistic adventures and eager to embark on the conquest for new territory. There was, however, another need, even more pressing, namely, the need for a single voice to rise above the sound and the fury of the religious wars, to make the voice of civil peace heard once again. In short, a need to enforce obedience was felt. At the time of Bodin, the best means to enforce obedience was well known. It had been discovered by the Church at the beginning of the twelfth century when, following the Gregorian reform, it reorganized the exercise of power in its own body. It did so by turning the statute (*loi*)—extracted from the maze of decrees

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[4] See F. Saint-Bonnet, ''Loi,'' *DCC*, p. 959.

[5] J. Bodin, *The Six Books of the Commonwealth* [Translated by M. J. Tooley], Barnes & Noble 1967, Book I, chap. X, available at http://www.constitution.org/bodin/bodin.htm.

and rules—into ‘‘the most important tool of power, first, of papal power which, by using it, succeeded in making itself obeyed by the whole Christian community; secondly, of bishops’ power which, alone or with others, tried to make itself be heard in the synods.’’[6]

Mutatis mutandis, it is with the same device (*i.e.*, the statute (*loi*)), that a few centuries later, kings and princes in Europe put a halt to religious wars. For the king to impose law on all his subjects was also to impose religious law. This evolution took place, first, in England with the Act of Supremacy (1543), a statute by Parliament that Henry VIII, furious at having failed to obtain from the Pope what he wanted, succeeded in forcing through the Lords and the Commons. The Act of Supremacy declared that ‘‘His Majesty is the supreme head of the Church,’’ a formula that effectively gave him the power to say what the religion was. Shortly thereafter, in Germany, the peace of Augsburg (1555) established the principle that eventually became the foundation of the new European public order, *cujus regio ejus religio* (*i.e.*, the principle according to which freedom of religion is the right of the prince). It is up to him to choose the religion he sees as fit for his realm. And later, in France, Henry IV ordained public peace to his subjects by enacting the very first statute of religious tolerance, the Edict of Nantes (1598). Nothing did more to imprint in the minds of their subjects the idea of the inherent superiority of these monarchs than these statutes by which the sovereign established, and possibly modified at will, the religion of their State.[7]

Divergent paths in Europe and in England. The theory of sovereignty was accepted by all European monarchies. But it was not conceived everywhere in the same manner and, as a result, its consequences were diverse, depending on the States. True, in all European States, sovereignty gave birth to what is to be regarded as the instrument of public law par excellence, the statute, and it transformed legislative power into the first power of the state. A sharp divide, however, rapidly opened between the continental European States and England. On the continent, in France and in Germany, sovereignty, just as it was in the Early Middle Ages, remained lodged in a physical body, that of the prince or the

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[6] G. Le Bras, ‘‘Les origines canoniques du droit administratif,’’ in *L’évolution du droit public. Études offertes à Achille Mestre*, Sirey, 1956, p. 395, in particular p. 404; A. Padoa-Schioppa, ‘‘Hierarchy and Jurisdiction in Medieval Canon Law,’’ in A. Padoa-Schioppa (Ed.), *Legislation and Justice*, European Science Foundation, Clarendon Press, 1997, p. 1, particularly p. 12.

[7] See the remarks by F. Maitland on Henry VIII exercising the power of statute-making on religious matters in Parliament, *The Constitutional History of England*, *supra* note 2, at p. 254.

king, who exercised an absolute power and took over the common good of their subjects. In England, the monarch was unable to take over anything; sovereignty abandoned him, so to speak, and went on to lodge itself in a body politic, the body of the ‘‘King in Parliament,’’ in accordance with a historical process that has remained germane to England. One may construe this evolution as the evidence of an English ‘‘exceptionalism’’ that gave to all the legal systems born of the British model (*i.e.*, the common law systems), a particular twist that has led them down a quite different path in public law from that pursued on the continent.

Part A
The Continental Monarchies

The invention of the State. Today, the public law of the European continental monarchies is of historical interest only; it has been buried by the democratic revolutions that, at the end of the eighteenth century, replaced the sovereignty of one person with the sovereignty of the people. However, it still merits study because it produced the State, an institution distinct and separate from civil society—an abstract entity vested since the eighteenth century with the responsibility for bringing happiness to its people under the legal concept of police power. This well-intentioned will to bring about happiness was at the origin of a spectacular development of public law all over Central Europe.

Although all European monarchies in one way or another contributed to the development of the State, they did not create the same kind of State everywhere. Two types of monarchies should be distinguished: the French monarchy, which progressively unfolded into the absolute monarchy, the foundational basis of the Royal-State (freed from the constraints of the common law); and the German monarchies or principalities, imbued with imperial Roman law, which developed all over Central Europe and even beyond (up to Russia), the model of the Prince-State. It was the Prince-State that eventually engulfed the whole common law.

Chapter 1
The French Legacy

The double legacy of the old regime. Two institutions survived the collapse of the French monarchy in 1789: the State and the *loi* (statute). The State as an institution is a very meaningful notion in French legal culture; it occupies a place without any equivalent in foreign legal systems. The State, in France, is the community of the permanent interests of the nation, not the instrument of domination or coercion that it may represent elsewhere, in other legal systems; the State is the *res publica*, the Republic, and it is surrounded today with the same respect, even the same devotion, that formerly surrounded the royal institution. The cognate notions that revolve around it, such as ''general interest,'' ''public interest,'' or ''public utility,'' resonate in the whole French legal system as constant reminders of its structuring principle and pervading spirit—the compelling submission of private interests to the ''public thing.'' When these concepts affect a private legal situation in a regular and justified manner, when, in other terms, the Republic speaks by its laws, private interests must yield, just as they did in the past when the king spoke by his. The French monarchy has engraved the ''public thing'' and its legal institution, the State, in the ''habits of the heart''[1] of the French nation.

