Public Order and Individual Rights: A Note on Legitimacy, Legality and the Rule of Law in Democratic Societies

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"The rule of law is fundamental to the existence of a free society. It secures our liberty and separates civilization from anarchy." These opening words of Justice Sandra Day O'Connor's address to the conference on "Democracy and the Rule of Law" held in March 2000 in Washington DC express a widely shared view on the significance of law in contemporary democratic societies. In her concluding remarks Justice O'Connor emphasized this conception of a legal order when she declared:"To preserve liberty, then, we must preserve the rule of law."[1)]

Justice O'Connor's distinction between civilization and anarchy suggests what might be defined as a legal conception of civilization where social order based on the rule of law is a fundamental requirement for safeguarding the freedom of the individual in a democratic society. It seems also to imply that democracy defined as the political system directed toward the pursuit of individual freedom has become the unique expression of a civilized word.[2)] History, however, as well as comparative law, tells us that people have lived for centuries under different political regimes while nevertheless participating in the building of great civilizations in which the concept of the rule of law, although it might have

1) Sandra Day O'Connor, Vindicating the Rule of Law: Balancing Competing demands for Justice, in Democracy and the Rule of law, edited by Norman Dorsen and Prosser Gifford, CQ Press, Washington, 2001, 31- 38.

2) See for instance, Philip Allott, Law and the Re-Making of Humanity, in Democracy and the Rule of Law, op. Cit., pp. 19-30.

been interpreted differently, was considered a corner stone of the politicaland social order. Therefore the current debate on the development of a democratic society and the defense of the social order, should acknowledge the significance of the diverse political and social cultures and their past or existing legal traditions in determining the shape and the objectives of the legal institutions which are the most appropriate for the protection of individual freedom and the preservation of the public order.

In this perspective, the Rule of law defines the terms of the rapport between public interest, social peace and individual rights. Thus the conception of the role of the judiciary in a democratic society cannot be separated from the political and social conditions in which this process takes place.

It is not the purpose of this brief paper to address the legal definition of civilization. I will instead limit my presentation to the current debate on the role of the Rule of law in Democratic society in regard to the administration of justice and the definition of judicial power. In doing so, I will also briefly discuss the intrinsic legal conflict and the resulting political tensions created by the opposition between a constitutionalist and a legalist models. The foundation of the modern state rests upon two main pillars that represent its legitimacy and its legality. The harmonious balance between these two pillars defines for a large part our democratic societies in so far as they seek to insure the protection of individual rights while they maintain the social peace.[3)]

On the one hand, the legitimacy of the state institutions is embodied in its political process where according to a prevailing democratic conception, it is "the government of the people, by the people for the people."Therefore, within a doctrine of separation of powers, the legitimacy of the executive and legislative branches is the product of an adequate system of representation of the people's will. Legality, on the other hand, rests firmly upon the respect and the enforcement of a set of legal norms and procedures which regulates government and the social relationships.

The role of the judiciary is traditionally viewed as the guardian of the legality and the enforcer of the law. Montesquieu's description of the judge as

3) David Dyzenhaus, Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar, Clarendo press, Oxford 1997, 283 pp.

"the mouth of the law" largely contributed to this conception. But this ideal balance may at times be compromised in a period of crisis, when, in a given society, the political institutions are no longer able, for various reasons, to function as they should.[4] For the past decades various democratic states have been affected by a decline in people's participation in elections, by the inability of political parties to reflect effectively the desires of an increasingly diverse population;[5] by the powerful representation of special interests; by the publicized corruption of politicians or, to take a more recent American example, by the inadequacy or the malfunction of the election process. Therefore the legitimacy of governance has come under scrutiny. In regard to the U.S these circumstances have led some people to consider with the Wisconsin congressman, D.R, Obey that "the US electoral system, although formally democratic has lost its legitimacy".[6] Such a predicament has an effect on the ideal balance between legitimacy and legality.

In many cases, judges were compelled to assume an increasing role not only as guardians of the legality but also as protectors of the legitimacy. In these instances, judicial decisions are submitted to a broader political scrutiny. The century old question of the "government of the judges" to quote judge Walter Clark's expression (1911), is once again the object of an intense controversy.[7] The resulting discussions lead to the broader topic of the definition of the Rule of Law. At least since Montesquieu, the principle of separation of powers was viewed as one of the foundations of the modern state. As a result, the varying

4) This problem was addressed from a different perspective several years ago by Jürgen Habermas, Legitimations probleme im Spätkapitalismus, Surhkamp verlag, Frankfurt am main, 1973, English translation by Thomas McCarthy, Beacon Press, Boston, 1975, 166 pp.

