CULTURAL CONTEXTUALIZATION OF MODERN LIBERAL CONSTITUTION

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Abstract

The cultural contextualization of the ideal-type of the modern liberal constitution was and is made against imperial metaphysics, by overcoming the rule of law constituted by absolute monarchies and moving to a qualitatively superior cultural phase, that of the rule of law and in opposition to the totalitarianisms of the last century, which aimed to create a perfect society by establishing an anti-perfectionist constitution. Opposition to the imperial constitution makes the fundamental features of modern constitutions their revolutionary character, that is, in legal terms, reviewable, the fact that only self-centred societies can establish such a constitution, and the fact that constitutional law transforms from a form of stabilization of the existing order in a form of foundation of the future. Opposition to the absolute monarchy or the lack of the stage of absolute monarchy in the evolution of that society led to the split of Western legal cultures and the creation of two distinct models of the rule of law. Finally, opposition to totalitarianism has led modern constitutions to emphasize their liberalism, postulating the individual as the goal of any social system, the priority of freedom over power and the general interest, and the priority of the right over the good.

***Keywords**: constitution, liberalism, modernity, culture, rule of law, totalitarianism, absolutism, empire*

I. The cultural contextualization of the modern constitution by opposition to the constitution of the empire – the revolutionary constitution

The ideal-type of the constitution of the empire implied, as a result of the metaphysics that culturally founded it, that its organization was conceived as eternal, immutable, because it would be the political translation of the unique and imperishable principle that would constitute the very nature of reality in its unity. This constitution could not be changed by anyone. It was designed with an inimitable

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nature, impossible to revolutionize. Modernity denies the eternal character of the way power is constituted. The modern constitution is therefore fundamentally modifiable, it can be revolutionized, not necessarily by violence, but procedurally, by revision, that is, by a legal revolution of the constitution of society. This change in the nature of the constitution corresponds to a culturalist view of law. Hegel sums up this vision well. He wrote that „it is very sphere of relativity – as that of education – which gives right an existence"[1]. Constitutional law is, in this type of vision, a "cultural fact", dependent on a certain state of self-consciousness of the community that tries to self-organize, that is, on the idea that a social group makes of itself, which is, from certain points of view, a quasi-religious one. But this dependence on culture does not necessarily mean a spiritualist or nationalist "particularization", as might result from the historical contextualization analysed above, but the "relativization" of ideal-typical features that are normative in a particular sense, that are not "written" in advance, in the nature of things or of the group, but are "written" as the culture of the group is configured and "rewritten" as the culture of the group is analysed retrospectively, as a code that both unifies and rewrites customs.

"The cultural code of a society is therefore neither solidified nor autonomous, but without ceasing to be composed under the effect of social practices, even if this transformation is itself subject to precise syntax and is thus framed within certain limits"[2]. Methodologically speaking, this means that we give up and, at the same time, we do not give up the claims of universalization. The cultural contextualization of law means neither the adoption of an empirical conception of it, according to which each group has a culture totally dependent on the concrete conjuncture and therefore a legal order with "concrete" necessity, nor the adoption of a universalist determinism, which would presuppose that all groups are found in certain historical conditions will necessarily have the same evolution in terms of establishing the legal order. Located at the intersection of the two conceptions, culture "fulfils the function of controlling innovation, which we can oppose to the function of coercion [...]"[3].

The approach to constitutional law in terms of cultural contextualization allows us, therefore, to understand the relationships between legal constraints, which try to maintain the existing order, and the pressure of social innovation, which tries to change it, without claiming that someone, individual or group, manages to consciously pursue a purpose, rationally predetermined, of the revolution that is taking place. Cultural contextualization offers us, in other words, a "revolution procedure", ensuring the understanding, at the same time, of the release of the forces that will make the change and their control, not by formally validated legal norms, but by framing the

[1] G.W.F. Hegel, Elements if the Philosophy of Right, Cambridge University Press, 2003, §209, p. 240 (translated by H.B. Nisbet).

[2] Bertrand Badie, Contrôle culturel et genèse de l'État, in Revue française de science politique, 31e année, n° 2, 1981, p. 330.

