



How Could Laws Support the Holocaust? How to Prevent This from Happening Again?

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Abstract. This article examines how law could allow, enable, or even support the Holocaust and asks what legal and cultural safeguards are necessary to reduce the risk of comparable catastrophes recurring. Building on a keynote lecture delivered at the ‘Holocaust and Law’ conference (Cluj-Napoca, 6–7 November 2024), it approaches the question through legal history and legal philosophy, focusing on the interrelations between law and political power, law and morality, and law and culture. The analysis rejects overly simple explanations grounded solely in individual culpability or the presence of a totalitarian regime and instead emphasizes structural vulnerabilities within modern constitutionalism. First, it argues that the primacy historically accorded in parts of European constitutional thought to sovereignty and legislative supremacy – shaped by the notion of law as an expression of the general will – has repeatedly weakened the effective entrenchment and judicial enforceability of fundamental rights. Second, it identifies a voluntarist or will-based conception of law, reinforced by legal positivism, as a pathway through which law can be reduced to command and coercion, thereby becoming a tool of domination rather than a constraint on power. Third, it contends that the rejection of human nature and natural law undermines the foundations of inherent dignity and pre-political rights, rendering rights contingent on state recognition and vulnerable to ideological manipulation. In conclusion, the article considers the post-1945 turn towards constitutional supremacy and rights-based adjudication, while warning that institutional design alone is insufficient without a culture capable of grounding dignity in shared humanity and resisting the political instrumentalization of law.

Keywords: Holocaust, rule of law, sovereignty and legislative supremacy, legal positivism, human dignity

1. Introduction

The twentieth century was the worst century in terms of number of people being killed. Colonialism, two world wars, and the totalitarian regimes triggered the violent death of 120 million people. World War II alone is responsible for half of these casualties. Moreover, some 20th-century rulers were responsible for the death of countless people (Mao Zedong, Josef Stalin, Adolf Hitler, etc.).¹ The Holocaust produced the death of six million Jews as a consequence of a political decision taken by Hitler in the context of World War II (the so-called ‘Final Solution’).²

What happened to Europe and to the whole world in that century? How could all these happen after the introduction of modern constitutionalism in the Western world? How could we prevent it from happening again? These are some of the questions that were raised and discussed by the drafters of the *Universal Declaration of Human Rights* after World War II.³

This is also the topic of this article that mainly reproduces my keynote speech at the inauguration of the conference titled ‘Holocaust and Law’, which was organized by *Mathias Corvinus Collegium* and held in Cluj-Napoca (Romania) on 6–7 of November 2024, on the 80th anniversary of the Holocaust in Northern Transylvania. My presentation – and now this article – has two parts: first, I will explain how the abovementioned could take place from a historical and legal-philosophical perspective; and, second, I will ask whether or to what extent we are now safe enough from repeating a similar tragic path. In doing so, I will touch upon three important dimensions of law, namely the relationship of law with power (or political power), with morality (or moral philosophy), and with culture. In dealing with the Holocaust, it is impossible not to recall some of Hannah Arendt’s ideas contained in two of her books, *Origins of Totalitarianism* (1951) and *Eichmann in Jerusalem* (1963/64), the latter being particularly related to the Holocaust. I shall try to be as clear as possible, but – as I did in my presentation – I beg the audience’s (now the readers’) pardon for my attempt at taking a synthetic approach to such a complex issue.

1 Mao Zedong (China, 1943–1976), 78 million; Josef Stalin (Russia, 1922–1953), 23 million; Adolf Hitler (Germany, 1933–1945), 17 million; Leopold II (Belgium, 1865–1909), 15 million; Hideki Tōjō (Japan, 1941–1944), 5 million; Ismail Enver Pasha (Turkey, 1913–1919), 2.5 million; Pol Pot (Cambodia, 1963–1981), 1.7 million; Kim Il-Sung (North Korea, 1948–1994), 1.6 million; Mengistu Haile Mariam (Ethiopia, 1974–1991), 1.5 million; Yakubu Gowon (Nigeria, 1966–1975), 1.1 million; etc.

2 In this regard, the conference held in the Berlin Suburb of Wannsee on 20 January 1942 was particularly relevant. This is known as the ‘Wannsee Conference’; on this matter, see Browning (2007) explaining how ‘[i]n a brief two years between the autumn of 1939 and the autumn of 1941, Nazi Jewish policy escalated rapidly from the pre-war policy of forced emigration to the Final Solution as it is now understood—the systematic attempt to murder every last Jew within the German grasp.’

3 On this matter, see Morsink, 1999, 2004; see also Glendon, 2002; Brown, 2016.

2. How Could the Law Support the Holocaust?

There is no need to explain what the Holocaust is, how it emerged and evolved in Europe in the context of World War II. Here it is enough to recall that six million people were killed in an inhuman attempt to definitively eliminate Jewish people all over Europe. The victims were humiliated, persecuted, mistreated, transferred to concentration camps, and murdered for the mere fact of being Jews, solely out of such a racial consideration. It is well known that Jewish people had already been ill-treated and expelled from some European jurisdictions under Nazi influence or dominion before the War. However, at the Wannsee Conference on 20 January 1942, the ‘Final Solution’ – or the ‘Final Solution to the Jewish Question’ – was decided, implying the definitive extermination of Jews. That was, no doubt, a government decision, although there is no document giving evidence of the approval of a law stating something like ‘All Jewish persons must be persecuted and killed.’ That is true, as is the fact that six million Jews were effectively persecuted and murdered. How could that happen? How could the law allow – or, even worse, support – such a horrendous criminal enterprise?

