grounded on a historical or ongoing agreement of free citizens. In *The Social Contract*, Rousseau also creates a metaphoric concept of collective

Brian H. Bix: A Dictionary of Legal Theory. Oxford University Press, 2004

rule of law A complex and contested ideal which can be traced back at least to Aristotle, under which citizens are to be 'ruled by law, not men'. There are various aspects to this ideal—and different commentators will vary in which they emphasize—but they tend to include that the standards of conduct are binding on all, including the most powerful; a rule's application should be consistent with its meaning; that rules should be promulgated; that they should be in clear language; and that compliance with rules must not be impossible.

Lon Fuller's (1902–78) (secular or procedural) natural law theory can be seen as an elaboration of the idea or ideal of the rule of law: when he writes of the 'internal morality of law', he means those moral ideals that require or are furthered by citizens being effectively guided by general rules. Other important advocates of a more formal procedural understanding of the rule of law have included Friedrich von Hayek (1899–1992), A. V. [Albert Venn] Dicey (1835–1922), and Joseph Raz (1939–). Some commentators have preferred a more substantive reading of the rule of law, one that entails either commitment to democracy or protection of certain individual rights (beyond those discussed in the formal/procedural idea of the rule of law).

See **Fuller, Lon L.; Hayek, Friedrich A. von; internal morality of law**

rule of recognition Within H. L. A. Hart's (1907–92) legal theory, put forward in *The Concept of Law* (1961), the rule of recognition was a 'secondary rule' (in contrast to 'primary rules', which apply directly to subjects, 'secondary rules' are those regarding the identification, interpretation, and modification of 'primary rules') which 'will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a [valid rule within the legal system]'.

The rule of recognition thus contains the criteria by which it can be determined which rules are part of the legal system and which are not. It is the final step in the normative chain of reasoning of why one ought

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The Rule of Law

Political Theory and the Legal System in Modern Society

With a Foreword by
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CHAPTER 12

The *Rechtsstaat* and the Rule of Law (The Problem Stated)

12.1. The German Theory of the *Rechtsstaat*

The legal form of a system based upon political and economic freedom differs in Germany and in England. The specific German phenomenon is the so-called *Rechtsstaat*.[1] The specific English creation is the unison of the two notions of the supremacy of Parliament and the rule of law.

By *Rechtsstaat*, two different things can be understood. For the pure science of law every state is a *Rechtsstaat*, be it democracy or dictatorship, be it a Fascist or a Bolshevist state. Even absolute monarchy and Fascist dictatorship are *Rechtsstaaten*, since they become objects of the pure theory of law only because we are compelled to conceive of the unlimited power of the monarch or of the dictator as derived from a basic norm. In this sense the idea of the *Rechtsstaat* is interpreted by Laski:[2]

> But the idea of a *Rechtsstaat* is a purely conceptual notion. It is a category of essence and not of reality. It makes the rulers of the state bound by the law they make; but it still leaves them free, through the use of the appropriate organs, to make the law. The Hitlerite state, equally with that of Great Britain or France or Czecho-Slovakia is a *Rechtsstaat* in the sense that dictatorial power has been transferred to the Führer by the legal order . . . . The idea of a *Rechtsstaat* is always qualified by the fact that the state is able, through its sovereignty, to change the substance of the law.

Such a conception of the *Rechsstaat* makes it possible for us to make every phenomenon called "state" the subject of normative jurisprudence. Such a conception is neither right nor wrong; it is simply meaningless.

From a historical point of view, the notion of the *Rechtsstaat* is a political one, and therefore, like every political conception, a polemical one. The word itself, but not the substance, is, according to Rudolph Gneist,[3] due to Robert von Mohl.[4] Lorenz von Stein already declared: "For it is clear that properly speaking there is no State without law. In a certain sense, every State is a *Rechtsstaat*. We, however, attach a special meaning to this word".[5]

We must, therefore, first determine clearly this special meaning. The notion of the *Rechtsstaat* appears already completed in the Kantian system. The *Rechtsstaat* is the creation of the bourgeoisie as an economically rising but politically stagnant class. This class identifies its state with the state as such, and thereby denies the character of *Rechtsstaat* to every other state, characterising it as a non-*Rechtsstaat*, even as a state of wrong (*Unrechtsstaat*).