[3] Idem, p. 329.

roles by a cultural "code". This "code" does not have the same way of sanctioning or updating as the positive legal system, but includes a way of validation that serves as a support for a new distribution of social roles, so a new legal system, which in turn will constrain society to maintain the new order once it is institutionalized. The contextual cultural understanding of constitutional law allows us, therefore, to understand the legal value of revolutions and to accept the idea that a reversal of order can be the basis for the creation of a new valid legal order.

The central issue of the cultural contextualization of constitutional law is, therefore, what is meant by revolution and what is its legal significance[4]. The revolution is often understood as the antithesis of a "passive" state of the human group, in which, in the absence of a "political eruption", "the social becoming stagnates"[5]. The revolution is equivalent to "entering the essence of the community into a phase of *political* activity, that is *instituting*"[6]. This vision favours the *constructive* phase of the revolution. It "means neither civil war nor bloodshed. The revolution is a change of certain central institutions of society through the activity of society itself: the explicit self-transformation of society, condensed in a short time"[7]. The brutal upheaval of a political regime is not in itself a revolution. It is not even a phase absolutely necessary for one. "Political rupture... is only a very particular case, neither necessary nor sufficient, of the way in which the revolution arose"[8].

Three fundamental ideas emerge from this vision of the revolution. The first can be summarized as follows: the revolution is consubstantial to politics; political society is essentially a *revolutionary* society; only "barbarians" do not make revolutions; civilization means admitting their necessity. The second idea is that the revolution is not any institution, but a self-institution, that it cannot come from an exogenous impulse, that to import or export the revolution simply means to destroy it, which means that a revolution must be *internalized*. The third idea is that the revolution is not a simple reaction to the past, but a foundation for the future. Modern constitutions, because they were the result of a revolution, reflect these three ideas. They legalize revolutions on three levels.

§1. The modern constitution builds a "revolutionary" society and classifies revolutions by a cultural code

The constitutions of pre-modern societies were considered eternal. Of course, the form of this self-consideration was diverse, but it is not this diversity that interests

[4] Some of the following considerations have been published in Dan Claudiu Dănișor, Dreptul și revoluția (Law and revolution) Revista de Drept Public no. 2/2017, p. 23-44.

[5] François Chatelet, Idée de révolution, Encyclopedia Universalis, Paris, 1968, 1. 14, p. 207.

[6] Cornelius Castoriadis, L'auto-constituante, in Espaces Temps, 38-39/1988, p. 51.

[7] Idem, p. 51.

[8] Jacques Lévy, Révolution, fin et suite, in Espaces Temps, 38-39/1988: Concevoir la révolution. 89, 68, confrontations, p. 72.

me here, but the fact that modernity destroys this claim. Thus, the first society is built, which includes in its incorporation the idea that it remains "revolutionary". This means that any modern constitution will provide for how it can be revolutionized. It necessarily comprises a "revolution procedure", called "revision" in the legal language. This ideal-typical feature of modern constitutions is present regardless of whether they are introduced against a feudal system or not, i.e., regardless of whether social evolution is conceived as an interruption of the course of the natural evolution of that society or not. The central idea of these revolutionary procedures is that the evolution remains legally continuous even in the conditions of a revolutionary movement. Jurists naturally prefer this type of approach, because they have a natural repulsion towards discontinuity, they dislike the situations of "radical power vacuum"[9], which are, from a typical legal point of view, the first phase of any revolutionary movement, whether violent or not. For jurists, the revolution is "a devolution of power that does not operate according to the provisions of the texts in force"[10], a rift in legality, the legal equivalent of the disease of the social body, which they are called to "treat". Jurists self-conceive as "doctors" of politics, and "their technique is precisely the removal of the vacuum, the anticipation of crises, ensuring continuity [...]"[11]. Jurists are not disgusted by the disorder that the moment of change inevitably produces. Therefore, for jurists, the constitution of a society is not revolutionized violently, but is procedurally revolutionized, *it is reviewed*. These procedural revolutions imply the idea that the moments of rapid upheaval of the system are due only to the fact that the political power at a given moment is not able to understand the social demands of change and that it is up to lawyers and law to anticipate and channel them. The revolutionary effervescence is just a transition, accelerating an old but unfinished transformation, which suddenly brings to fruition what would have been accomplished little by little, by itself. Moments of disorder must be legally tempered, procedures must be enacted, because "they contain in the germ the confiscation of liberties"[12]. The idea behind this view of the continuity of legal developments even in the event of a revolution is that the legal system must necessarily include effective "revolution procedures". The modern constitution thus becomes a legal act that ensures the channeling of social mobility, not just the stabilization of a state of political power.