The answers cannot – or should not – be too simple. It would be too simple to answer this question by resorting just to human freedom. Of course, this is related to human freedom, but this does not satisfactorily explain how such a huge number of people could behave that way, committing such inhumane acts. This is connected to what Hannah Arendt called the ‘banality of evil’.⁴

It would also be too simple to attempt to answer this question by referring to the political system, to the totalitarian regime within which such laws and governmental decisions were made.⁵ This is also partly true. However, it should be noted that the National Socialist Party controlled by Adolf Hitler won in the context of democratic elections and started to rule the country under the same legal system of laws that were in force before it came to power. In addition, it should be emphasized that the abusive exercise of political power, or putting law at the service of political purposes that are at odds with the common good of society and fundamental rights are not dangers that affect only totalitarian regimes.⁶

4 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963/1964); for Arendt, Eichmann was not a fanatic or a sociopath but rather an average, mundane person who relied on clichéd defences instead of thinking for himself, being motivated by professional promotion rather than ideology, and looking for success which he considered the chief standard of ‘good society’; on the expression ‘banality of evil’, see Russell, 2022; White, 2018.

5 See, for example, Arendt, 1951.

6 In the literature, see Orwell, 1945, 1949. As I showed elsewhere, the ideology of totalitarian regimes’ is incompatible with the respect of human dignity and the fundamental rights that flow from it. To put it simply, political power becomes unlimited in totalitarian regimes. Yet, in *Animal Farm* and *Nineteen Eighty-Four*, Orwell goes beyond totalitarian political regimes and deals with the relation between law, power, and politics in wider contexts.

Constitutional democracies also seem unable to fully and consistently guarantee the human dignity and human rights of individuals.⁷

In my view, the question cannot be properly answered without referring to the relationship between law and political power. The history of law, of legal philosophy, of political philosophy, and of political science shows the importance of the relationship between law and power, a relation that is as relevant as it is difficult. It is relevant because law is supposed to be above the state and constitute an effective limit to the exercise of political power. However, it is also difficult because law is created by the state. The fact that law is made by the state and should limit state power at the same time is – in practice and also from a historical perspective – notably controversial, particularly from the Early Modern Age onwards.⁸

The Western legal tradition shows how medieval lawyers discussed the issue when dealing with the limits of royal power.⁹ In *Summa Theologiae*, for example, Thomas Aquinas stated that law is a rational principle of practical order, consistent in adjusting the norm to the demands with an aim proposed by reason.¹⁰ The law, inasmuch as it is a statement of a practical reason,¹¹ turns out to be the rule of good moral acts, that is what founds its binding force,¹² so the obligatory observance of the law is not just a consequence of existence of a will or of a superior sovereignty but the requirement of norms adjusted to a promoted social end: the obligatory character of the law derives from a just equilibrium between the imperativeness of the act and the social end to which it tends.¹³ In short, natural law is the rule of reason, just and right,¹⁴ and thus positive laws and the mandates of the sovereigns are to be measured against the rationality of the natural law, because it does not only allow man his intimate relation with God but also constitutes the authentic norm to which men may come by reason and to which people must submit, because God speaks to people through it.¹⁵

In the Early Modern Age, Jean Bodin, in *The Six Books of the Commonwealth* (*Les Six livres de la République*, 1576), touched upon the notion of sovereignty and its limits. Unlike Machiavelli, Bodin understood that sovereign power must not be arbitrary, neither it could be unlimited, but it possessed an absolute character in the frame of the limits of natural law and of divine law.¹⁶ Particularly, in his first book, in the eighth chapter, he conceives the Law as a divine gift, an emanation of

7 On this matter, see, for example, Masferrer and Talavera, 2022, pp. 44–55.

8 See Masferrer, 2012, pp. 15–51, as to be discussed in the next two or three paragraphs.

9 Masferrer, 2023, pp. 15–41; see also Masferrer, 2024, pp. 124–146.

10 Thomas Aquinas, *Summa Theologiae*, I–II, *Quaestio* 57, a. 5 ad 3.

11 Gilson, 1981, p. 309.

12 Thomas Aquinas, *Summa Theologiae*, I–II, *Quaestio* 96, 2.

13 Thomas Aquinas, *Summa Theologiae*, I–II, *In sent.* II. d. 41, q. 1. a. 1. ad 4.

14 Thomas Aquinas, *Summa Theologiae*, II, 1, *Quaestio* 95, 2.

15 Welzel, 1972, pp. 52, 55.

16 Wyduckel, 1998, p. 9.

the goodness and providence of God, hence the attribution of the governor is not the *vis* but the political power, which is the power submitted to the natural law, thus distinguishing *ius* and *lex*:¹⁷ ‘The absolute power does not mean another thing but the possibility of derogation from civil laws, without being allowed to violate the law of God’, which led him to divide law into natural and human law: the first one is equitable and just, the second one would be so only if anchored to natural law. The ‘law’ then, taken in the meaning of the mandate of the prince, does not become the only source of law, but a way which is used by the sovereign for achieving justice, for which ‘it is important that the law of the prince is made as the law of God’, otherwise his mandate would be arbitrary and not obligatory in the internal forum, in the conscience of his subjects.¹⁸

