EXECUTIVE SUMMARY:

LAW MAKING IN THE COMMON LAW.

GROUNDS FOR

A COMPARATIVE CONSTITUTIONAL LAW ANALYSIS

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The following thesis constitutes the realisation of the core axis of a line of research directed towards the analysis of the convergence between legal systems in the context of legal globalization, particularly, two of the main families or legal traditions, common law and civil law in the field of European Union integration. This research proposal was made to me by Professor Almudena Bergareche Gros, based on my research interests, training needs, and prospects of confluences with her personal research line. The first required step towards this objective was a thorough approach and analysis of the common law as a legal system and its constitutionalism. This matter has been the subject of the thesis we put forward here.

We realised this question after finishing our master’s thesis where we studied the fundamental principles of the British Constitution. For a real study of the confluence of both legal systems it was essential a careful examination of the fundamental elements of the two previous scientific objects which are generating a third object of study. Starting from our familiarity with one of these objects, the tradition of civil law, where is incarnated the Spanish legal system, our goal is directed towards achieving a knowledge of the second object of study, as a key stage to understand the dynamics of convergence. The breadth and complexity of the subject, along with the interest of finding the core element that will give us the perspective around which develop our research led us to move towards the analysis of law-making process at the common law by the following reasons:

Firstly, taking into account basic assumptions deeply rooted in our legal culture about the relationships and differences between common law and civil law, being the most important of them the usual differentiation that identifies the first as a system based on the particularity of each case and focused on the court decision and therefore supports certain discretion for the judge before particular
conflicts that reach the courts, from the second that boasts a codified body of general abstract rules that determines and defines the possible applications and rulings, we soon reach signs that warned us that these assumptions had been largely overtaken by historical developments despite its usefulness as analytical criteria. This distinction revealed the desirability of directing our attention to the ways in which law is made in both legal systems and revisit this issue, which we found insufficiently addressed despite its fundamentality.

The second reason lies on our desire to direct our research efforts towards the confluence and integration of both legal systems, understanding this phenomenon as a progressive acquisition of common elements in the form of normative provisions and similar institutions, whether substantive or adjective. We were aware that this confluence necessarily is built from the respective law-making process of each legal system. Then, a prospective comparative law exercise came up.

The production methods or sources of law rules allow us to recognize the normative provisions of a legal system, and their relationship in a hierarchical structure allows us to identify them as a system. Upon the law-making process comparative lawyers have built their doctrine. Theorizing about rules has allowed them to induce macro-concepts such as family, tradition and legal system, basic concepts that define the object of research, establish a first general concept that allows the classification from this, and turns out to be the paradigm that historically enabled the origin and growth of the discipline of comparative law, the above mentioned difference between the case law and the statute law as common law and civil law respective cores.

We believe that the attention to this scientific object has not been wide enough at the Spanish academy. Both the relative small number of jobs and their limitated object prove this statement. While we can find a number of translations estimable, these correspond to very specific works without connection between them. Obtaining a panoramic image is almost impossible then, unless some familiarity is acquired previously. Revisiting the law-making process at the common law became an excellent motive for a comprehensive contextualization of
this legal system and its constitutionalism, fact that has determined this thesis structure.

This work is divided into two main areas, the common law as a legal system (chapters I to III), and its relation to English constitutionalism (chapters IV and V), ending with some conclusions related to our research.

The first chapter analyzes and discusses the genesis and evolution of the common law, examining the development of its main features during nearly a thousand years history. We have organized this chapter into six historical periods, from Anglo-Saxon legal systems previous to its establishment in 1066, its appearance, the special relationship between the common law and Roman law, the acquisition of its classical form during the fourteenth and fifteenth centuries, and its transformation before the petrification risk in the sixteenth and eighteenth centuries, recording lastly its contemporary trends. Given the characteristics of our object of study as a historical product, the first approach to it must be a historical introduction.

We supplement this view by examining the work of the writers we considered most relevant for our research purposes. Within the range of authors that deserve our attention, and considering the limitations of this research, we have been forced to select those that we considered most representative, which stand out for their contribution to the common law as a legal system in its different historical periods, and those whose work conform part of the common law as a source of law. Therefore, we have chosen Bracton, Coke and Blackstone. Remaining relevant authors have not been ignored though; their contributions have been analyzed in this thesis in relation to the matter that is under consideration.

Once we are set with the proper elements of the framework where is incardinated our study, we addressed the law making process in the common law. To do this we start from the concept of rule in the common law, including both practical and theoretical senses. This concept of legal rule determines the structure and organization legal system. Finally, we give close attention to the various sources at common law, starting with basic questions about case-law, with special attention to the precedent and its enforcement mechanisms, particularly the
analogy; and statutory law, taking into account the particular integration of statutes, and the distinctive delegated legislation. We continue with equity and custom always related to the earlier as main sources. These have been analysed from historical, theoretical and practical perspectives.