Sometimes the revision procedure itself is denied in revolutionary times. The social system tends to change, then, outside of any procedure. Can the operation of such a revolution still be legally valid? The modern answer to this question is affirmative. Modern constitutional law has internalized in its normative space the idea

[9] Yves-Marie Bercé, Conclusion: vide du pouvoir. Nouvelle légitimité, in Histoire, économie et société, 1991, 10e année, n°1. Le concept de révolution, p. 24.

[10] Idem.

[11] Idem.

[12] François Dosse, La triade libérale, in Espaces Temps, 38-39, 1988, Concevoir la révolution. 89, 68, confrontations, p. 87.

that revolutions cannot be prevented by regulation. This awareness of the limits of the legal led to the reconfiguration of constitutional law in the modern era. It is understood, from now on, first as a cultural "code", and then as a normative system. This "code" serves as a benchmark when revolution procedures, revisions, no longer work. It is largely composed of prescriptions without a formal legal sanction. In order to impose itself as a "norm", or, more precisely, to ensure a new distribution of social roles, any constitution that wants to be modern must remain a "cultural code", i.e. it must admit that it can be *restructured through the effect of the practice of political institutions*. This "flexibility" is absolutely necessary to preserve the spontaneity of social developments. This is why a modern constitution can only be truly understood if, in addition to its texts, these political institutions are studied and how they can restructure legal institutions. This means that the first norm of the cultural code that the modern constitution represents is that the constitutional "norms" concerning political organization must not, in principle, involve legal but political sanctions. Those who believe that the legality of a rule is sanctioned therefore have difficulty in qualifying constitutional rules as legal rules.

The cultural code on which the modern constitution is woven in the background validates the new distribution of roles in a revolutionized society other than the validation of legal norms in a stable constitutional system. Validation is done by accepting that an environment of communication between the various forces involved must always be established during a revolution. The modern cultural code is therefore composed primarily of the rules necessary for the forces facing a revolutionized society to be able to establish a relationship of communication and integration of conflicts into a system in which each can communicate to the other their claims, without resorting to force. For example, the rule that there must be some form of collegiate provisional deliberative body, the rule that provisional bodies that can be established are only absolutely necessary, the acceptance of the need for a general rule of legalization of new social requirements and practices, the need to adopt rules of institutionalization, the provisional nature of the rules established by the revolutionary authorities etc.

§2. The modern revolutionary constitution can only be adopted by self-centred societies

In order not to be an aborted attempt at evolution, the revolution must take place in a society that is able to include new ideas and techniques. Not every society is capable of integrating a revolution. Only self-centred societies can produce this integration, centrifugal ones, which define their development in opposition to an external centre, can produce the moment of political tension, but they cannot sustain it.

But we must keep our distance from the temptation to consider a certain culture central only because the relations of economic and military forces at a global level favor it, as has happened in modern times with European culture. Eurocentrism is

only a form of transformation of Western culture into a culture that is defined by opposition, so peripheral, because it is no longer capable of self-cantering. This is why in Western societies "the concept of revolution seems to have entered a phase of deep coma"[13]. This tendency to outsource the definition of identity, this inner barbarism[14], should be limited. Multiculturalism is not enough, at least as long as it is "based on an essentialist definition of culture", which raises the question "if not culture has come to acquire almost the same meanings as "race"[15]. The transposition of this multiculturalism into law, legal pluralism, is also only a form of "tolerance" of differences, at least as long as it is based on a culturalist and essentialist definition of legality, which is constituted by "benevolent" opposition towards an alleged "barbarian" juridical periphery.

The self-cantering of a society's identity presupposes that its revolution must be the fruit of the revolution of its central elements. Therefore, the revolution has no chance unless it is assumed by a part of the social elites, those who should provide the ideas, methods and material means necessary for this self-centring. As long as this is not possible, the disturbance of order being caused only by the peripheries, the revolution remains a utopia. As A. Touraine noted about the 1968 French movements: "If utopia is (here) so strong, it is because political struggle is not yet possible"[16]. The transformation of slogans into ideology, ideology into cultural code and its assumption by some elites makes possible the transition from challenging order to replacing it.