5) For the particular case of latin American countries, see Angel R. Oquendo, Democracia y Pluralismo, Biblioteca de Etica, Filosofia del Derecho y Politica, volume 96, Fontamara, Mexico City, 2004, 282 pp, esp. pp. 119-145.

6) Thomas M. Franck, Democracy, Legitimacy, and the Rule of Law: Linkages, in Democracy and the Rule of Law, op cit. Pp. 169-177, quoting David R, Obey: " The democratic system in this country is in crisis as never before in my lifetime. It is the ultimate destruction of the legislative process." (p. 173).

7) For a discussion of the use of this concept in France, see the remarks made by Dominique Rousseau and Denys de Béchillon in L'émergence d'un concept, in Gouvernement des juges et démocratie, edited by Séverine Blondel, Norbert Foulquier and Luc Heuschling, Publications de la Sorbonne, Série Sciences Politiques, Paris, 2001, pp. 332-355.

degrees of relationship between these three powers are a measure of the validity and the effectiveness of the political system. The reliance on the doctrine of the Rule of law as means of "accounting for and regulating legislative activity"takes a new meaning when the distinction between governance and justice represents a different political reality. As professor G. Timsit stated: "to judge is not to govern."[8]

There are many definitions of the Rule of Law. This expression is often considered as an imperfect translation of the German concept of Rechtsstaat or the French "Etat de droit". The notion of a Rechtsstaat first appeared in Germany at the end of the 18thcentury with the philosophical writings of Kant. In the following century, the Hegelian conception of the state left its mark on public law doctrine illustrated by the works of Lorenz von Stein. By then, however, administrative law was firmly established as an element of the Rechtsstaat the idea of which had already come to the attention of the legal and political communities with the work of R. von Mohl.[9] It progressively came to express a positivist conception of a formal legality as defined by Julius Stahl in 1856, "the concept of the Rechtsstaat does not comprise the purpose and the content of the State but the method and character of their realization". After World War II and the promulgation of the German constitution – the Grund Gesetz (the basic law)in 1946, the idea of a Rechtsstaat, discredited by the legal rise of the Nazi state, was replaced with the concept of a Verfassungstaat to describe a legal system where the constitutional court plays a major role in the interpretation of the constitution and the protection of fundamental individual rights defined as "public subjective rights".[10]

In France on the other hand, the concept of "Etat de droit" (rule of law) described a different legal reality.[11] With the establishment of the third

8) Gérard Timsit, Gouverner ou juger. Blasons de la légalité, Presses Universitaires de France, Paris 1995, 126 pp.

9) Michael Stolleis, Public law in Germany, Berghahn Books, New York, 2001, 514 pp.

10) Rainer Grote. Rule of law, Rechtsstaat and Etat de droit. In Constitutionalism, universalism anddemocracy. A comparative analysis. The German contributions to the 5th world congress of the international association of constitutional law, edited by Christian Starck Nomos, Baden-Baden 1999, pp. 269-306.

11) L'Etat de droit. Travaux de la mission sur la modernisation de l'Etat publiés sous la direction de Dominique Colas with a foreword by François Mitterrand, President of the

Republic after the final collapse of the monarchy, the conception of the "Etat de droit" meant the rule of the statutory law made by the parliament.[12] It became the foundation of the principle of legality and the parliamentary sovereignty based on what R. Grote has called the "veneration of the law (loi)"as the expression of the general will as defined in Jean Jacques Rousseau's conception of the political society.[13] The universal declaration of the rights of man proclaimed the inalienability of human rights. But it stated also that the conditions and the limits of their exercise were set by the law (loi).[14] The rule of law was thus defined as the implementation of the will of the legislator. It confirmed the legislative supremacy of the elected national assembly.[15] This primacy of the law (loi) might in part explain why France had 15 constitutions (22 if we include the projects that were not enforced) in a 200 years period while it preserved the unique model of a Civil Code, despite numerous amendments and new legislation.