In the second part of this thesis we study the interplay of the sources of law with the political organization where is incardinated. We analysed in chapter four the key elements of British constitutional law. After a brief historical look at its fundamental principles (parliamentary sovereignty, rule of law and separation of powers), we study its organs (Monarchy, Parliament, Judiciary and Government Organization and Administration), its complex territorial organization, and its special conception of citizenship and protection of individual rights.

Since this legal and constitutional system has developed in the geographical areas the British presence and influence has extended from the historical form of the British Empire to the present organization of the Commonwealth, the fifth chapter is focus on the analysis of the models we have estimated as most representative of this constitutional and legal system transplant: Australia, South Africa, India, the United States of America, and Canada. They are all models of this process, showing common characteristics and at the same time historical adaptations to their environment, making them worthy of deep study, although again due to the limitations of this work we have made brief descriptions, but consistent with the objectives of this research.

Finally, we have tried to put forward some conclusions of the work in the sixth chapter, identifying the key milestones found, the confluence of our research with the director of this work, Prof. Dr. Almudena Bergareche Gros', and try to contextualise it at the comparative law discipline and within the phenomenon of legal globalization, advancing further development of research lines.

According to the object of analysis in the development of this thesis we have adopted a legal perspective, namely positive and historical, and open to the sociology of law, as we have tried to approach to it from legal facts and the historical and social reality in which they develop. And with regard to the scientific method we have used is to reconstruct the concepts of the object of study guided
by legal analysis by both historical and social references as by classical writers. The choice of method is therefore the need to rebuild the legal concepts in order to build strong bridges that allow us to bridge the gap between common law and civil law, such as reaching from the continental jurist position a deep understanding of the common law. To do this we have not hesitated to use auxiliary legal research methods such as the exegetical, dogmatic and jurisprudential.

1. We are going to put forward the main conclusions we have reached, at the same time we link our line of research with our thesis advisor Almudena Bergareche Gros’ line and we try to focus on future scientific goals at the Comparative Law field, under the framework of the current legal globalization, taking the European Union as the paradigmatic case of integration of legal systems from diverse traditions.

Observing common law’s origin and evolution allowed us to note that the procedural law determines the substantive law. This fact is characteristic of this legal system, originated in the royal courts established after the Norman Conquest in 1066. These courts extended and deepened their jurisdiction comprehensively through the whole kingdom, repealing the native legal systems. The main source of law making is case law, based on the precedent as a rule to make law, instead of statute law, an occasional source until the Nineteenth and Twentieth centuries. This legal system induces its legal principles and general rules from every particular case, from the decision taken on analogous circumstances. Using this method lets to continuously reconstitute the generality from the social reality, after being normatively recognized and judged by the courts, in a judicial process where parties face each other, and it is decided by a judge or jury that is part of a judicial system interconnected. This feature allows a broader participation in the law making process than a unique and limited specific legislator who just allows a mechanical deduction of a generality that which subsumes and regulates the particular. A good example of this fact was the solution adopted to the jurisdiction crisis of the Fourteenth and Fifteenth centuries: the erection of a new overbidding jurisdiction, equity, with a law making power free from the bonds that impeded the innovation in the common law though. When this jurisdiction crisis is repeated
again in new circumstances in the Nineteenth century the way out was to unified these two jurisdictions, however respecting them us autonomous but linked normative corpus. The making law process in the common law counts with an interrelation and integration tool more proper for connecting and ruling de social and political systems with the legal system than its civil law tradition’s counterpart. Furthermore, it doesn’t neglect the advantages of the statute law and it doesn’t denature it as an auxiliary way of law making.

For this reason, we can affirm that the common law produces a legal system with a practical appearance closer to the Roman law’s one. Firstly, we have checked that there presence and influence cores of Roman law in England: the conversion to Christianity of the Germanic people invading England, the research and teaching of Roman law at the universities of Oxford and Cambridge, the cannon law for its effective normative regulation and for the training of jurists who will practice in common law jurisdiction and equity, borrowing elements from this legal system (such as the accusatory process) and at the prerogative courts where elements of civil law are received, along with the influence of Scots law and the development of commercial law, and, of course, in its scientific method and in the structuring of this law made by its first authors GLANVILLE and BRACTON, and to a much lesser extent, in its precepts and legal institutes. Secondly, the own law making process based on case law helped by statute law is much more similar to the Roman law’s law making process, made by two bodies, the pretor and the jurisconsults, occasionally assisted by imperial dispositions, than the Roman-Germanic legal systems focus on the law.