This transition is legally transposed by moving from understanding any norm as a crime to liberty, to building a new norm, which is able to gain the support of subjects, by transforming them from "subjects" to "actors" and moving from a type of right created from top to bottom, by the work of an alleged "rational legislator"[17], to a law that is created mainly from bottom to top, through the practice of citizens transformed into actors of regulation. Without this transformation, "the self-founded regulation of autonomy disappears behind mere «self-concern»", and "revolutionary individualism" transforms into "narcissistic individualism"[18]. In order to allow this construction of a new normative order, the "claim to autonomy" must not turn into a "demand for independence", which, through radicalization, makes the very idea of submission to a norm appear incompatible with freedom"[19]. The internalization of the contestation by

[13] Jacques Lévy, op. cit., p. 69.

[14] Jean-François Mattéi, La barbarie intérieure. Essai sur l'immonde moderne, Paris, Presses Universitaires de France, 1999.

[15] André Jacob, L'intervention interculturelle à la lumière de la théorie de Jürgen Habermas, Extrait de: Micheline Labelle, Jocelyne Couture et Frank W. Remiggi, La communauté politique en question, i Books, Presses de l'Université du Québec, 2012.

[16] A. Touraine, Le communisme utopique. Le mouvement de Mai 68, Paris, Seuil, 1972, p. 53-54.

[17] See Jacques Commaille, A quoi nous sert le droit ? i Books, Gallimard, Paris, 2015, especially Part III «Les mutations contemporaines de la légalité».

[18] Alain Renaut, Les révolutions modernes, in Espaces Temps, 38-39, 1988. Concevoir la révolution. 89, 68, confrontations, p. 99-100.

[19] Ibid.

the elites and its transformation into a political debate is the condition for the successful implementation of a new order. Remaining in the phase of slogans, beautiful, provocative, but sterile, like those shouted by the French youth in May 1968 («II est interdit d'interdire», «Jouissez sans entraves», «Prenez vos désirs pour la réalité», «Soyez réalistes, demandez l'impossible» etc.) only establishes a kind of "neo-narcissism that leads to desertion from politics", at "the end of *homo politicus* and replacing it with *homo psihologicus*"[20]. The revolution of the self-centred society cannot be made "by the revolt of its margins […], but by the emergence of a new centre"[21]. And this new centre is first and foremost *cultural*. A revolution does not necessarily need a formal ideology, but it needs this cultural re-centring.

§3. Modern constitutional law is a form of foundation for the future

Modern revolutionary constitutions are future-oriented. They do not organize a "status" but establish a future. They are a re-self-centring of the social group. That's why they build *objectives*. *A contrario*, social movements that are captive in the past or present cannot be considered genuine revolutions. For example, I believe that the anti-communist movements of 1989 failed to re-centre themselves in order to orient society towards a new future. They build their identity by relating to the past and the West. Not only have they failed to create a new culture, assumed by social elites, they have not yet succeeded in creating these elites. Hence the lack of endogenous ideological landmarks or the internalization of exogenous ones by society. Post-communist states did not really achieve political modernity. The need to achieve this modernity, which was hindered by the "freezing" of internal conflicts during communism, takes them back to the past. The anti-communist revolutions did not produce any new political polarization, operating only an apparent return to the situation prior to the establishment of communist states. However, this return is not possible. The ideological engine of the progress of these societies has reversed its sense of functioning: instead of pulling societies towards a new goal, it has returned them to an idyllic past, which, in fact, most of the time, they have not experienced it[22].

On the other hand, the need to find ideological landmarks other than Marxism turns them to the West and to the postmodernism it claims, even if it does not really realize it[23]. "It seems that Western societies are ready to jump off the train of modernity, tired of travel, even when the post-communist East is desperately looking to get on board. In this situation, it is difficult to find unambiguous ideological

[20] Gilles Lipovestsky, Narcisse ou la stratégie du vide, in Réseaux, volume 4, n°16, 1986. Philosophie et communication, Éditions Gallimard, p. 11.

[21] Jacques Lévy, op. cit., p. 78.

[22] Dan Claudiu Dănișor, Democrația deconstituționalizată, Bucharest, Universul Juridic, Craiova, Universitaria, 2013, p. 38-39.