If Bodin attempted to defend a notion of sovereignty that paradoxically – or perhaps confusedly¹⁹ – combined the absolutism of the sovereign power and its limitation by the natural law, Thomas Hobbes embraced – notably resorting to Bodin’s arguments²⁰ – absolutist power without any kind of limitation.²¹

In the Late Modern Age, modern constitutionalism tried to set clear limits on state power. The shift from the absolutist *ancien régime* to liberal constitutions was, no doubt, a determined attempt towards that direction, having four principles as its main pillars: national sovereignty (power resides with the people – who form the nation – not with the monarch), the separation of powers (legislative, executive, and judicial), the recognition of fundamental rights, and the rule of law – or, in the civil law tradition, legislative supremacy. However, modern constitutionalism put limits on the state in a historical period in which sovereignty was somehow regarded – at least from a political philosophy perspective – as a limitless notion (see Rousseau’s views).²² It is undeniable that Rousseau highly contributed to the ‘mythicization of political power’.²³ Earlier authors had marked the wrong way. In this sense, the influence of Hobbes’s approach to liberty and its negative effect in ‘too willing to sacrifice individual liberty to the needs of the state’ has been shown.²⁴

17 Bravo Gala, 1986, pp. LII–LIII.

18 Bodin, I. 8: ‘There is a great difference between the right and the law. The right implies the equity only; the law leads command. The law is no other thing but the command of the sovereign who uses his degree to the laws of the Greeks...’.

19 On Bodin’s possible contradictions, see, for example, Touchard, 1995, pp. 319–321.

20 Hoekstra, 2013, pp. 1079–1098.

21 See, for example, Kavka, 1986; Hampton, 1986; Sommerville, 1992; Bobbio, 1993; Dyzenhaus and Poole, 2013.

22 Masferrer and Taitlin, 2014, pp. 105–128.

23 Ballesteros, 1974, p. 16; on this matter, see also Cotta, 1963, pp. 171–189; 1965; 1964.

24 Gearty, 2010, p. 8. According to this author, Hobbes is partly responsible of the fragility of liberties and fundamental rights in the current Western legal culture: ‘(...) there is no doubt that Hobbes remains hugely influential (...). Hobbes’s residual theory of liberty has proved of immense influence.’

In my view, modern constitutionalism needs to be approached from a historical and comparative perspective in order to better understand how the Holocaust was allowed to occur or how some fundamental rights have been violated in different contexts and situations such as in the fight against terrorism.²⁵

A comparative approach to the development of the rule of law and its limits, that is, the fundamental rights of individuals, reveals the existence of three distinct areas: 1) the constitutional, 2) the legislative, and 3) the doctrinal. A historical analysis of these three areas shows divergent developments and contradictions. While modern constitutional texts include a growing list of principles and fundamental rights, such rights might be barely respected by laws introduced by governments whose nearly all-embracing executive powers are difficult to limit and control.²⁶

Moreover, if the progressive weakening of human rights in post-modern thought is added, as much in legal sense as in political philosophy, it is understandable how nation-states might exercise their power beyond – theoretically clear – constitutional limits and reasonable standards of humanity and justice, as happened during the Holocaust (under a totalitarian regime, as was the Nazi regime) or when fighting against terrorism (in the context of liberal democracies governed by the rule of law). It is undeniable that liberal states and modern constitutionalism that buried the absolutist power of the *ancien régime* were unable to protect millions of people in the West from totalitarian regimes, two World Wars, and the Holocaust.

One might wonder why our liberal constitutions, with the rule of law and recognition of fundamental rights, became a failure in the 20th-century Western world, being unable to effectively protect and save people from destruction, devastation, violence, and death. Although a proper answer to this question would go beyond the limits of this study, I would summarize my answer by referring to three reasons that might partly explain why our Western constitutional systems failed. As will be seen, all of them reflect the flaws and contradictions between the purpose of laws and legal institutions in modern liberal or constitutional democracies and the cultural, philosophical, or ideological ideas that permeated society, particularly political and economic agents.

2.1. The Primacy of National Sovereignty and Legislative Supremacy Over Fundamental Rights

The first reason of the failure of modern constitutionalism in preventing the Holocaust is related to the primacy of legislative supremacy over fundamental rights in the Western tradition, particularly in Europe under the influence of the French Revolution and Rousseau's notion of 'law as the expression of the general

25 See, for example, Masferrer and Talavera, 2022.

26 Masferrer, 2013a, pp. 37–60; see also Masferrer, 2013b, pp. 277–302.

will'.²⁷ For Rousseau, legislative supremacy – as the most significant expression of the principle of national sovereignty – took priority over fundamental rights. This is why European modern constitutions sacrificed the protection of fundamental rights in favour of a will theory conception of law (as shall be seen) that precluded any constitutional entrenchment of rights.²⁸ This also explains why European constitutionalism, in contrast with North American constitutionalism, had not succeeded in ensuring an adequate system of protection for individual rights. In the first half of the twentieth century, a new variant of European constitutionalism developed that recognized the normative character of constitutional texts. Some examples of this are the Constitutions of Austria (1920), Spain (1932), Italy (1947), and Germany (1949). However, this change did not resolve the problem of inadequate protection given to fundamental rights in states subject to the rule of law, states which continue to suffer from the contradictions and insufficiencies caused by the primacy of the principle of national sovereignty,²⁹ a principle that allows for the tendency of the state or the prevalent political force at its helm to assume absolute control and so severely limit individual freedoms.