For the above mentioned reasons challenging the nature of the principle of legitimacy and political representation, this conception of the "Etat de droit"is nowadays being questioned. Senator Robert Badinter, a former Minister of Justice and a former president of the Constitutional Council, has proposed a different definition. "It means basically that the government is controlled by legal rules and that the parliament must pay attention to the respect of constitutional principles. It is one of the characteristics; I would even say one of the main requirements, of the *Etat de droit*. It replaces the conception that in a democracy, the political majority has all the rights because it is a majority. When one knows how majorities are made in an election, I am very much in

Republic, Presses Universitaires de France, Paris, 1987, 254 pp.

12) Laurent Pech, Rule of law in France, in Asian discourses onthe Rule of Law. Theories and implementation of Rule of law in twelve Asian countries, France and the U.S.A, edited by Randall Peerenboom, Routledge, London, pp. 79-112.

13) For a classic presentation of this conception, see Raymond Carré de Malberg, La loi, expression de la volonté générale, Economica, Paris, 1984, reprint of the Sirey, 1931 edition.

14) La déclaration des droits de l'homme et du citoyen de 1789. Histoire, analyse et commentaires sous la direction de Gérard Conac, Marc Debene et Gérard Teboul, Economica, Paris, 1993, 365 pp.

15) Marie-Joelle Redor, De l'Etat légal à l'Etat de droit. L'évolution des conceptions de la doctrine publiciste française 1879-1914, Economica, Paris, 1992, 389 pp.

favor of the Etat de droit."[16] As we can see, for Mr Badinter, who spoke here mostly as a former president of the constitutional council, the judicial control of legality is bound to play a greater role indemocratic societies given the flaws in the nature of the legitimacy acquired through the political process.

In this context, let us return briefly to the United State and listen to Chief Justice William Rehnquist who declared recently: "One of the fundamental legal tenets of the rule of law in the United States has been the idea of an independent judiciary exercising judicial review."[17] Whether we agree or disagree with Justice Scalia's conception of the Rule of Law as a Law of Rules in the context of "law that is made by the courts"[18], Justice Rehnquist's opinion raises a much contested issue in the political history of the United States,[19] an issue which already attracted the attention of the founding fathers and later received more public exposure with Justice Marshall's grounding of the principle of judicial review in the resolution of cases, with the well known decision Marbury vs. Madison in 1803. For the past 50 years, beginning with the Warren Court, the US Supreme Court has developed a theory of judicial supremacy which has been confirmed by the Burger and Rehnquist courts. From 1958 with the decision in *Cooper vs. Aaron*, the court has considered that its opinions bound all other branches of government and constituted the "supreme law of the land". This power of the court was made even more explicit in the plurality opinion in *Planned Parenthood vs. Casey* (1994) which stated: "So indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals".

Judicial supremacy as expression of a conception of legal constitutionalism is

16) Robert Badinter, Le gouvernement des juges vu par les juges, in Gouvernement des juges, op. Cit., pp. 289-293.

17) William H. Rehnquist, Opening Remarks, in Democracy and the Rule of Law, op cit, 1-2.

18) Antonin Scalia, The Rule of Law as a Law of Rules, Chicago Law Review 56(1989) 1175-1188.

19) For instance, Keenan D. Kmiec's comment. The Origin and Current Meaning of "Judicial Activism" California Law Review 92 (2004) 1441,

thus the corner stone of a conception of the rule of law and the functioning of legal institutions in the American democracy.[20] It recognizes *de facto* if not *de iure* the political role of the judges whose powers are increasingly at the center of controversy on the traditional principles of independence of the judicial power.[21] Justice Marshall's limited claim opened the door to the development of a doctrine of legal constitutionalism which granted the courts more power to interpret the constitution and eventually lead to the present doctrine of judicial supremacy.[22] A debate that induces the American legal scholar Fred Schauer to argue that: "Judicial supremacy is under attack. From various points on the political spectrum political actors as well as academics have challenged the idea that the courts in general and the Supreme Court in particular have a special and preeminent responsibility in interpreting and enforcing the constitution."[23] In response to the developments of legal constitutionalism, the doctrine of popular constitutionalism revived by some American scholars brings a new light on the issues of legitimacy and legality in the perspective of the expansion of judicial powers[24] in a constitutional state where the protection of fundamental subjective rights is paramount.[25]

Let me turn now to a different but nevertheless comparable legal conception. One year after Marbury vs. Madison, in 1804 the cornerstone of the French legal system, the Civil Code often called "Code Napoleon"was promulgated. Thus, as is well known, within a period of one year, the two countries which had both recently experienced a political revolution and proclaimed to the world their belief in the fundamental rights of man, embarked on two different paths.

20) Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Columbia Law Review. 102(2002) 237.

21) Frank I. Michelman, Living With Judicial Supremacy, Wake Forest Law Review 38 (2003) 579. Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. Law Review 73 (1998) 333.

22) John Yoo, Choosing Justices: A Political Appointments Process and theWages of Judicial Supremacy, Michigan Law Review 98 (2000) 1436.

23) Frederick Schauer, Judicial Supremacy and the Modest Constitution, California Law Review 92(2004)1044-1067.

24) Robert Post, Reva Siegel, Popular Constitutionalism, Departmentalism, and Judicial Supremacy, California Law Review 92 (2004) 1027-1043.

25) Larry D. Kramer, Popular Constitutionalism circa 2004, California Law Review 92(2004) 959-1011.

France's lawmakers were influenced by the revolutionary ideal of the sovereign popular will.[26] They chose to affirm the supremacy of legal statutes (Lois). They assigned accordingly a more limited function to the judiciary whose members had not been able to dissipate the original suspicions of the revolutionary statesmen against the judges. It would be exaggerated to trace this suspicion through two centuries until today but it is worth noting that the current constitution promulgated in 1958 does not use the term "power" to describe the judiciary. The constitution mentions the executive and legislative powers but refers to the judicial "authority".

A few years before the promulgation of the Civil Code, the constitution of *an VIII* (1799) expanded the provisions of the Law of 16-24 August 1791 which had confirmed a strict separation of powers. "*Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of ordinary courtsto interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.*" Article 52 of that same constitution resurrected the Council of State (Conseil d'Etat) with the mission to advise on the drafting of legislation and regulations and on the resolution of conflicts related to the administration.[27] The history of the Council is bound to the vicissitudes of the political regimes which have governed France for the past two centuries. Born in the years of the Consulate, the Conseil d'Etat came to prominence during the empire but was almost suppressed when the monarchy was restored. It briefly disappeared in 1870 but was restored with greater judicial powers in 1872 with the beginning of third Republic.[28] By then, the Conseil d'Etat was recognized as a true administrative jurisdiction. It survived the war years during the German occupation of France between 1940 and 1945. It was confirmed in its function after World War II and

26) Olivier Beaud, La puissance de l'Etat, Presses Universitaires de France, Paris, 1994, 512 pp. See in particular, La suprématie normative de la loy, pp. 95- 108.

27) François Burdeau, Histoire du droit administratif français (de la revolution au début des années 1970) Presses Universitaires de France, Thémis droit public, Paris , 1995, pp. 66 ss.

28) For the history of administrative law between 1800 and 1872 see Grégoire Bigot, L'autorité judiciaire et le contentieux de l'administration. Vicissitudes d'une ambition (1800-1872) Bibliothèque de science administrative, volume 15, LGDJ, Paris, 1999, 516 pp.

was granted more powers with the reform of 1963.

The nature of the Conseil d'Etat is original and unique since it is a jurisdiction which is not part of the judiciary but belongs to the administration of the State.[29] It thus falls directly within the divisions of the executive branch. It is presided by the Prime Minister or, in his absence by the Minister of Justice in cases required by the law. But all functions are assumed by a vice president who is a not a member of the government but is one of the *Conseillers*. The Council has nevertheless extensive jurisdictional powers to judge the legality of the acts and decisions of the state administration both at the national and at the local level. Members of the Council of State are civil servants. They are not members of the judiciary although the French Cour de cassation acknowledged their status of judge. The administrative courts are not placed under the supervision of the Justice Ministry but under the supervision of the Ministry of the Interior. They members of the Conseil d'Etat are not recruited through the school for the training of judges and prosecutors. The majority of the members comes from the National School of Administration (ENA) which trains the civil servants for the departments of the state and local administration. The access to the Conseil d'Etat is determined by the rank of the students at the time of graduation. Roughly one third of its highest ranking members (Conseillers d'Etat 1/3 and Maitres des requetes 1/4) is appointed by the government from other administrations. It comprises about 300 members and includes a few persons coming from the University (professors) and other administrations.