[23] Dan Claudiu Dănișor, La Roumanie entre l'Etat national le droits collectifs des minorités nationales, in Patrick Charlot, Pierre Guenancia et Jean-Pierre Sylvestre (dir.), Continuité et transformations de la nation, Editions Universitaires de Dijon, 2009, p. 99-100.

support"[24]. Thus, post-communist societies self-identify only in appearance. They are built by external opposition and are therefore incapable of a true revolution and, consequently, of a true constitution.

The West is in the same situation. It was built during the Cold War through opposition to communism. Or, after its fall, the West, left without the external enemy that saved it from a serious reflection on the philosophical foundations of its own identity, and after a moment of ecstasy, in which it thought that history was over[25] (ironically or not, the ideal was communist!), it realized that it was either "dissecting", risking not looking too good in the eyes of ex-communist flatterers, or it was quick to invent another external opponent to take the place of the late communist bloc. The option for the simplest solution reactivated a cleavage that I thought it was obsolete, the one between Christianity and Islam. Religion thus regained the central position it had lost in favour of philosophy, in a caricatured but effective manner, in the context of precarious education and massive media coverage of information. The unassuming death of communism as an official doctrine left both the East and the West without philosophy. This inability of today's democracies to self-centre, this loss of sense of development, this "de-substantiation"[26], is the one that seems to prevent the constitutions created after the western model to frame the possible revolutions in a cultural code.

Orienting modern constitutions to building the future, not to organizing one *status quo*, makes the objectives of a constitutional nature typical of this type of system. These objectives are not simple policies, they are *standards of any policy*. In this capacity, the objectives are *normative*. They are therefore legal norms, but in a special sense. However, I will be concerned with how to legalize these standards later.

II. The cultural contextualization of the modern constitution by opposition to that of the absolute monarchy and the splitting of Western legal cultures

The ideal-type of the constitution of the absolute monarchy included, as we have seen, a principle of limiting power by law, which was constituted as a status of law. The modern constitution transforms this status of law into a "état de droit". The difference is not only in degree, but in nature. The status of law was only a way of organizing power through which a limitation of power was obtained. The "état de

[24] Piotr Sztompka, Devenir social, néo-modernisation et importance de la culture: quelques implications de la révolution anticommuniste pour la théorie du changement social, in Sociologie et sociétés, vol. 30, n° 1, 1998, p. 85-944.

[25] Francis Fukuyama, The End of History and the Last Man (1992), in Romanian: Bucharest, Paidea, 1994.

[26] Gilles Lipovestsky, op. cit., p. 17.

droit" is also a system, built independently of political power, which guarantees the rights and freedoms of subjects. The combination of the two aspects of the "état de droit" has created a split in modern European legal cultures. The preponderance of the organization of political power in order to limit it and the conception of the protection of rights as a result of it and the position of the judiciary over political power was imposed in continental Europe, creating what is usually called the Roman-German legal system and a state governed by public law. The preponderance of the judicial protection of rights and freedoms, including against public authorities, which does not enjoy a privileged status before the judge, has been imposed in the Anglo-Saxon cultural space, creating a special kind of "état de droit", which is understood as a way of law, Rule of Law. They tend to unify, building a standard of the rule of law that is imposed on democracy.

§1. The difference between the concepts of "état de droit" and "Rule of Law"

If the "état de droit"is understood as a form of state, the architecture of the state is adapted to "support" the presence of *rights* and the action of *law* in their favour, if understood as a form of legal system, built to protect rights, then the state is reabsorbed in justice, the architecture of law and justice being adapted to support the presence of a power that can affect rights through rules created by exercising political power. The idea of the "état de droit" does not "solve" the polarization statism/anti-statism, because the option to focus the social system on the state (and a type of law that is used by it to design society) or rights (and a type of law that provides protection and, consequently, the limitation of power) must be done upstream of the construction of the rule of law. The purposes and architecture of the rule of law will depend on this option. This is why the continental European concept of "état de droit" differs from the concept of "rule of law", which is apparently its Anglo-Saxon equivalent.