The contradiction was that, while declarations and modern constitutions clearly stated that fundamental rights did not emanate from sovereignty but from nature, laws understood as the expression of the general will maintained priority because they stemmed from the principle of national sovereignty, so this primacy precluded the constitutional entrenchment of rights. Let us describe this contradiction between the legislative texts and the political philosophy approach to law and fundamental rights.

As said, declarations and modern constitutions clearly stated that fundamental rights did not emanate from sovereignty but from nature and, for this very reason, they should be recognized or declared but not created by state power. Furthermore, as these fundamental rights were inherent to man, the state was not entitled to deprive or dispossess individuals of them, and they were therefore not at the mercy of a pact of any kind. It is important not to forget that the creators of the first declarations and constitutional texts, both in Europe and in North America, assumed the existence of a series of rights that stemmed from nature and were intrinsic to man. These rights were pre-political in character, and it was accepted that men, once they had formed political communities, could not have them taken away by virtue of any pacts or agreements. Section I of the Declaration of Rights of Virginia expressed this idea in the following way:

27 Rousseau (1762) stated that the citizen's civil and moral freedom should be embodied in a settled disposition, to accept 'the supreme direction of the general will' as the basic rule of his preferences, decisions, and conduct (I, 6), and holding that 'the constant will of all the members of the State is the general will, which makes them citizens and free' (IV, 2); see Foley, 2021, pp. 614–633.

28 Masferrer and Taitlin, 2014.

29 See Kotzur, 2003, pp. 85–122.

That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

The American Declaration of Independence went even further by affirming, after having insisted on the inalienable quality of fundamental rights, ‘To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.’³⁰

From this perspective, the function of governments, whose power derives from the consent of those they govern, is to guarantee and protect fundamental rights. The same idea was expressed in the Preamble to The Declaration of the Rights of Man and of the Citizen, which explains that the purpose of the Declaration is:

To set forth in a solemn declaration the natural, inalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties.

The same document, after stating in its first article that ‘Men are born and remain free and equal in rights.’, goes even further by declaring, ‘The aim of all political association is the preservation of the natural and imprescriptible rights of man.’

It is precisely because these rights were declared to be natural and imprescriptible that the French Constitution of 1791, when guaranteeing a number of these fundamental rights in its First Title, stated, ‘The legislative power may not make any laws which infringe upon or obstruct the exercise of the natural and civil rights recorded in the present title and guaranteed by the Constitution.’

The idea that fundamental rights, being grounded in the very nature of human beings, are not dependant on the sanction either of public powers or of the people or nation in whom or in which sovereignty is vested, is an idea at the very heart of modern Western constitutionalism, so much so that almost all international declarations and constitutional texts over the last two hundred years continued to state this principle unambiguously.

However, the ideas of Rousseau concerning sovereignty and legislation as the expression of the general will, which formed part of the first declaration and constitutional texts, were pernicious. A detailed study of the work of Rousseau reveals the extent to which he conferred on the state and legislation absolute

30 Paragraph II of the Preamble to the Declaration of Independence of the United States of America (the 4th of July 1776).

value, placing them above – and not at the service of – humanity. Rousseau presented the notions of sovereignty and legislation as being interlinked,³¹ but he defended the superiority of legislation as it represented the expression of the general will and carried with it the force of democratic legitimacy.³²

Sovereignty, according to Rousseau, could not be divided; all one could do was to differentiate the various functions of the state, and this idea would have an enormous influence on French thought. From a political perspective, one could make a distinction between ‘will’ and ‘force’, and while the notion of will corresponded to the functions of the legislature (whose task was to determine the will of the nation and enact legislation in accordance with this will), force was the province of the executive power (who carried out the mandates of the law or forcibly executed them). His conception of the separation of state powers was not a balanced one, as the legislature was granted supremacy over the others. Jiménez Asensio has made the following point:

one of the consequences derived from the superiority of the legislature was the inexistence of a legal hierarchy between the Constitution and ordinary legislation. Legislation was the expression of the general will, and the Constitution was simply one more law among others that served to codify certain principles concerning political relations.³³

These new ideas broke with the traditionally accepted Roman principles according to which the will of the monarch was legally binding (*quod principi placuit legis habet vigorem*),³⁴ but his actions were not constrained by law, as it was believed that the monarch was above the law (*princeps legibus solutus est*).³⁵ The new system adopted was based on the principle of legislative supremacy, and the law, as well as being the expression of the general will of all citizens, without

31 In the opinion of Rousseau, the notions of sovereignty and of legislation as the expression of the general will are closely linked: ‘Sovereignty, being nothing less than the exercise of the general will, can never be alienated, and the Sovereign, who is no less than a collective being, cannot be represented except by himself: the power indeed may be transmitted, but not the will (...). Sovereignty, for the same reason as makes it inalienable, is indivisible; for will either is, or is not, general (...) It is therefore essential, if the general will is to be able to express itself, that there should be no partial society within the State, and that each citizen should think only his own thoughts’ (Rousseau, 2007 [1762]).