The essence of the *Rechtsstaat* consists in the divorce of the political structure of the state from its legal organisation, which alone, that is to say independently of the political structure, is to guarantee freedom and security. In this separation consists the difference between the German *Rechtsstaat* and the English doctrine of the relation between the supremacy of Parliament and the rule of law.

The *Rechtsstaat* is, therefore, not the specific legal form of democracy, but it is neutral as regards the political structure. This radical separation of the form of the state from the legal structure is completed in the work of Friedrich Julius Stahl:

> The State is to be a *Rechtsstaat*; that is the watchword, and expresses what is in reality the trend of modern development. It shall exactly define and inviolably secure the direction and the limits of its operations, as well as the sphere of freedom of its citizens, by means of law; thus it shall realise directly nothing but that which belongs to the sphere of law. This is the conception of the *Rechtsstaat*, and not that the State shall only apply the legal order without administrative aims, or even only secure the rights of the individuals. It signifies above all not the aim and content of the State, but only the method and the nature of their realisation.[6]

It is characteristic that not only the liberals such as Rudolf Gneist, Lorenz von Stein, and Otto Bähr reached this formulation, but even

Stahl, the author of the Christian conservative theory of the state; and that Gneist[7] as well as Bähr[8] gave to it his assent. The postulate that the state has to have the character of a *Rechtsstaat* was developed by Stahl in a series of biting polemics against de Maistre and Bonald, in a criticism culminating in a denial that the monarch is the representative of God on earth,[9] and ending with the statement that the monarch "may not rule against the law, but only through the medium of the bureaucracy, and only with representation of the people".[10] It may be noted that Stahl, who had been appointed to Hegel's chair in Berlin University in order to combat Hegel's influence, himself shows clearly in this formulation the influence of the Hegelian philosophy of law. Similar formulations are to be found in Otto Bähr's work. According to him, a *Rechtsstaat* is given if the postulate is fulfilled that the state makes the law the fundamental condition of its existence, and that all life within its boundaries, of the individual as well as of the state in relation to its members, must move within the limits of the law. "In the realisation of the law the State realises the first germ of its own Idea."[11] For Rudolf Gneist, a state is a *Rechtsstat* if it fulfils four conditions: everyone must know exactly his duties; no citizen must bear more burdens than his fellows; private law must carry out the protection of the person and of property insistently, jealously, and energetically in the various spheres of its functioning; and, finally, the relation between citizen and state must be subject to the control of administrative tribunals.[12]

This praise of the idea of the *Rechtsstaat*, which in Welcker's words belongs to the highest grade of culture, belongs as has been shown by Dietrich Schindler, to the period of early liberalism. In this period, however, the *Rechtsstaat* theory does not merely stress the negative character of the state, that is to say the protection of liberty and the maintenance of the legal order; on the contrary, in opposition to Stahl, the idea of the *Rechtsstaat* was made to serve the cultural and welfare activities of the State.[13] This aspect of the *Rechtsstaat* was especially stressed by Robert von Mohl in his *Encyklopädie* of 1859:[14]

> Its essence consists in that it protects and furthers all natural aims recognised by the people as the life aims of the individuals, as well as that of the community. For this purpose it takes care that all activities of its citizens and that of the governing power are carried out within the limits of an all-embracing legal system; and that in the aggregate of life within

> its boundaries, in the relation of the individuals to each other as well as in the relation of the whole to its parts, the law is not violated. On the other hand, it furthers the various powers of its citizens and the interests resulting from them, in so far as their own powers are insufficient and in so far as the object justifies the application of the total power. The establishment and maintenance of the legal order is therefore not its sole, not even its most important aim, but is the dominant character, the inviolable negative side of all its operations.