In continental Europe since the construction of the concept of "état de droit", statism was dominant, and the idea that law has as its main function the social design and devolution of power was almost unanimously accepted, so the efforts of "liberal" legal theories were focused on limiting by changing its architecture and the way it masters and uses the legal order, in order to be able to "slip" into society some rights that the state cannot sovereignly have, while the Anglo-Saxon world was less prone to statism, and law was conceived in this cultural space as a system of protection of rights rather than as an instrument of social engineering, so efforts were made in this cultural space by partisans of the state to insinuate its political power in a social system in which rights were central. The European "état de droit" was conceived as a form of state which, by the way in which its powers were formed and the way in which they were exercised, was to become compliant with the rights of the subjects, while the "Rule of Law" was a form of juridical and judicial protection of rights, including against state power, no matter how it is formed, i.e. a form of protection of rights

against democracy itself. The difference between the concept of "état de droit" and that of "Rule of Law" is that the latter does not include the idea of the state. The first is a system of institutions, the second is a path of protection.

Both realities indicated by the two notions are aimed at protecting rights, but in a different way. The reality of the concept of "Rule of Law" means the pre-existence of certain rights of individuals as a foundation of public law. Fundamental rights are not built in this system to ensure that a certain private space (of freedom) is preserved by opposition to a public space that is dominated by political power, but they are the very essence of public space. Therefore, in the regime characterized as "Rule of Law" there is no difference that statists (aware or not of their statism) make between public law and private law, because *the state is subject to the same juridical and jurisdictional regime as individuals*. Under this regime, it is not just a question of the fact that there is a part of the law which the state cannot and does not impose on it, but that *the state can never free itself from the power of the law it applies to its subjects, by building a public law that privileges it over them*. The supremacy of law is thus *absolute* in the regime characterized as "Rule of Law"[27]. The rights of subjects of the legal order are protected by judges whose impartiality towards the state is guaranteed primarily by the impossibility of an administrative law regime (which applies to the state a different law from the law applicable to individuals) and by the fact that they judge the state as any another subject of the legal order.

§2. The evolution of concepts

The concept of "état de droit" has evolved in continental Europe to impose individual rights before the state and to guarantee free access to an independent and impartial judge, while the concept of "Rule of Law" encompassed these two aspects from the beginning. The "état de droit" tended to transform from a type of state into a type of legal regime, while the legal regime indicated by the concept of "Rule of Law" gradually adapted to the presence of an increasingly strong and more active, trying to keep this state subject to the legal order like any other subject. The result may seem the same: limiting power, but the methods of reaching it are radically different. The evolution of the "état de droit" in continental European culture has involved four phases: parliamentary "état de droit", the administrative "état de droit", jurisdictional "état de droit" and the social "état de droit". These types of "état de droit" follow the evolution of democracy on the old continent. In continental European culture, only the evolution of the democratic political system could lead to the gradual imposition of an "état de droit" as a political standard, i.e. as a teleological limit of the power of *demos* itself. In the United States, this evolution does not have the same

[27] See Albert Dicey, Introduction to the Law of the Constitution (1885), London, MacMillian, 9e ed., 1950, p. 188 and the following. Dicey distinguishes rule of law, a principle he considers specifically English, from the French regime of administrative law, based on the pre-eminence of the state and the separation of powers.

meaning. It was dependent on the struggle between anti-federalists and federalists during the adoption of the United States Constitution and mainly reflected the ideas of the latter. Central to this debate was whether the public space – political – should be, as the anti-federalists wanted, a space in which "the selection of preferences was the subject of a governmental process; preferences […] need to be developed and shaped *through the political system*" (s.n.)[28] or, as the federalists argued, politics must be only a process of conflict and negotiation between various social groups, in which individuals arrive with predetermined interests, which they want to promote through the exercise of power, the political system responding, as a mechanism, to elections which are made *outside of it*, and the common good being only the aggregation of particular interests, the balance of competing forces being ensured by the normal functioning of a kind of "political market", whose "competition law" is the Constitution. Because the second conception prevailed in the United States, the legal system, even when it has as its source the political power, does not aim at projecting the common good, but only the protection of rights, which are only pre-existing interests of the political process protected from a legal point of view. So in European "état de droit" human rights were *the outcome* of political process, while in the United States, human rights are the *premise* of political system. In Europe, human rights are confined mainly to the private sphere, outlining the autonomy of subjects from political power, while in the United States they are the essence of public space, outlining the impossibility of empowering political power over the legally protected interests of subjects. For the "état de droit", as understood in continental Europe, to evolve towards the guarantee of individual rights as rights that structure the public space, European democracy must take another step: it must consider itself as subsequent to the system of means of protection of human rights. This process has already begun, with the "état de droit" on the old continent being considered an indisputable political standard, but it must be continued, and the meaning of this evolution is not at all clear. To do this, the state must give up defining preferences through political decision-making, even if it is democratic. Once again, the choice between statism and anti-statism seems to have to be made upstream of the (re)construction of the "état de droit".