The Conseil d'Etat is not a constitutional court. The control of the constitutionality of the laws is exercised by a constitutional council, established by the constitution of the Fifth Republic in 1958.[30] The constitutional council is not a court and therefore does not exercise judicial review but can only give a compulsory opinion *ex ante*on the laws before their promulgation.[31] Citizens and private individual cannot bring a claim to the Constitutional council.

29) Francesco Bonini, Amministrazione e Costituzione: il modello francese, Carocci, Roma, 1999, 217 pp.

30) Jacques Meunier, Le pouvoir du Conseil Constitutionnel. Essai d'analyse stratégique.LGDJ, Paris 1994, 373 pp.

31) Dominique Rousseau, Droit du contentieux constitutionnel, 5thedition, Domat Droit public, Montchrestien, Paris, 1999, 487 pp.

Although the opinions of the constitutional council have acquired more authority in the past forty years,[32] the French system remains more legalist than constitutionalist and does not include a process of judicial review.[33] Thus despite the development of a limited system of control of the constitutionality of law, the institution of administrative justice is one of the foundations of the French conception of the Rule of Law.[34]

In this perspective, the control of the legality of the state decisions remains fundamental. The Conseil d'Etat is divided into 6 sections. One of them the "litigation section" acts as the supreme court of administrative justice.[35] It judges the legality of all executive decisions except for the "acts of government" which constitute a limited category of decisions which are considered to be political acts regarding France foreign policy or relationships between the executive and the legislative branches. In this regard the Conseil d'Etat is the judge of the administration and not the judge of the political power.

The litigation section was created in 1806. It is nowadays subdivided into10 sub-sections. It hears recourses against decrees and other executive decisions from the head of state and members of the government. It functions also as an appellate court for lower administrative courts and exercise a "power of cassation" on these judgments. Since 1987. the majority of the appeals case were transferred to administrative courts of Appeal which were created in order to lower the number of cases brought before the Council of State and the number of cases awaiting judgment (the backlog was 25,000 cases in 1987; in 1998 the total number of case awaiting judgment in front of all the administrative jurisdictions 1st instance, Appeal and Council of State was 208,000).[36] However, the Council's powers as a Court of cassation enables

32) La légitimité de la jurisprudence du Conseil Constitutionnel, edited by Guillaume Drago, Bastien François and Nicolas Molfessis, Economica, Paris, 1999, 415 pp.

33) For a discussion of the legitimacy of constitutional courts in a comparative perspective see Marc Verdussen, Les douze juges. La légitimité de la Cour constitutionnelle. vEditions Labor, Bruxelles, 2004, 95 pp.

34) Frank Moderne, L'intégration du droit administratif par le Conseil Constitutionnel, in La légitimité de la jurisprudence, op. cit. Pp. 67-103.

35) Achille Mestre, Le Conseil d'Etat protecteur des prérogatives de l'administration. Etudes sur le recours pour excès de pouvoir, Bibliothèque de droit public, volume 116, LGDJ, Paris, 1974, 312 p.

36) See in general, Charles Debbasch, Jean-Claude Ricci, Contentieux administratif. 8th

him to retain a competence in the resolution of appeals cases (40% of these cases are not sent back to appeals courts for a decision on the facts).[37]

The jurisdictional function of the Conseil comprises different categories of judgments. A formal distinction proposed by Edouard Laferrière by the end of the 19th century classifies four types of decisions: full jurisdiction; annulment; interpretation and repression.[38] The main categories are the full jurisdiction and the annulment which represent the domain of the "recourse against excessive power". Another French legal scholar, Leon Duguit challenged this formal classification. He proposed instead a material distinction between objective law that comprises the category of annulment and subjective law that represent the function of full jurisdiction, since in this latter matter the administrative judge takes also into account the nature of the damage caused by the unlawful decision and the question of its compensation.[39] In both categories, the recourses that are opened to the plaintiff, are objective recourses.[40]

Despite the increasing concurrence of other jurisdictional recourses and the prevision of its future decline (already announced in 1912), the recourse against excessive power is an important tool for the control of the legality of administrative decisions.[41] It is founded on the violation of the law and requires that the unlawful administrative decision be annulled. It is thus a recourse in the interest of the legality and in the interest of public order.[42] The evaluation of the violation of the law is broadly interpreted according to the general notions

edition, Dalloz, Paris, 2001, 1018 pp.