The characteristics of the *Rechtsstaat* are in Mohl's theory equality before the law, care for the maintenance of individuals in all suitable cases, equal access of all competent citizens to all public offices, and finally, personal liberty. This material conception of the *Rechtsstaat*, which has been called by Heller the social *Rechtsstaat*, is however lost after the débâcle of the revolution of 1848. In the later development, the relation of the *Rechtsstaat* to the cultural and welfare aims of the state comes last. In the succeeding period of liberalism, only the negative aspect is understood by *Rechtsstaat*. In this period the already mentioned differentiation between the changeable aims of the state on the one hand, and the equal and unalterable form through which every state must realise its aims on the other, becomes constitutional reality. In this theory the strange alliance between throne and altar on the one hand, and the competitive economic system on the other, is consummated.[15]

After this, the essentials of the *Rechtsstaat* are therefore as follows. The fundamental principle is the legality of administration,[16] that is to say, the postulate that the administration of the state is bound by its own laws, and that every interference of the state must be reducible to such laws. This implies the supremacy of the law and only of the law; but of a certain type of law, namely of the general laws. From this it follows that the relation between the state and individuals must be determined in advance by formal rational law. The interference of the state with liberty and property must be predictable and calculable; in Stahl's words, it must be exactly defined. From this it follows that those interferences must be controllable, and indeed by independent judges.

This idea of the *Rechtsstaat* is indifferent in the first place as to the aims pursued by the state, and secondly — and this is decisive — as to the form of the state. Whether it be republic or monarchy, democracy or aristocracy, is without significance, provided only that these essentials of the *Rechtsstaat* are fulfilled.

Kelsen Hans: General Theory of Law and State (1945)

G. The Power of the State

a. The Power of the State as the Validity and Efficacy of the National Legal Order

The power of the State is usually listed as its third so-called element. The State is thought of as an aggregate of individuals, a people, living within a certain limited part of the earth's surface and subject to a certain power: One State, one territory, one people, and one power. Sovereignty is said to be the defining characteristic of this power. Though the unity of the power is held to be as essential as the unity of the territory and the people, it is nevertheless thought possible to distinguish between three different component powers, the legislative, the executive, and the judicial power of the State.

The word "power" has different meanings in these different usages. The power of the State to which the people is subject is nothing but the validity and efficacy of the legal order, from the unity of which is derived that of the territory and of the people. The "power" of the State must be the validity and efficacy of the national legal order, if sovereignty is to be considered as a quality of this power. For sovereignty can only be the quality of a normative order as an authority that is the source of obligations and rights. When, on the other hand, one speaks of the three powers of the State, power is understood as a function of the State, and three different functions of the State are distinguished. We shall first turn our attention to these three functions.

b. The Powers or Functions of the State: Legislation and Execution

A dichotomy is in reality the basis for the usual trichotomy. The legislative function is opposed to both the executive and the judicial functions, which latter are obviously more closely related to each other than to the first. Legislation (*legis latio* of Roman law) is the creation of laws (*leges*). If we speak of "execution," we must ask what is executed. There is no other answer but the statement that it is the general norms, the constitution and the laws created by the legislative power, which are executed. Execution of laws, however, is also the function of so-called judicial power. This power is not distinguishable from the so-called "executive" power by the fact that only the organs of the latter "execute" norms. In this respect, the function of both is really the same. By the executive as well as by the judicial power, general legal norms are executed; the difference is merely that, in the one case, it is courts, in the other, so-called "executive" or administrative organs, to which the execution of general norms is entrusted. The common trichotomy is thus

at bottom a dichotomy, the fundamental distinction of *legis latio* and *legis executio*. The latter function is subdivided into the judicial and the executive functions in the narrower sense.