§3. The relationship of the "état de droit" with democracy

A. Distinguishing or undistinguishing between public space from private space

The "état de droit" as it was understood in Europe and democracy seem, at first sight, radically different. The first concept means the limitation of power, the second means the exercise of it. The first is legal, the second is political. As Haberbas noted,

[28] Stéphane Bernatchez, L'État de droit aux États-Unis: le débat entre les fédéralistes et les anti-fédéralistes, in: Revue Québécoise de droit international, hors-série juin 2015. Mélanges en l'honneur de Jacques-Yvan Morin. p. 248; Cass Sunstein, «Interests Groups in American Public Law» (1985) 38 Stan L Rev 29 à la p. 31 [Sunstein, «Interests Groups»].

"we are accustomed to considering law, the "état de droit" and democracy as themes of different subjects. Thus, the science of law deals with law, and political science with democracy, the first considering the rule of law from a normative point of view and the second from an empirical point of view. […] The rule of law and democracy appear to us as two totally different entities. There are reasons for this. […] Of course, these empirical reasons, which explain the distinct "academic" treatment of the two entities, do not mean at all that, from a normative point of view, we can have the "état de droit" without democracy"[29]. The two phenomena are inextricably linked, at least in modern European culture. This is because, once the state creates law through a changing political power, without being limited by any right superior to it, as was the case when a right that did not originate in human will was accepted, a "natural" right, guaranteeing the autonomy of legal subjects requires that this political power be legitimized by the equal participation of these subjects in the formation of the power that will constrain them by the rules they create. Law, which is both a means of coercion and a means of protection, is legitimized by democracy, and democracy is legitimized by law. Only in this way can the laws created by political power be, as Kant thought, considered at the same time as laws of coercion and as laws of freedom. "This double aspect is part of our conception of modern law: we consider the validity of a legal norm to be the equivalent of the statement that *State* guarantees at the same time the effective imposition of the law and the legitimate determination of the law"(s.n.)[30].

The description of this relationship between law and democracy is valid only in a certain cultural space: the one in which, upstream of its construction, we have already opted for statism, i.e. we have accepted that the state decides which society is good and uses the right to achieve it. Therefore, this type of understanding of the relationship between law and democracy is valid for modernity only as it was understood in continental Europe. This system is built, on the one hand, around the way in which the state "masters" the legal order, that is, it produces and instrumentalizes it in order to obtain a result *determined by it*, in a public space autonomous from private interests and, on the other hand, around the autonomy of the subjects in their *private* space. The rule of law is, in this cultural area, a State theory which, put into practice, guarantees a sphere of autonomy *private* individuals, through a *freedom of participation*. Democracy is a *state theory* which, put into practice, guarantees the effectiveness of the freedom to participate through the freedom of autonomy. But the "état de droit" thus outlined does not consider human rights as constitutive of the (public) political space itself, which remains only a space *of power*. Therefore, its evolution depends on the evolution of legitimation and the exercise of power, that is, in modern Europe, on the

[29] Jürgen Habermas, Interrelations entre état de droit et démocratie, traduit de l'allemand par Elsa Collomp, «Actuel Marx» 1997/1 n° 21, p. 17-18.

[30] Idem.

evolution towards democracy and of democracy. Because of the option for statism, no matter how attenuated it may seem, public space and private space remain distinct, even if they are interdependent. The citizen is something other than the man who asserts his private interests: he must become, when he enters the public space, a virtuous man. The central problem of this type of "état de droit" is, consequently, that of *corruption*. Individuals, in order to assert their private (selfish) interests, against the public interest (based on virtue), give up the virtues that must characterize them, trying to instrumentalize power, trying to make its representatives give up, in turn, to these virtues, corrupting them.