32 ‘Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same, or other; there is no intermediate possibility. Every law the people has not ratified in person is null and void – is, in fact, not a law. The people of England regard themselves as free; but they are grossly mistaken; they are free only during the election of members of parliament.’ Jiménez Asensio, 2005, p. 71.

33 Jiménez Asensio, 2005, p. 71.

34 Institutions 4, 1.

35 Institutions 3, 31; in this respect, see the classic study by Wyduckel (1979).

discrimination of any kind,³⁶ was obliged (at least in theory), to guarantee the freedom and natural rights of all individuals.³⁷ The law would now state clearly what could be demanded as a right,³⁸ who could be charged and condemned for committing a crime,³⁹ and it would make civil servants legally accountable for the actions they carried out while discharging their duties.⁴⁰

However, how could all this be compatible with the unlimited popular sovereignty of Rousseau (rather than national sovereignty),⁴¹ and how could it be achieved if legislation, which was intended to be the expression of the general will, was in fact firmly in the hands of a legislative power (and today an executive power) that proved difficult to control? If sovereignty is unlimited, and it is sovereignty (in the absence of any notion of the pre-political dignity of man or a social dimension to mankind that prefigures political society) that is the primary force that shapes society, then how can it be affirmed that ‘the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights’,⁴² or that ‘Law can only prohibit such actions as are hurtful to society.’?⁴³

The effect of Rousseau’s ideas was not to bury absolutism but rather to cause it to shift its centre, by replacing an absolute monarch with a legislature that represented a supposed but non-existent (as such a thing is impossible) general will, free of any theoretical limitations. This led the way to totalitarianism with a veneer of democratic legitimacy.⁴⁴

36 Article 6 of the Declaration of the Rights of Man and of the Citizen: ‘Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the Law (...).’

37 Article 4 of the Declaration of the Rights of Man and of the Citizen: ‘Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by Law.’

38 Article 5 of the Declaration of the Rights of Man and of the Citizen: ‘Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by Law, and no one may be forced to do anything not provided for by Law.’

39 Article 7 of the Declaration of the Rights of Man and of the Citizen: ‘No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by Law (...). But any citizen summoned or arrested in virtue of the Law shall submit without delay, as resistance constitutes an offense. Article 8: (...) no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense.’

40 Article 15 of the Declaration of the Rights of Man and of the Citizen: ‘Society has the right to require of every public agent an account of his administration.’

41 Duguit, 1937, p. 133.

42 Article 4 of the Declaration of the Rights of Man and of the Citizen.

43 Article 5 of the Declaration of the Rights of Man and of the Citizen.

44 Ballesteros, 2006, p. 115: ‘In effect, totalitarian democracy is possible and the revolutionary Convention proved that; it arose in an environment in which the general will was believed to serve as a supreme principle, and individual rights were subordinated to the will of the collective

Rousseau envisaged 'a form of government that placed the law above man', a system in which the individual would be free as a consequence of the supremacy of the law.⁴⁵ However, in my opinion, Rousseau's understanding of the relationship between sovereignty, the law, and freedom was based on unrealistic premises that generated irresolvable contradictions.

One of the clearest contradictions in the work of Rousseau concerns his concept of national sovereignty, a concept that various authors have described as 'dogma'⁴⁶ or an idea he endowed with the quality of a 'supernatural force'.⁴⁷ This myth or dogma, would, when it collided with the cult of individual liberty,⁴⁸ inevitably result in the violation of fundamental rights,⁴⁹ because, following Rousseau's vision, the will of the nation (in contrast with the proclaimed individualistic goals of the liberal revolution)⁵⁰ must always prevail over the will of the individual.⁵¹

entity. This conversion of the general will into an absolute principle led to the logical necessity of eliminating dissenters, who were seen almost as delinquents.' Concerning totalitarianism and democracy in relation to Rousseau, see Talmon, 1956, pp. 41 et seq.

45 In connection with this, Rousseau believed, 'A free people obeys but it does not serve; it has magistrates but not masters; it obeys nothing but the laws, and thanks to the force of laws, it does not obey men (...). A people is free, whatever form its government takes, when it sees in him who governs it not a man but the organ of the law. In a word, liberty always follows the fate of the laws, it reigns or perishes with them, I know nothing more certain.' Rousseau, 1964, p. 842; see Rousseau, 2007 [1762]; concerning the correspondence of individual will with that of the Nation, following the tradition of Rousseau, see Paine, 1962, p. 243: 'Every citizen is a member of the Sovereignty, and, as such, can acknowledge no personal subjection; and his obedience can be only to the laws.'

46 Duguit, 1922, p. 56; for a criticism of Duguit's notion of sovereignty (with respect to Public Law) and liberty (concerning Private Law), see the study by Grimm (1973); a review of this study can be found in the *Anuario de Filosofía del Derecho*, 1975, written by Jesús Ballesteros.