The executive power in turn is often differentiated into two separate functions, the so-called political and the so-called administrative function. (The former is in French and German terminology labeled "the government" in a narrower sense.) To the former are usually referred certain acts which are aimed at the direction of administration and are therefore politically important. They are performed by the highest administrative organs, such as the head of State and the chiefs of various administrative departments. These acts, too, are acts of execution; by these acts, too, general legal norms are executed. Many of these acts are left largely to the discretion of the executive organs. But no amount of discretion can divest an act of the executive power from its character of a law-executing act. Accordingly, the acts of the highest executive organs too are acts which execute general legal norms. The differentiation of the executive power into a governmental (political) and an administrative function has, therefore, a political rather than a juristic character. From a legal point of view, one might designate the whole domain of the executive power as administration.

The functions of the State thus prove to be identical with the essential functions of law. It is the difference between creation and application of law that expresses itself in the distinction between the three powers of the State.

c. The Legislative Power

By legislative power or legislation one does not understand the entire function of creating law, but a special aspect of this function, the creation of general norms. "A law" — a product of the legislative process — is essentially a general norm, or a complex of such norms. ("The law" is used as a designation for the totality of legal norms only because we are apt to identify "the law" with the general form of law and erroneously ignore the existence of individual legal norms.)

By legislation, further, is understood not the creation of all general norms, but only the creation of general norms by special organs, namely by the so-called legislative bodies. This terminology has historical and political origins. Where all the functions of the State are centered in the person of an absolute monarch, there is little ground for the formation of a concept of legislation as a function distinct from other functions of the State, especially if general norms are created by way of custom. The modern concept of legislation could not arise until the deliberate creation of general norms by special central organs began to take its place beside

or instead of customary creation and this function was entrusted to an organ which was characterized as the representative of the people or a class of the people. The theoretical distinction between the three powers of the State must be seen against the background of the political doctrine of the separation of powers, which is incorporated in the constitutions of most modern democracies and constitutional monarchies. According to this principle, the creation of general norms — in principle of all the general norms, the "laws" — belongs to the legislative body, either alone or together with the head of State. This principle is, however, subject to certain exceptions.

The creation of general norms by an organ other than the legislative body, namely, by organs of the executive or judicial power, is usually conceived of as an executive or a judicial function.

From a functional point of view, there is no essential difference between these norms and "laws" or statutes (general norms) created by the legislative body. The general norms created by the legislative body are called "statutes" in contradistinction to those general norms which, exceptionally, an organ other than the legislative body — the head of State or other executive or judicial organs — may create. The general norms issued by organs of the executive power are usually not called "statutes" but "ordinances" or "regulations." Regulations or ordinances not issued on the basis of a statute which they put into effect but issued instead of statutes are called "*décrets-lois*" in French, *Verordnungen mit Gesetzeskraft* in German terminology.

From a systematic point of view, it is particularly unsound to refer to the executive function the creation of general norms where, under exceptional circumstances, such norms are created by the head of State instead of the legislative body. The function is here exactly the same as that which is ordinarily performed by the legislative body. A similar impropriety is involved when general norms created by a court are classified as decisions and referred to the judicial function.

A law-creating function not taken into account at all by the usual trichotomy is the creation of general norms by way of custom. The general norms of customary law, although not created by the legislative power, are executed by the organs of the so-called "executive" as well as by the organs of the judicial power. Custom is a law-creating process completely equivalent to the legislative procedure. The customary creation of general legal norms is a *legis latio* just as much as what is ordinarily designated as legislation. The general norms of customary law are applied by the executive power just as are the statutes.

d. The Executive and Judicial Power

It is only as an exception that the organs of the executive and judicial powers create general norms. Their typical task is to create individual norms on the basis of the general norms which are created by legislation and custom, and to put into effect the sanctions stipulated by these general and individual norms. The putting into effect of the sanction is "execution" in the narrowest sense of this term. The administration has — as we shall see later — also other functions to perform than that of enacting individual norms and effectuating (administrative) sanctions.

Insofar as the so-called executive and judicial function consists in the creation of individual norms on the basis of general norms and in the final execution of the individual norms, the legislative power, on the one hand, and the executive and judicial power, on the other, represent only different stages of the process by which the national legal order — according to its own provisions — is created and applied. This is the process by which the law or, what amounts to the same thing, the State, regenerates itself permanently.