We do not intend to say that there is here a direct causal link between the characteristics of one legal system with the features of the other. We are aware of the risk of a poor post hoc ergo propter hoc assumption which is not even the object of this thesis. However, reconsidering this issue, usually incompletely analized in our legal culture, and from where we can deduce conclusions that difficult the relations among these two legal traditions, the realization of a more complex phenomenon of influence of Roman law in the common law which we usually accept, and the plethora of methodological possibilities for comparative
law that opens this issue, invite us to persevere in the investigation of this collateral but relevant perspective for our line of work.

The growth capacity of the common law with its law making process has been appreciated in the study of the three classic authors selected. The fact that these authors are facing similar issues from the perspective of its temporal context exemplifies the sense of historical continuity of the common law, reflecting the changes of their legal order drafting a new schematization of this system, task so daunting that we can only speak of partial successes, of consecutive individual approaches, despite being based on previous authors, establishing a connection at the common law by the intertextuality of these authors.

From Bracton we can see in these three jurists the complex relationship between common law and statutory law, and of the law making process based on the axioms of *a similibus ad similia* and consent of the governed, along with the idea of rule of law. All three agree on the participatory nature of the law making process based on the cooperation of the King and the most important men in the realm, until its realization by the confluence between monarch and parliament, requiring the approval of both houses. Their works are reactions in circumstances of crisis the common law, times when it seems to separate from its essence as case law led by precedent. This reaction is embodied in an effort to integrate the changes directed the essential principle of common law, guided by a specific legal reasoning process, as COKE taught us in the case of Dr. Bonham, creating judicial review over statute law. That constitutional sense of the common law is observed again in BLACKSTONE, who considered dangerous to alter its fundamental elements. Hence the recognition of leading role of judges in the creation of law, or strictly following him, in their statement as previously existing law, when judges depart from the precedents for the irrationality of their application to the circumstances that they are coeval, what they are doing is going back to the original interpretation of the law.

Similarly, these authors have pointed out the pattern for proper examination of the connection between the common law, law making process and British constitutional law. It is a profoundly convenient approach to English, and British political organization, and their transpositions as phenomena of legal
expression, and as expressions of the specificities of the common law. They insist on the basis of political organization on the essential sovereignty that, belonging to all members of that organization in a natural state, is relies on a single authority, capable of generating a single will which makes possible the transformation of the Natural State to the Civil State, and that will continue as long as the specific relationship between sovereign and subjects subsists. However, as this sovereign is constituted, the three of them insist on the foundational constitutional value of freedom and individual rights, which are previous to the political organization. In this aspect, along with the original and unique balance of elements present in the first English, and then British constitution, allowing the defense of freedom and individual rights, reflected in related social stratification rests their proud defense of their constitution. We insist, BLACKSTONE and COKE both agree on the concept of common law as authentic constitution, and on its judges as their main strongholds, which ties in with that sense of historical and legal constitution.

We must take into account that historical and legal value at the time of studying the law making process. It help us on our purpose of observing this legal phenomenon from its own perspective, unveiling itself as a method or normative technic rather than a specific normative content, despite possessing normative value, understanding it as a recognition rule for HART, or norm that regulates the law making process for KELSEN. We can recognize here the identification of law as prophecy as it is done by HOLMES, law as a rational expectation of the rules that the courts will apply. The individual judgment contains the statement of a rule, rule due to the precedent is generalized to a set of similar cases, integrating it as a part of a system dependent on those parts, not only as links in a chain, but as a gear that will incorporate new sprockets, bringing them the motion while it gives them the sense.

The precedent thus becomes the essential element of this legal system, its key. We understand the precedent as a rule but endowed with a specific character, as an authentic rule of rules, rules governing the pattern and principle that directs the judge to identify similar cases, the applicable substantive law, and the integration process. Moreover, it is addressed to all the legal practitioners involved in this process, that to achieve a result that closely matches their expectations are
to share the same logic. The doctrine of stare decisis which regulates the exercise of the power of the courts to depart from past precedent and create new ones, is an example of these jurisprudential rules of rules, and being a rule is recognised as a criterion by the common law lawyers, so even the creation of new rules by the judge is incardinated in a principle of legal certainty far greater than we can get by the legislator. Case law is limited to a strict normative space, even more if we compare it with the Sovereign Parliament as we find it the British constitutional model.

So we insist that precedent and *stare decisis* form a mode of legal reasoning, a logic to enforce law in a legal order. From a rule established by a court of law recovered in a new process, the court may apply it as regulatory precedent, or directed to obtain a result considered fair, may apply a strict application of that precedent, or rather to reformulate the rule in that precedent in light of new circumstances by distinguishing it, creating an exception determined by the new case. We are facing a law making process which operates from the transformation of a existing provision that has integrated new circumstances, and generates a new provision. As we have already said, it is a law creation process constrained and directed, compared to the legislative law making process.