37) Jean Massot, Olivier Fouquet, Le Conseil d'Etat: juge de cassation. Berger-Levrault, Paris, 1993, 216 pp.

38) On the role of Laferrière in the development of French administrative law see, Pascale Gonod, Edouard Laferrière, un juriste au service de la République, Bibliothèque de droit public, volume 190, LGDJ, Paris, 1997, 445 pp.

39) René Chapus, Droit du contentieux administratif, 8th edition, Domat Droit Public, Montchrestien, Paris, 1999, pp. 175-177.

40) See for instance, André Helbronner, Recours pour excès de pouvoir et recours de plein contentieux, in Recueil Dalloz, 1953, ChroniqueXXXIV, pp. 183-188.

41) David Bailleul, L'efficacité des recours pour excès de pouvoir et de plein contentieux objectif en droit public français. Bibliothèque de droit public, volume 220, LGDJ, Paris, 2002, 428 p.

42) Maxime Mignon, La notion d'intérêt ouvrant le recours pour excès de pouvoir, Recueil Dalloz, 1953m Chroniques XXII, pp. 121-126.

left undefined by the Conseil d'Etat of "general principles of the law". These principles are considered "unwritten rules which have legislative validity and consequently are binding upon the administration....They cannot be described as forming a system of customary administrative law"They are applicable even in the absence of a text. This conception of general principles of the law creates a higher level of legality which is no longer uniquely determined by the will of the lawmaker. It provides the administrative judge with an assortment of legal norms which include but is not limited to constitutional principles.[43]

In a procedure of objective recourse, the particular issue of the plaintiff's rights is not taken into consideration and the court will not decide on this matter. Since the famous Council's decision in the case *Dame Lamotte* in 1950, the significance of the recourse against excessive power has not been challenged. In the *Dame Lamotte* decision the Council stated that "this recourse is open even in the absence of a text against any administrative act and it has the effect to ensure the respect of the legality in accordance with the general principles of the law."

The power of the Council was recently reinforced by two statutes from 18 February 1995 and 30 June 2000 which provide the administrative jurisdictions with more control over the conditions of the annulment of the unlawful act and give the judge the power of injunction to impose the execution of their decision by the administration. In a recent decision from 11 May 2004 (Association AC!) the Council has confirmed the administrative judge's control over the effects of the annulment.

The concept of objective recourse is an original institution of the French administrative system[44] which reflects the significance of the legal order based on the preeminence of the sovereign law(loi) as opposed to the constitutional protection of individual rights.

In this respect the history of the French legal system is made of this inherent tension between private subjective rights and public order. The current

43) On the other types of recourses, see Jean-François Brisson, Les recours administratifs en droit public français, Bibliothèque de Droit public, volume 185, LGDJ, Paris, 1996, 494 pp.

44) On the history of the French administrative system, see the stimulating remarks by Pierre Legendre, Trésor historique de l'Etat en France. L'administration classique, Fayard, Paris, 638 pp.

international legal developments and the decisions of the European Court of Human right are imposing a different perspective on French courts but the affirmation of the principle of legality, whether it is interpreted as conformity to the law or compatibility with the law, remains a strong element of the judicial conception of the Rule of Law. In this respect the French administrative judges play a significant role in the definition of the legality.[45] From a comparative evaluation of both the constitutionalist and legalist models and in light of the development of the subjective rights and the proliferations of the cases based on their violation, the objective recourses appear to be more than ever an efficient and useful jurisdictional instrument in the hand of judges in order to maintain the coherence of the social order and ensure the legal responsibility of the government while striking the right balance between the public interest and the individual rights.[46]

45) For instance Joseph Capion, L'Etat de droit vu par le juge administratif, in L'Etat de droit, op cit., pp. 132-142.

46) See the remarks by Gilles LeBreton in his foreword to David Bailleul, L'efficacité comparée des recours pour excès de pouvoir…, op cit., p. I : "The recourse against excessive power has adopted the Republican ideal since it embodies the triumph of the general will which results from each citizen's ability to see beyond his own private interest to identify a transcendental general interest."