The doctrine of the three powers of the State is — juristically — the doctrine of the different stages of the creation and application of the national legal order. Since the law regulates its own creation, the creation of general norms, too, must take place in accordance with other general norms. The legislative process, that is, the creation of general legal norms, is divided into at least two stages: the creation of general norms which is usually called legislation (but comprises also the creation of customary law) and the creation of the general norms regulating this process of legislation. The latter norms form the essential contents of that normative system which is designated as the "constitution."

e. The Constitution

1. The Political Concept of the Constitution

Since the State is here understood as a legal order, the problem of the constitution — which is traditionally treated from the point of view of political theory — finds its natural place in the general theory of law. It has already been treated in the first part of this book from the point of view of the hierarchy of the legal order.

The constitution of the State, usually characterized as its "fundamental law," is the basis of the national legal order. The concept of the constitution, as understood in the theory of law, is, it is true, not quite the same as the corresponding concept of political theory. The former is what we have previously called the constitution in a material sense of the term, covering the norms which regulate the process of legislation.

As used in political theory, the concept is made to embrace also those norms which regulate the creation and the competence of the highest executive and judicial organs.

2. Rigid and Flexible Constitutions

Since the constitution is the basis of the national legal order, it sometimes appears desirable to give it a more stable character than ordinary laws. Hence, a change in the constitution is made more difficult than the enactment or amendment of ordinary laws. Such a constitution is called a rigid, stationary, or inelastic constitution, in contradistinction to a flexible, movable, or elastic one, which may be altered in the same way as ordinary laws. The original constitution of a State is the work of the founders of the State. If the State is created in a democratic way, the first constitution originates in a constituent assembly, what the French call *une constituante*. Sometimes any change in the constitution is outside the competence of the regular legislative organ instituted by the constitution, and reserved for such a *constituante*, a special organ competent only for constitutional amendments. In this case it is customary to distinguish between a constituent power and a legislative power, each being exercised according to different procedures. The device most frequently resorted to in order to render constitutional amendments more difficult is to require a qualified majority (two-thirds or three-fourths) and a higher quorum (the number of the members of the legislative body competent to transact business) than usual. Sometimes, the change has to be decided upon several times before it acquires the force of law. In a federal State, any change of the federal constitution may have to be approved by the legislatures of a certain number of member States. And still other methods exist, too. It is even possible that any amendment of the constitution may be prohibited; and as a matter of fact some historical constitutions declare certain of their provisions, or the entire constitution within a certain space of time, as unamendable. Thus, for instance, Art. 8, Par. 4, of the French Constitution of February 25, 1875 (Article 2 of the Amendment of August 14, 1884) declares: "The Republican form of Government shall not be made the subject of a proposed revision." In these cases it is not possible legally to amend the entire constitution by a legislative act within the fixed time or to amend the specific provision. If the norm of the constitution which renders an amendment more difficult is considered to be binding upon the legislative organ, the norm excluding any amendment has to be considered valid, too. There is no juristic reason to interpret the two norms in different ways, and to declare — as some writers do — a provision forbidding any amendment invalid by its very nature.

Every provision, however, whose purpose it is to render more difficult or even impossible an amendment of the constitution, is efficacious only against amendments carried out by an act of the legislative organ. Even the most rigid constitution is "rigid" only with respect to statutory, not with respect to customary law. There is no legal possibility of preventing a constitution from being modified by way of custom,* even if the constitution has the character of statutory law, if it is a so-called "written" constitution.

The distinction made by traditional theory between "written" and "unwritten" constitutions is, from a juristic point of view, the difference between constitutions the norms of which are created by legislative acts and constitutions whose norms are created by custom. Very often the constitution is composed of norms which have partly the character of statutory and partly the character of customary law.