Along with the *stare decisis*, we have its methodological principle, analogical reasoning, *a similibus ad similia*. The analogy is legally understood as process to extract normative implications from legal cases identified as analogous, consisting analogy in common law in applying the provision that has been applied in cases considered as analogous. Both identifying cases that are similar and those that differ are part of this process institutionalized by immemorial practice of analogical reasoning in a dialectical context between provisions and cases, thus forming a decision making process basing its legitimization on its rationality, a particular social management process, public and participatory.

We must remember that statute law, despite its position in the hierarchy of source of law, is not free from the dependence of judges as co-creators of law. The statute law, as a general rule, is bound by the interpretation made by judges in its application, that we can to better understand as a process of particular re-creation of rules. A re-creation process again governed by rules of rules, by interpretive
guidelines that are the product of judicial authority to regulate the mechanisms of law-making. We thus obtain a real corpus of rules on which is founded the legal order. Therefore we value neither trivial nor casual that HART theorized his rule of recognition as a common law lawyer, although of course we do not deny the universal validity and usefulness of this concept.

The result of this intense normativization is a deep legal certainty inherent to this specific law-making process is an authentic legal constituted policy. The common law is a actual corner stone for constitutional government, a tradition of founding authority in law. We can read its rejection to the creation of special courts as a rejection of the possibility to escape from law, a rejection to ways out of the ordinary legality. Hence, this argument was COKE’s main weapon against the monarchs’ attempts to expand their prerogative beyond what was recognized lawful at common law, corresponding it with what POCOCK identified as the "ancient constitution".

This mythical character of the constitution directs us to the traditional conception of the British constitution as something close to the ethereal, to the mystical or directly non-existent (we can remember the famous TOCQUEVILLE’s aphorism *there is no constitution in England*), statements that they are all insisting on the specificity of this object of study and the difficulty to approach to it, greater if we continue to seek the element originally cloned in our original environment, like someone who is learning a language comes to the direct translation without regarding the interaction of the terms and context. Can we continue to characterize the British Constitution as non-written? It seems more appropriate to speak of partially written, or better yet, partially encoded, possibly because no other constitution is contained in more documents: *Magna Carta* (1215), *Petition of Right* (1628), *Bill of Rights y Claim of Right* (1689), *the Act of Settlement* (1700), *Act of Union* (1707), *the Parliament Acts* (1911 y 1949), *the Crown Proceedings Act* (1947), *the European Communities Act* (1972), *the British Nationality Act* (1981), *the Public Order Act* (1986), *the Scotland Act* (1998), *the Human Rights Act* (1998), *the House of Lords Act* (1999), *the Terrorism Act* (2000) and *the Constitutional Reform Act* (2005). As we can see the number of constitutional statutes has increased more in the last fifty years than in the previous eight and a half
centuries. There is no constitution outside of the social time’s dictates and the common reaction is to try to ensure through general rules greater defence mechanisms of fragments of generality. We do not want underestimate the unwritten British Constitution, but to relativize and complement the assertion of a not positivisised constitution.

The feature of the British constitution that actually perseveres in its force, despite the apparent inconsistencies and adaptations in its flexibility, rested on the sovereignty of Parliament (feature shared exclusively with Israel and New Zealand), which is an constantly active constituent process related to the legal reconstitutionalization through case law. Its overconfidence in political control is blamed, such argument is also a foundation to explanations and justifications prone to mythologize British political culture, and to justificate its failure to take root as a possible solution elsewhere than British society. Its value is a constitutional alternative, no other regulation of the power struggle. It manages to construct the bifurcation between politics and law, the space that must necessarily belong to politics becomes free of the influence of external inputs, namely a judicial intervention that here is no other thing than the defence of political positions grounded in the legitimizing force of law. For many, the British Constitution forsakes the citizen having no rules protecting the rights against modification by the power of the moment, and instead, what it is doing is recognizing the limits of law in its judicial mechanisms, remember the dangers of not practicing active political participation, leaving it to professionals. The extended solution is the constitutional judicialization of politics as guarantee of inalienable rights, as ferrous limits to power, which happen to be weak if the individual is not an active citizen.