The word ''State'' came into being in the sixteenth century, but the idea behind it is much older. From the beginning, the French realm possessed interests of its own that needed to be defended. As F. Olivier-Martin put it in his great classic on French absolutism: ''The totality of these interests form, in line with Roman terminology, the public thing, the *res publica*, which is distinct

[1] As A. de Tocqueville put it in *Democracy in America*, [Translated by H. C. Mansfield & D. Winthrop], University of Chicago Press, 2000, I, II, ix, p. 275: ''I understand here the expression *mœurs* in the sense the Ancients attached to the word *mores*; not only do I apply it to mores properly so-called, which one could call habits of the heart, but to the different notions that men possess, to the various opinions that are current in their midst, and to the sum of ideas of which the habits of the minds are formed'' (emphasis in original).

from the private interests of its members, whether individuals or subordinated communities. It is this public thing that will eventually be called the State, with a capital S.''[2] And, if one clear thread runs throughout the whole history of French public law, it is this: the State is not, does not, and cannot belong to the King. The distinction between the ''public thing'' and the king, considered as an earthly or physical body, is engraved in the institution of the Royal-State (Section A), which forms the keystone of the French monarchy. The king governs this public thing received from God, the State, in an absolute manner, not arbitrarily, according to his whims or humors; the laws of the king follow special procedures and obey precise rules (Section B).

A. THE ROYAL-STATE

1. The Theory

The renaissance of the public thing. With the downfall of the Roman Empire, the concept of the public thing completely disappeared, and the Merovingian kings ruled the country without the slightest idea of the State. At the beginning, the king of the Franks exercised power in his own interest, because he was the most powerful. The realm was his property; he was *dominus*, in the sense of owner of persons and goods that happened to be part of it. He was senior, in the sense that he exercised a personal power. The Merovingian monarchy was domineering (the king was a boss who required obedience and gave protection) and patrimonial (the realm was the property of the king who occupied it with arms and by right of conquest).[3] When the first Carolingians were consecrated, royal power changed completely. The sovereign power exercised by the king was given by God himself. The king became an officer of his realm; he was no longer a proprietor, but rather a depository. All ecclesiastical authorities, from Hincmar of Reims to Yves of Chartres, unanimously declared that power is a function entrusted to the king for the governance of the public thing, ''*ad dispensacionem rei publicae.*''[4] This meant a return to the Roman notion of public thing and the affirmation of its sharp distinction from the person of the king; in short, it is the birth certificate for the State.

The consecration of the king. The consecration of the Carolingians was followed and deepened by the first Capetian, Hugues Capet, who himself was

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[2] F. Olivier-Martin, *L'absolutisme français* followed by *Les Parlements contre l'absolutisme traditionnel au XVIIIe siècle*, LGDJ, Reprint 1997, pp. 35-36.

[3] J. Ellul, *Histoire des institutions, Le moyen âge*, PUF, Quadrige, 1999, p. 58.

[4] Olivier-Martin, *supra* note 2, p. 37.

elected and who used it to confirm the election of his son, Robert, by the highest dignitaries of the realm. The practice of election and consecration of the heir was followed reign after reign until the end of the twelfth century. Henceforth, heredity sufficed, but the consecration was always kept and rigorously observed by the Capetians—save for Louis XVIII—until 1825.

The consecration was a decisive element in the formation of the French conception of the State.[5] All medieval kings had themselves crowned; the king of France was not crowned, but rather, consecrated. The consecration was not strictly speaking a sacrament, but it came very close to it; common wisdom considered it ''a mystery.'' With the ceremony of the consecration, the king entered a world that was no longer that of the common mortals, but rather of divinity. The king took an oath to the Church and to the realm; he swore to maintain his people in peace and to always act in equity. As God's mediator, the king promised not to abuse power and to fulfill the duties of his trust for the common good of the realm. His words were surrounded by an array of symbolic gestures. Undressed, except for a shirt in which several openings were made for the anointments, he was anointed by God, with the oil of Saint Ampoule mixed with balm of holy chrism, on the forehead, chest, arms, and hands. The anointment was administered in the name and power of the holy Trinity, which was believed to make it more effective. Then the insignia of the royal function were delivered; in the right hand, the scepter, symbol of the power coming down vertically from God himself; in the left hand, the hand of justice by which the king ''protected the good men and frightened the bad men.'' The consecration created a special relationship between God and the king.

The status of the king. The king of France was a sacred person. Sovereignty in France has not been created by force or by conquest. Rather—and this is a key factor—it was given by God to the king, for special purposes and on special conditions; sovereignty is a ''function,'' a ''trust,'' a ''duty,'' in the French legal tradition, well before being a ''power,'' as it might have been in other countries. The king held his power from God; he was sovereign not inherently, but by the grace of God. He was the only one in his realm, and even among the princes of Europe, to be able to present himself as lord ''by the grace of God.'' As Jean Barbey said, the consecration ''brings about remarkable consequences, both legal and religious [. . .] that over determine the French royalty.''[6]

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[5] J. Barbey, ''Le sacre,'' in S. Rials (Ed.), *Le miracle capétien*, Paris, Librairie académique Perrin, 1987, p. 79.

[6] *Id.* at p. 83.