47 Duguit, 1922, p. 57.

48 Duguit, 1922, 57–58: 'The cult of individual liberty was established together with the myth of national sovereignty.'

49 Duguit, 1922, pp. 213–214: 'Many theologians of individualism have tried hard to explain it, but without success, because the result is always the same, either national sovereignty should disappear for the benefit of individual freedom, or individual freedom must be sacrificed on the altar of national sovereignty, and this result comes about regardless of the sophisms employed in order to maintain both national sovereignty and individual rights intact.' On this point, see the following extracts from Rousseau: 'Each man alienates, I admit, by the social compact, only such part of his powers, goods and liberty as it is important for the community to control; but it must also be granted that the Sovereign is sole judge of what is important.' (*The Social Contract*, Book II, Chapter 4); 'Moreover, the alienation being without reserve, the union is as perfect as it can be, and no associate has anything more to demand: for, if the individuals retained certain rights, as there would be no common superior to decide between them and the public, each, being on one point his own judge, would ask to be so on all; the state of nature would thus continue, and the association would necessarily become inoperative or tyrannical' (*The Social Contract*, Book I, Chapter 6).

50 A concise study of the myth of a self-sufficient society as a reaction to the Absolute State is given in García de Enterría, 1981 [1972], pp. 13–31.

51 This entails that 'the individual is unable to feel complete except as part of the State, and the State may be all-powerful without diminishing the autonomy of the individual. This is what Rousseau is saying when he affirms that, as a consequence of the social contract that creates the

This inherent contradiction is what provoked the French constitutionalist Jean Duguit, writing just after the First World War, to produce a ferocious critique of the liberal dogma of sovereignty, and of Rousseau in particular,⁵² whom he characterized as ‘the pontiff of national sovereignty.’⁵³

2.2. A Voluntarist Conception of Law, or the Will Theory of Law

As seen, the primacy of national sovereignty over fundamental rights was owed to the fact that law was understood as the expression of the general will. Defining law as pertaining to will rather than to reason is, in my opinion, the second factor that explains how laws could allow for and support the Holocaust.

I think that grounding law on will, rather than on reason, notably contributes to weakening the rule of law (*Rechtsstaat*) in constitutional democracies.⁵⁴

In *The Prince* (1532), Machiavelli separated politics from the common good and regarded the former as an instrument to keep and increase power (Chap. XVII).⁵⁵ He viewed power as the ‘exercise of command’. From then onwards, the notions of ‘power’, ‘command’, and ‘domination’ became notably close. It is the one who commands that has the power. Thus, power meant the capacity to command or give orders, and law was understood as the will of those who have power. From this conception of power as ‘domination’, the exercise of power is based on the command–obedience relationship, no matter the political regime (aristocracy, oligarchy, or democracy). In *Animal Farm*, George Orwell magnificently described this conception of power as ‘domination’, showing how a revolutionary process can degenerate, giving rise to a dictatorship. The accumulation of much power by the ruling class brings with it the identification between law and the will of government, between law and command, between citizen and subject, between abiding by the law and subjection, between order and repression. This triggers discrimination, injustice, and cruelty. The French and North American revolutions changed this system, establishing the rule of

collective will, individuals, by obeying this will, are in fact only obeying themselves. The more powerful this collective will is, the more powerful are individuals, as the collective will is made up of these individual wills. By affirming the limitless sovereignty of the collective will of the State, one affirms the limitless sovereignty of the individual. Individual autonomy is realized in State sovereignty and because of this sovereignty’ (Duguit, 1922, pp. 215–216).

52 Duguit, 1922, p. 214: ‘The instigator of these sophisms is indisputably J.J. Rousseau, who by a singular error is often cited as the inspiration for the liberal Declaration of Rights promulgated in 1789, when the truth is quite to the contrary, he is the originator of all doctrines of dictatorship and tyranny, from the Jacobin doctrines of 1793 to the Bolshevik doctrines of 1929 (...). It is sufficient to simply open the Social Contract to see how J.J. Rousseau sacrifices individual rights without reservation to the power of an all-mighty State.’

53 Duguit, 1922, p. 285.

54 Masferrer, 2016; 2017, pp. 493–545.

55 (1532) Chap. XVII.

law and the subjection of the state to law.⁵⁶ However, the new political regime did not prevent the introduction of legal positivism, whose roots can be found in 13th-century nominalism.⁵⁷

According to von Jhering, there can be ‘no law without coercion’, ‘coercion makes the State and Law’, and ‘law without coercion is an empty word; it is like fire without burning’.⁵⁸ According to legal positivism, political power was the foundation of positive law, assuming the risk of identifying law with force (coercion, capacity of command) and overlooking any kind of axiomatic or ethical dimension of law.⁵⁹ In legal positivism, law and political power are inextricably linked. Positivism, abdicating from the pursuit of any kind of substantive or axiomatic justice, sought a formal justice to legitimize the exercise of power. This conception of law reinforced the identification between power and command, between law and coercion. *Animal Farm* shows the pernicious effects of reducing justice to a matter of conferring legitimacy on the exercise of power. Precisely because of the high degree of legitimacy of the new political power which revolutionary legitimacy conferred on the farm, the new ruling class converted ideology into power; they transformed their representative function into a capacity for giving commands, using law as a repressive instrument to ensure that orders were observed (coercion). The novel even shows how the ultimate criterion of legitimacy, namely the ‘constitutional’ principles of the animals, might be distorted or manipulated through a biased interpretation and used to justify authoritarian commands, violent executions, and other kinds of abuse.