The British academic and political debate is not without advocates of constitutional reform along the lines of continental constitutionalism, a text which set the institutional framework, guarantees of rights, guiding principles, territorial organization, and a high court hearing disputes between constitutional bodies and capable of enacting legislation contrary to the constitution. First, sovereignty would be transferred from its particular current place, the Parliament, to the constitution. And secondly, there are many criticisms around the rejection of
democratically unelected judges directly making political decisions at the same time they are politically irresponsible. From the judiciary, Lord Denning (who acted as Master of Rolls) said that if judges were granted with power to declare the unconstitutionality of sections of Acts of Parliament, they would become political appointments based on political reasons, and the reputation of the judiciary would suffer accordingly. From the academia Professor Loughling rejects legalization of politics, its confinement by the law for the sake of an apparent escape from politics in exchange for reaching a legally imputed certainty and projected timeless. The result is the politicization of law, distorting both areas and their relationship. The solution is to re-look at politics and correct faults in the political process, taking conscience that solution dwells in the political space.

Finally, it has been found a transposition of ideas and legal institutions of the common law along with the transplant of constitutional principles, governance, protection of fundamental rights and legal system, both in terms of law-making processes and normative dispositions. BLACKSTONE guided us as to the mechanism of this process: the English colonist carried with him his right, and was entitled to apply and adapt it to the circumstances of the new environment because it was an uninhabited territory or acquired by conquest or treaty.

Firstly, the constitutional principles of the rule of law and separation of powers are present in all cases analysed, as well it is common to all the abandonment of the principle of sovereignty of parliament due to their written constitutions embedded into modern constitutionalism. Secondly, we find this form of government, the Westminster parliamentary model, in every case except in cases of violent rupture of the bond with the mother country, such us the United States of America and its adapted presidentialism in choosing a own head of state, and certain elements corrected of parliamentarism, in South Africa, where the President is the head of state and government, and India, with a head of state with symbolic powers but with residual powers that are activated in exceptional circumstances. The protection of individual rights is entrusted to the ordinary jurisdictions, with the exception of South Africa due to the apartheid shadow in its constitutional history, reason why the Constitution 1996 incorporated specialized and concentrated to protect individual rights. Similarly, the common law moves to
these latitudes, and from a common origin in its original form in English law, takes
different paths but similar principles that act as a guide, and headed by the
supreme jurisdiction of the Privy Council, until these domains and subsequently
independent states break this judicial bond.

2. This research on the English legal and constitutional space is enshrined
with the research of Professor Almudena Bergareche Gros, director of this work.
The convenience of a deep approach to this space arises once a number of
paradigms have been and them required comparison and confrontation with
English constitutional reality. From her original research on the concept of internal
constitution in the history of Spanish constitutionalism, in particular concerning its
recurring presence in the nineteenth century, which led to the recovery of the
analytical concept theorized by Constantine Mortati “Constitution Material”,
together with other elements of the Theory of Organization.

The application of these theoretical elements is two-way in our research, as
they are extremely useful in understanding the english constitutional phenomenon
and to performe comparative exercises aimed at finding hypothesis between
English and Spanish constitutionalism. This observation opens a line of
comparative research which will be address in future work, as it enables us with
theoretical instruments to address research in comparative law.

First, considering the meaning and use of the concept of internal
constitution in the Spanish constitutionalism from the deeper analysis of the use of
this concept in the development of the Constitution of the Restoration of 1876, she
found the paradoxical consolidation and continuity of this concept in the history of
Spanish constitutionalism, outlining the main lines of continuity as transformation
of the state organization according to the true principles governing the cultural,
economic, political and legal processes in the country in the nineteenth century,
accompanying a particular form of state organization.

Both the European continental enlightened reason and the English
empirical reason, are not present in the Spanish political subject. It lacks of the
economic substrate based on a domestic unit, and the social substrate of a
bourgeoisie as citizenship and holder of certain political rights, nor the substrate of a secularized culture. This inevitably leads to the lack of representation of generality and an identity of interest on which to erect the organizing principle of the state constitution. These are supplemented and hide under the concept of internal constitution, consists of two essential elements, the political unity of religion and hereditary monarchy. To these must be added a mere ideological use of liberal culture. Thus it provides the basis for legitimizing the state organization, managing to continue the system. So the concept of internal constitution of the state implies an organization based on the two aforementioned elements constituting a Administrative State, an administrative organization in constant adaptation to the environment by updating rules.

The recovery of the concept of constitution in the material sense by CONSTANTINO Mortati can serve as a key tool to open paths for constitutional interpretation of Spanish history and establishing an understanding the European Union constitutionalism. This work represents one of the first investigations in the field of constitutional law on the transformation of constitutional theory in the first half of the twentieth century and its impact on constitutional law. The work aims to lay the foundations for a new constitutionalism that breaks some of the paradigms of liberal constitutionalism. To address this crisis constitutionalism to the social transformations of the twentieth century, which was not isolated the Spanish constitutionalism despite their estrangement, characterized by the emergence of mass society and the consequent expansion of the state to all areas of social and economic life, far from solved problem worse comes to our present, and the transformation of the concept of internal constitution of Spanish constitutionalism.