If there exists a specific procedure for constitutional amendment different from the procedure of ordinary legislation, then general norms whose contents have nothing in common with the constitution (in a material sense) can be created through this special procedure. Such laws can be altered or abolished only in this way. They enjoy the same stability as the rigid constitution. If these laws are considered to be part of the "constitution," this concept of constitution is understood in a purely formal sense. "Constitution" in this sense does not mean norms regulating certain subject matters; it means nothing but a specific procedure of legislation; a certain legal form which may be filled with any legal content.†

3. The Content of the Constitution

As a matter of fact, the constitution, in the formal sense of the word, contains the most diverse elements besides the norms that are constitutional in a material sense. At the same time, there are constitutional norms (in a material sense) which do not appear in the specific form of the constitution, even when there is one.

a. The preamble. A traditional part of the instruments called "constitutions" is a solemn introduction, a so-called "preamble," expressing the political, moral, and religious ideas which the constitution is intended to promote. This preamble usually does not stipulate any definite norms for human behavior and thus lacks legally relevant contents. It has an ideological rather than a juristic character. If it were dropped, the real import of the constitution would ordinarily not be changed in

* Cf. *supra*, p. 119.
† Cf. *supra*, pp. 122f.

negative legislator, an organ which may be composed according to a totally different principle from that of the parliament elected by the people. Then an antagonism between the two legislators, the positive and the negative, is almost inevitable. This antagonism may be lessened by providing that the members of the constitutional court shall be elected by parliament.*

III. THE SEPARATION OF POWERS

A. The Concept of "Separation of Powers"

The judicial review of legislation is an obvious encroachment upon the principle of separation of powers. This principle lies at the basis of the American Constitution and is considered to be a specific element of democracy. It has been formulated as follows by the Supreme Court of the United States: "that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." †

The concept of "separation of powers" designates a principle of political organization. It presupposes that the three so-called powers can be determined as three distinct coördinated functions of the State, and that it is possible to define boundary lines separating each of these three functions from the others. But this presupposition is not borne out by the facts. As we have seen, there are not three but two basic functions of the State: creation and application (execution) of law, and these functions are not coördinated but sub- and supra-ordinated. Further, it is not possible to define boundary lines separating these functions from each other, since the distinction between creation and application of law — underlying the dualism of legislative and executive power (in the broadest sense) — has only a relative character, most acts of State being at the same time law-creating and law-applying acts. It is impossible to assign

* Cf. my article *Judicial Review of Legislation* 287f.
† Kilbourn v. Thompson, 103 U.S. 168, 190f. (1880).

the creation of law to one organ and the application (execution) of law to another so exclusively that no organ would fulfill both functions simultaneously. It is hardly possible, and at any rate not desirable, to reserve even legislation — which is only a certain kind of law-creation — to a "separate body of public servants," and to exclude all the other organs from this function.

B. Separation of the Legislative from the Executive Power

a. Priority of the So-called Legislative Organ

By "legislation" as a function we can hardly understand anything other than the creation of general legal norms. An organ is a legislative organ insofar as it is authorized to create general legal norms. It never occurs in political reality that all the general norms of a national legal order have to be created exclusively by one organ designated as legislator. There is no legal order of a modern State according to which the courts and administrative authorities are excluded from creating general legal norms, that is, from legislating, and legislating not only on the basis of statutes and customary law, but also directly on the basis of the constitution. What counts practically is only an organization of the legislative function according to which all the general norms have to be created either by the organ called "legislative" or on the basis of an authorization on the part of this organ by other organs which are classified as organs of the executive or judicial power. The general norms created by these organs are called ordinances or regulations or have specific designation; but functionally they have the same character as statutes enacted by an organ called legislator. The habit of characterizing only one organ as "legislative" organ, of calling the general norms created by this organ "laws" or "statutes," is justified, however, to a certain extent if this organ has a certain prerogative in creating general norms. This is the case if all the other organs may enact general norms only on the basis of an authorization emanating from the so-called legislative organ. Then the so-called legislative organ is the source of all general norms, in part directly and in part indirectly through organs to which it delegates legislative competence.

b. Legislative Function of the Chief of the Executive Department

Most constitutions that are supposed to embody the principle of the separation of powers authorize the head of the executive department to enact general norms in place of the legislative organ, without a special authorization emanating from this organ in the form of an "authorizing statute" (*Ermächtigungsgesetz*), when special circumstances are present,

such as war, rebellion, or economic crisis. Besides the ordinary legislative organ, these constitutions thus countenance an extraordinary legislative organ, from which only the designation "legislative" is withheld.