The key issue for contemporary constitutional democracies does not consist solely in setting up effective procedural mechanisms to grant legitimacy to governments but in establishing effective controls over the exercise of power as a means to avoid its degeneration into domination and to guarantee its relation to axiomatic or ethical criteria. For that to be feasible, law needs to be based upon reason, not upon will; otherwise, the will of the state would be enough to perfectly justify and legitimize almost any measure in the name of security, the notion upon which the modern ‘social contract’ was built by political philosophers, from Hobbes to Rousseau.

2.3. The Rejection of Human Nature and Natural Laws

As said, the positivistic approach to law is based on the idea that law is coercion, command, exercise of power. All these definitions reveal that law stems from will, not from reason and rationality. Since modernity ceased to believe in the

⁵⁶ Masferrer, 2013a.

⁵⁷ Masferrer, 2020.

⁵⁸ von Jhering, 1913, pp. 73, 176, 190.

⁵⁹ Masferrer, 2020.

ability of reason to grasp what is true or false, good or evil, and, consequently, the knowledge of the common good was beyond human capacity, some authors took a step further in even denying the existence of a good that may be considered as common to all humans. The dualist conception of human beings, as Descartes pointed out in separating between *res cogitans* and *res extensa*, which led some philosophers to mistakenly identify human nature with just the latter, contributed to the vilification of human nature (physis or body, understood as *res extensa*) as an obstacle and limitation to human freedom (spiritual or mind, understood as *res cogitans*). This explains why modern ‘social contract’ theories were based on the need to overcome a ‘state of (human) nature’ which limited and precluded human development and peaceful coexistence. In other words, human nature needed to be overcome and replaced by an agreement or social contract as the only way to guarantee freedom and security.

Note that, if the basis of any contractual agreement is the will of the parties, and if law is based on a contract that seeks to overcome the limitations of nature (including a human nature reduced to *res extensa*), the consequence is twofold: i) law is based on the will (rather than on reason), and ii) no realities such as ‘human nature’ or ‘natural laws’ should be considered in making laws.⁶⁰

This is why the will theory of law led to a positivist conception of law that rejected both human nature and natural laws (in the works of John Austin, Jeremy Bentham, Hans Kelsen, etc.). Such rejection has obvious consequences. If there is no human nature, there are neither natural laws nor natural rights (or pre-political rights); if there are no natural rights, then rights are not supposed to be recognized, but created, by the state. In short, individuals are not protected in their rights because they deserve it (by the fact of being humans) but because state power decided to approve laws to protect individual rights. Rights belong to the state, not to individuals, because they surrendered them all to the state.⁶¹

The rejection of human nature has other consequences indeed. If there is no human nature, then not all the people are equal, as expressed by George Orwell in *Animal Farm* (1945): ‘All animals are equal, but *some* animals are *more equal than others*’ (emphasis added) – a statement that could be easily paraphrased to humans as ‘All men are *equal*, but *some men seem to be more equal than others*.’ If there is no human nature, then some men have more rights than others. If there is no human nature, then there is no common good either; if there is no common good and there are only individual interests, then the state becomes the source of peace and security, gaining primacy over individuals, becoming the Leviathan

60 For a more developed description of this issue, see Masferrer, 2020b, pp. 1–27.

61 Note that, unlike Thomas Hobbes and Jean-Jacques Rousseau, John Locke defended a social contract whereby individuals did not surrender all their rights, so the state had the obligation to recognize and protect some fundamental rights (freedom, security, property) because they belonged to individuals and the state had no power over them.

– as Thomas Hobbes argued – or the *Totalität* – as Hegel defended –, wielding ‘absolute power so that the government is free to exercise control over the lives of its subjects by whatever means possible’.⁶²

It is no coincidence that the rise of this political philosophy took place concomitantly with the emergence of totalitarian states, nationalism, racism, and genocide. In fact, such philosophical ideas paved the way for and justified unmeasured and despotic exercise of power. Thus, it is highly convenient to grasp the real impact of the denial of human nature in terms of fully understanding the relationships between law and power, law and morality, law and culture, as well as the voluntarist notion of law. Note that all these relations were completely affected by the shift from an Aristotelian to a Cartesian conception of human nature, namely from an Aristotelian human nature whereby man is a social animal (so nature does not limit but enables human freedom and development) to a reduced and distorted version of the Cartesian dualism that identified human nature with the body separated from the mind.

Within such a philosophical and political-philosophical conception of human nature, common good and law alike, it is easy to understand that law could not constitute an effective limit to state power anymore but rather became a means in the hands of the Leviathan, a state that can do almost everything it pleases. With a formalistic law, a law without any substantive or axiological content, in a society composed of individuals without a common ground recognized by the state and the law, and without a common good (belonging to all humans), it was just a matter of time and particular historical circumstances that humanity would be led to disasters such as World War II and the Holocaust.

Summing up, it could be said that the denial of human nature makes the search for the common good impossible; if there is no common good, everything is relative; if everything is relative, law becomes a formalistic reality without any substantive content, so everything is contingent and negotiable; if law has neither substance nor axiological content, then law cannot limit state power and is put at the service of state and political interests, and the state is again placed above the law. What should limit state power is put in the state’s hands without any restriction once the law has been emptied of any substance or axiology that might effectively limit state power and protect individuals in their dignity.