Taking into account the changes made by the fascist regime in the legal order and the problem of integration of new legal sources, MORTATI'S material constitution involves a new principle of the legal validity agreed with the new environment, a framework that has broken the liberal social homogeneity to give place to the plurality of mass society. The author uses the traditional categories of constitutional law and restructures them according to new premises, taking into account comparative constitutional law, especially the English constitutional law,
being important to emphasize here the break with the traditional distribution of powers, introducing a fourth function that will drive all actions of the State. The principle of representativeness crisis overcoming determines the distribution of classical powers to accommodate the emergence of a fourth state function, one that gives unity to the organization and government activity. This function is reserved to the Government legally uncontrollable space, corresponding to the State political discretion. It is the role of political leadership, entrusted to the intelligence, the elites. But this discretionary action is determined by the material constitution. The constitution in the material sense is a fundamental principle, a direction of the social organization, that being the dominant social group itself, is nomodynamics, here recognized and technically constructed as dynamics of a specific organization.

If Mortati already raised the influence of English constitutional law, this question is developed by introducing for the first time in the Spanish language of a constitutional text of G. MOSCA, author known in our country for his political writings, but almost unknown as a constitutionalist. This paper delves into a formalistic as well as a historicist conception of constitutional law and review its impact on both the Spanish constitutional law as in the comparison, especially in the aftermath of the English model at the continental level, establishing trunking lines between the European constitutional process with the English constitutional history, showing the methodological relationships between Constitutional Law, Political Science and Management Sciences, while relevant conclusions are drawn regarding the Spanish constitutional law.

3. These conceptual tools are essential to the practice of comparative law, discipline that despite its scientific development for over a century, and currently living in a boom period, has not yet overcome the doctrinal debate on the consideration of comparative law as a science or as a method, or its limitation to only method. We believe that what is latent in this debate is the inborn use of comparative method by all jurists since ourr training is started, although we do it unconsciously. The lawyer learns and carries out its work by comparing normative contents at least in the legal system where he is immersed, and more and more
frequently in a plurality of legal systems interconnected. However, the international dimension is the essential element to achieve the concept of comparative law as an autonomous science, element that is its essence and form that construct their own knowledge structure and the deduction of general principles and laws.

The history of comparative law has been characterized by a headlong rush in which, although we can find a real scientific advance and the multiplication of its practical exercise, essential methodological issues has not been addressed which materializes in a weak institutionalization. At first, the comparative law needed for being an autonomous science not only an object of study (the international diversity of legal system) and a method (the comparative method), but also the awareness of the existence of a independent science with its own object and methods. These factors do not occur until the Nineteenth century, although we recognize previous comparative law efforts. Max Rheinstein says 1860 is the date when the systematic study of comparative law begins, and 1900 the first International Congress of Comparative Law is celebrated in Paris. As a legal discipline is the latest to join a large and dilated science, with a proper object that coincides with the existing disciplines, but bringing its own perspective.

The reason for this recent origin of comparative law as an autonomous discipline is that in order to compare, at least according to a scientific methodology, we need to compare objects in which we can recognize a common essence, and that through the application of the comparative method we discover differences, all of which is a mere exercise of comparative will if we lack of homogeneous comparative objects. The codification process that spanned around all European states in the nineteenth century gave this common essence.

So the original phase of comparative law is defined by the emergence of the phenomenon of codification process despite being supported by a stratum averse to comparative law for conceiving law as a product of the common conscience of the nation according to the Historical School of Savigny, and therefore unable to take criticism of the legislation, proved to be a breeding ground that will enable the development of empirical comparative law. Then Comparative Law was defined as an objective science with an universal objective, purpose determined by an
unshakable faith in progress, characteristic of the historical context of the late nineteenth and early twentieth centuries. A third period can be seen in the partial rupture of these ideals, along with many others during the two world wars, stage when it became apparent the structural limits to its realization. Finally, the current phase is determined by amplification and deepening of the global legal space, its constitutionalization that makes compulsory comparative law. And as we advance, during these four stages the weak institutionalization of comparative law coupled with unresolved methodological dilemmas has been constant, although its practice has spread uninterrupted temporally or physically.

This is not to say there is lack of methodological proposals. We start with R. DAVID and his structuring project based on the division between micro and macro-comparation reusing the methodology of economic analysis. This category conceptualized as a set of legal family legal systems of common essential features, key term carried the distinction between micro and. The subject of the first would be the research under a legal family, while the second involves the comparative analysis of several legal families. This analytical framework allows to organize the work of the lawyer who will decide where he runs into his research, research fitting both positive pragmatic jurist, for example, faced a problem of regulatory forwards between systems needs to find the right solution, or curiosity that moves comparing the diversity of policy options, such as one jurist interested in law as a social science that tries to build a structure of superior knowledge.