The legislative competence vested in the head of the executive department is sometimes very extensive. He can be capable of regulating matters that, as one says, have not before been regulated either by statutes or by customary law. This formula determining the legislative competence of the chief of State is, however, not quite correct. If there is any legal order at all, consisting of statutory or customary law, there are no matters that are not legally regulated. Such a thing as a legal *vacuum* is impossible. If the legal order does not obligate the individuals to a certain behavior, the individuals are legally free; they cannot legally be forced to behave in that way. Whoever attempts to force them thereto commits a delict himself, and that means that he violates existing law. Insofar as the legal order is silent it constitutes a sphere of individual liberty. This sphere is protected and hence regulated by the legal order obligating the State organs not to encroach upon this sphere. Only on the authority of a norm are the State organs allowed to interfere with the freedom of the individual; but every such norm means that the individual is obligated to observe a certain behavior, that his sphere of liberty is restricted. If the chief of State is authorized by the constitution to regulate by an ordinance subject matters which have not before been regulated by the legal order, the subject matters intended are those which have not before been regulated positively, that is to say, by norms imposing legal duties upon the subjects, but which have been regulated negatively because they fall within a legally protected sphere of liberty of the individuals. What the inadequate description aims at is the fact that the head of the executive department can be competent to regulate matters that before have not in any way been subject to positive regulation.

The vesting of such a competence in the head of the executive department usually does not mean that the ordinary legislative body is deprived of the possibility of regulating those same matters positively. Usually the head of the executive department is competent to regulate them only as long as the legislative organ fails to do so. He loses his competence as soon as the legislative organ submits the matter to a regulation of its own.

The head of the executive department exercises a legislative function when he has a right to prevent by veto norms decided upon by the legislative organ from becoming laws, or when such norms cannot become laws without first receiving his approval. His veto can be either absolute or suspensive. In the latter case, a new decision by the legislative organ

is necessary to give a bill the force of law. The head of the executive department, in fact, fulfills a legislative function even from the mere fact that he may have a right to take the initiative in the legislative procedure, to submit a bill to the legislative organ. This right appertains sometimes to the cabinet and to every cabinet minister within his own sphere of competence. Such participation in legislation by the head of the executive department or by the cabinet is provided even by constitutions which are based upon the principle of the separation of powers.

c. *Legislative Function of the Judiciary*

We have already seen that courts fulfill a legislative function when authorized to annul unconstitutional laws. They do so also when they are competent to annul a regulation on the ground that it appears to be contrary to a law, or — as is sometimes the case — that it seems "unreasonable." In the latter case, the legislative function of courts is especially obvious.

Courts further exercise a legislative function when their decision in a concrete case becomes a precedent for the decision of other similar cases. A court with this competence creates by its decision a general norm which is on a level with statutes originating with the so-called legislative organ.

Where customary law is valid, the creation of general norms is not reserved for the so-called legislative organ even in the sense that other organs can create such norms only upon authorization from the former. Custom is a method of creating general norms that is a genuine alternative to legislation. As to the effect of their legal function, custom and legislation are in no way different. Customary and statutory law are equally obligating for the individual.

C. Not Separation but Distribution of Powers

Thus one can hardly speak of any separation of legislation from the other functions of the State in the sense that the so-called "legislative" organ — to the exclusion of the so-called "executive" and "judicial" organs — would alone be competent to exercise this function. The appearance of such a separation exists because only those general norms that are created by the "legislative" organ are designated as "laws" (*leges*). Even when the constitution expressly maintains the principle of the separation of powers, the legislative function — one and the same function, and not two different functions — is distributed among several organs, but only one of them is given the name of "legislative" organ. This organ never has a monopoly on the creation of general norms, but