62 Aghamelu and Ejike, 2017, p. 249: ‘(...) he presents the state as an absolute entity to which every individual must be submissive unconditionally. For him, the will of the state is the universal will, the will of the Absolute, and so cannot be challenged or questioned by any individual. He recognises unlimited interference in the individuals’ rights and freedom. The implication of this is that the constitutional monarch, which Hegel advocates as the head of the state, wields absolute power so that the government is free to exercise control over the lives of its subjects by whatever means possible’.

3. How Can This Be Reversed? How to Prevent It from Happening Again?

This is the second question of my study. Answering it will be much shorter than the previous one.

I described the contradictions and weaknesses of modern constitutionalism, and how some political philosophies (Hobbes, Rousseau) gave primacy to legislative power to the extent of leaving the recognition of fundamental rights to a secondary level and institutionally unprotected. In this vein, I argued that Rousseau's ideas did not bury absolutism but rather shifted its centre, by replacing an absolute monarch with a legislature that, expressing a supposed general will, was free of any theoretical constraints.

This is precisely the lesson that Europe learnt after World War II, giving rise to the constitutional state of law (*Rechtsstaat*). Rousseau's approach, which gave rise to the legislative rule of law, is the one that the new model of the 'constitutional rule of law' sought to overcome, through constitutional supra-legality controlling the legislature and a direct guarantee of fundamental rights. In this sense, the new European constitutional model became similar to the American model.

It is then appropriate to highlight here the difference between the constitutional state of law, in the European version, which arose after World War II, and the 'legislative state of law', which was consolidated after World War I and which had a merely programmatic constitution with little binding force, as I described above. Current neo-constitutionalism (Alexy, Habermas) arose precisely as a consequence of the devastation caused by totalitarian states, which showed the deficiency of a system based on the absolute power of the legislature, a transmission belt for the executive, therefore with the capacity to make laws that allow or promote atrocities. Constitutional control of the legislature by national supreme (or constitutional) courts and the direct judicial guarantee of fundamental rights (judicial review) were established as the counterweight to the above-described deficient model of the 'legislative' rule of law. The new model of constitutional state somehow makes the violation of fundamental rights or constitutional principles more difficult – at least in theory.⁶³

In practice, however, the danger of political or ideological colonization of supreme or constitutional courts is notable and real, as can be seen both in the US and in Europe. Thus, the theoretical purpose of the new model of the constitutional state (preventing the violation of fundamental rights or constitutional principles) is one thing, and its real or practical operation – particularly when court members are appointed by political parties, and then seem to be more attentive to political

63 On this matter, see Regla, 2019, pp. 85–100; see also Ansuategui Roig, 2008, pp. 81–90.

interests than protecting human rights and the dignity of all, particularly of those most vulnerable – is quite another.⁶⁴

In my view, there is only one way to reverse the picture I have just described: Western culture needs to regain, retrieve, or recover *humanity*. Note that the expression ‘crimes against humanity’ was not the result of theoretical work but a way to describe some violations of rights that started to occur at the end of the 19th century in the context of slavery and colonialism, more specifically when George Washington Williams spoke about slavery in the United States (1883), when referring to the slave trade in Africa as a ‘crime against humanity’ (in the first annual message in December 1889, of U.S. President Benjamin Harrison) or when describing the atrocities committed by Leopold II of Belgium’s administration in the Congo Free State (in a letter by George Washington Williams to the United States Secretary in 1890).

The expression ‘humanity’ cannot be detached from human nature without losing its proper content. Human nature allows us to search – in the context of a plural and deliberative democracy – for the common good. Only through the recognition of the existence of human nature and a good common to all humans is it possible to protect human dignity and will the human rights stemming from it be truly humane and provided for all humans (not just for some depending on their capacity, talents, or other reasons).

In doing so, we can resort to history, as the drafters of the *Universal Declaration of Human Rights* did in 1948, when using the expression ‘human dignity’ or ‘inherent human dignity’, which originates from Kant and from other philosophers, political philosophers and lawyers who had been using the expression ‘dignity of human nature’, fully aware that human dignity precisely stemmed from – and found its roots in – human nature.⁶⁵

Grounding dignity upon human nature is relevant to distinguish between ‘natural dignity’, ‘moral dignity’, and ‘social dignity’. If human nature matters, then common good can be searched and grasped by human reason and deliberated through dialogue in the public discourse. Then law, which is not just mere will or coercion but also reason – thus needing to be justified and legitimated through rational arguments –, is endowed with a substantive or axiological content that enables it to put limits to state power because it contains some principles, values, and rights that are always above the political power, and states have the main duty of protecting and promoting natural or pre-political rights.

One may wonder whether we are now heading in this direction. I am afraid we are not. Today’s politics seems to be at the service of the economy and powerful corporations, and law to be at the service of politics. This explains why it fails to

64 Masferrer and García-Sánchez, 2016, pp. 1–25.

65 Morsink, 2009; see also references in footnote no. 50.

protect all people, particularly the vulnerable, despite – or, partly, precisely because of – the increase of human rights, some of which do not seem to be really *humane*.⁶⁶

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66 On this matter, see Masferrer, 2024, pp. 41–57.

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