This concept still seems more useful than suggested by Glenn, legal traditions, though it may seem timely review. Understood as regulatory information that shapes in different legal systems state graduation. The first stage in the formation of a tradition is starring capture information from an act of revelation, or legislative decision. This moment is a sign of the normativity of the information, since it is not deserve to allocate resources for their conservation (through memorization or use of any means of recording). This information becomes an ideal of conduct that can be transmitted to future generations. These act in accordance with it, adapt to the new time or single-mind depart from it. This involves generating more information, restarting the process. Recognize its virtues as an update of the concept of legal family. Category is a more open, less
taxonomic, almost devoid of boundaries, recognizes the fact that the mutual influences and common elements between different traditions. It is based on the variability of the legal system, accusing the legal concept of family being too static, detached from reality in order to achieve educational validity. Its main advantage lies in its usefulness for analysing legal territories that do not fit in stiffness involving family law or the legal system, we find different forms of production rules, regulations gradual multiple rights.

Our research area delimited by the conjunction of these two concepts, we need heuristic guidelines that direct our work. As stated in the introduction, in the multitude of options we chose the functional criteria Zweigert constructed and updated by R. Michaels, trying to move towards a real science of comparative law, rebuilding the legal concepts from his own context as we have attempted in this thesis, understanding that this process is *conditio sine qua non* to our objective.

4. This is the comparative law that is called to play a leading role as a key methodological tool in our contemporary legal context, that of a world moving toward the law. We are in a legal framework of globalization, characterized by legal rules and procedures governing transnational political and economic processes that determine the law-making processes of state law. The contemporary intensification of this phenomenon allows us to find uniform international standards, especially in the economic field as the *lex mercatoria*, principles and conventions of UNIDROIT and Lando wide-reaching followed in Europe, so we can understand that some authors theorize legal globalization as the trend towards a single set of rules governing global coexistence. Beside we also find a constitutionalization (but without constitutionalism) of a global governance structure supported by a sense of rule of law, or principle of legality especially intense at transnational level, understood as a plurality of interrelated authorities whose legitimacy rests on the legality of their actions, reaching beyond traditional institutions.

This phenomenon of global legal governance progressively articulated as a global federalism hierarchical set of traditional forms of government with regulatory institutions specialized in sectors with global jurisdiction. And legitimacy is embedded to a rational basis of authority in a society deeply
technologized and with great access to information, and the need for legal certainty and rationality is compulsory for the development of capitalism as an economic process in which the actors involved in it require to be enabled to make rational calculations of risk and raise expectations that can see materialized.

The legal globalization process is being assembled in certain sectors and based on hits in different historical moments, a dynamic that has invigorated from World War II. Technological advances and the acceleration of trade on the legal basis in the spaces previously built by colonial European powers, who established its legal institutions in their territories and populations of influence, building what is known as "legal families", mainly common law and civil law (as we have seen in the last part of this thesis about the common law case), have led to a messy and multiple phenomenon.

We have on one side the convergence or integration of these two dominant families, convergence understood as the process by which various legal systems resemble progressively adopting rules that can be identified as common, or by the integration of institutions. There is a doctrinal consensus that this phenomenon is a reality at least in the area of private law in the European common policy space. And the best example of this convergence is found in our object of study in the different production methods or sources of law. Both families are under the paradoxical hierarchical relationship between the statutory law and case law, against the theoretical superiority of the former reality urges us to the indispensability interpretative preponderance of the latter.

This again drives us to another aspect of our context of legal globalization, what was called juristocracy or the transfer of decision-making capacity to both state-jurisdictional as internationally, leading to a myriad of judicial relationships beyond state borders. The European legal space stands out in this respect, with the reception by the state courts of the doctrine of the Courts of Justice of the European Union and the European Court of Human Rights, and in a less developed form these elements found in other regional areas and sectioned so universally, as arbitration exercised by the International Chamber of Commerce (ICC) or the Court of the World Trade Organization, and the International Criminal Court’s jurisdiction. Therefore we can say that the legal globalization is not the work of a
universal legislator, but from many judges and courts in constant communication, communicating their interpretive principles and policy statements.

Special mention deserves the almost global presence of constitutional courts, with similar characteristics but with different functions, what we estimate is not trivial because we can identify a pattern of structural transformation. Equally interesting is the interplay between them exerted through the generation and reception of a common doctrine. In this regard, the constitutional doctrine of common law jurisdictions is of great interest, particularly as historical reference of protection mechanisms of fundamental rights and civil liberties. The case law of the Supreme Court of the United States of America, symbol of legal globalization understood as expanding American common law, and even the Supreme Court of the United Kingdom after the Human Rights Act 1998, which involved the full assumption of the European Convention on Human Rights and the European Court of Human Rights (always articulating mechanisms that facilitate their own compatibility with the constitutional principle of British Parliamentary Sovereignty), and therefore part of the same legal level as the Spanish Constitutional Court, are very contrasted experimentation spaces to consider.

The growing prominence of courts in contemporary legal systems is confirmed and, especially through constitutional courts, connection points that allow reconstitution of legal systems and their relation and integration. An example of how this issue is already being addressed by our Constitutional Court is found in the doctrine of "judgment to call the legislator" (Appellentscheidung). Through it, the Constitutional Court, while remaining a kelsenian negative legislator, gives indications to invoking positive legislator to correct a deficiency in constitutional law, without declaring it unconstitutional. The STC 48/2005, in his FJ 2 is a sample of this doctrine, requesting that its institutional act must to be reformed to allow the intervention of the parties on the question of constitutionality, following the Judgment Ruiz Mateos v Spain June 23 1993 of the European Court of Human Rights. We even have samples of a transformation of the figure of the legislator negative into a positive, as in the judgment of the Constitutional Court 185/2012, which challenged the constitutionality of the statutory provision establishing the binding nature of the prosecutor's report to
establish joint custody of children, estimated as unconstitutional as it prevented the judging monopoly of judges and courts.

In this sense, the common law legal system is the paradigm to study. Its specific relationship between case-law and statute law, the latter being superior, but dependent on the first to implement and integrate into the legal system, reminds us more of the biological interaction mutualism than a strictly hierarchical relationship. We must not forget that before the kelsenian theoretical construction, this relationship between sources of law allowed the practical genius of the common law to give rise to the judicial review first and then constitutional judicial review, remotely in case the of Dr. Bonham in 1610 in which the Coke upheld the supremacy of common law as the authentic constitution versus statutory law, and its modern origin in the case Madbury vs. Madyson in 1803. Given the enhanced role of this source is essential to study the doctrine of precedent of the common law, with its principle of stare decisis and distinguishing technique between ratio decidendi and obiter dicta.

5. After this contextualizing digression that opens perspectives for our research, we return to conclude, to the aim of this thesis, but incorporating this viewpoint of legal systems integration in globalization. This opportunity is offered by the fact that we could observe a paradigmatic integrative relationship of the European Union law by the United Kingdom as a common law legal system. After joining the European Communities through the European Communities Act 1972, with full recognition of the principles of supremacy and direct applicability of EU law, it has led to subsequent reconsideration of the relationship between these two legal corpus by English courts, along with compatibility with the constitutional principle of parliamentary sovereignty.

The courts have faced the challenge of finding the proper interpretation of Union law in addition to its impact on the British law proposing various solutions in their approach, developing a series of interpretive case law principles governing the application of those not state regulatory provisions which conflict with EU law. From the perspective adopted in Macarthys Ltd v Smith (1979), which recognizes
the normative and binding nature of EU law and not its mere interpretative value, what implies to recognize its repealing force of state law that is inconsistent, but as a normative element and part of state law, English courts have followed three guidelines in this process: to nullify British laws that contradicts the law of the Union, with the decision in Factortame (1991) as a landmark; give a theological interpretation to national law implementing Community law, from Garland v British Rail Engineering (1983); consider the normative objective of developing a community directive, and preserve traditional methods of interpretation for the law which do not share this purpose, accurately distinguishing normative applications separate but related, as in Duke v Realliance GEC Ltd. (1988).

In this process it has not been any obstacle enough, even the constitutional principle of parliamentary sovereignty. Despite its apparent incompatibility with the recognition of the supremacy of a external legal order that can contradict acts of parliamentary sovereignty expressed through its legislation, and even the development of this law through delegated legislation made by the executive and provides European Communities Act 1972 in Schedule 2 Section 2 (2), this being due to the own sovereign will of the British Parliament according to the precepts of the European Communities Act 1972, its sovereignty implies the ability to limit their sovereign power, conserving residually power to recover its full exercise repealing or amending the law that mandated his restriction voluntarily.

We understand that this process has not been so alien to the nature of the common law, it has been faced with the same logic with which statutory law was integrated into the common law, as a higher law, enforceable to repeal the substantive law that the courts had applied so far, but which turned out to be an equally dependent application process on the interpretation of judges, according to the normative assumptions and logic that govern this process. Again, an approximation of formal hierarchical logic, so characteristic of our legal family, would have led inevitably to error if we insist on ignoring the nature and essence of the common law, so far invariable element despite its relationship with legal systems opposite in nature and essence.