In the system characterized as "Rule of Law", in which public space is an arena in which private interests compete to assert themselves, corruption exists, of course, but it is not central as in the other system. There, particular interests are not *private* and distinct from *public* interest. The instrumentalization of public space to obtain the satisfaction of particular interests is the essence of the political system, which is a framework for negotiation between interest groups. It is therefore natural for them to influence political power, provided that this influence is made transparent and within certain procedural limits. Influencing public decision does not necessarily mean corrupting it; the lobby is not to be confused with influence peddling. Democracy does not create an autonomous public space in which power chooses good society. The fundamental difference from the democracy that separates the public space from the private space is that man is not required to divide himself into a virtuous citizen in public space and a man situated, selfishly, in private space. Individuals carry their interests with them when they enter the public space, they are not required to leave them at its door. They are limited, of course, but they are limited *reciprocally*, not because above them there would be a *higher public interest*, which would not result from the "clash" of particular interests. There are practically no *private* interests in this vision, but only *particular*. Any *particular* interest can become *general*, using public power, provided that it complies with the rules of political competition, thus passing through its *advertising*. The public interest is only a mediation between the particular interests and the general interest. And as law is always this mediation between the general and the particular, "the general will is identified with the law"[31], not with political will. We are dealing with a three-stage development, not an opposition. The private interest competes in the political arena with other private interests, it turns into the public interest, which, if it manages to win the competition, becomes, through the democratic exercise of power, the general interest, "law". The problem with this type of "état de droit" is not corruption, but the factions, i.e. the destruction of real social pluralism (and real legal pluralism) by forming group(s), which, when it takes power, distort(s) competition. A society of this type functions

[31] Stanley Hoffmann, Preface to Laurent Cohen-Tanugi, Le droit sans l'Etat, Paris, PUF, 1985, p. VIII.

normally only if the top politics, which inevitably constitutes the imposition of a faction (which can, of course, be constituted as a party), has neither the importance nor the intensity it has *micro-politics*, ie that which results in the subjects, on the one hand, solving their problems by means of a "regulation" designed to maintain a level playing field for business competition, group competition and the exercise of rights, and, on the other hand, via *litigation*: hence the enormous importance of lawyers[32].

The "état de droit" and democracy are in a deep inter-relationship in both systems, but the type of this relationship depends on the fundamental choice for the separation or unity of public and private space. The regimes that separate them are cantered on power, albeit to limit it; the regimes that unify them are cantered on rights, even if they accommodate them with the presence of a power that wants to be more and more autonomous. A unitary theory of the "état de droit" would involve overcoming the polarization between statism and anti-statism. So, we return to the starting point, and the "état de droit", in both variants, fails, although it claims to overcome the fundamental polarization between statism and anti-statism. Those who opt for statism build a *public law "état de droit"*, and those who opt for anti-statism build a *private law "état de droit"*. Habermas described this polarization well: "The liberal paradigm of law relies on an economic society institutionalized in private law, essentially thanks to property rights and freedom to contract, abandoned to the spontaneous effect of market mechanisms. This "private law company" is based on the autonomy of legal subjects who, in their capacity as market participants, pursue their personal objectives more or less rationally. Hence a normative expectation that claims that social justice can be created only by guaranteeing such a negative legal status, i.e. only by repressing the domains of individual freedom. The model of the rule of social law was born from a critique of this conditioning. The objection is obvious: if the freedom "to own and accumulate" must guarantee social justice, then we must have an equality of "legal power". But the growing inequality of positions of economic power, wealth and social positions has in reality led to an increasing destruction of the effective conditions for the use of equal opportunities in equal legal competences. If we want the normative content of legal equality not to be completely transformed into its opposite, we must, on the one hand, specify the content of the existing rules of private law and, on the other hand, be introduced fundamental social rights which justify the claims for a fairer distribution of the wealth produced by society and more effective protection against the risks posed by it. In the meantime, this *materialization* of the law gave rise to side effects, which it did not pursue, to a *paternalism of the social state*".

B. The evolution of the "state of public law"

The evolution of the state of "public law" in Europe was dependent on the liberating character of absolute monarchies, which established a kind of "absolutist status of

[32] Idem, p. IX.

law", which some authors even consider an "absolutist état de droit"[33]. The dependence results from the fact that the subjects perceive in this cultural space the centralizing power of the state as liberating. Hence a deep reluctance, sometimes almost pathological, for pluralism and/or federalism, i.e. for exactly the foundations of the society that produced the other system, the one characterized as "Rule of Law". There are good reasons for this attitude. In feudalism, in Western Europe there was no "state" in the modern sense of the term, but only a "status" which was later abusively assimilated to the state. This state can be characterized as "patrimonial-senior", as we saw earlier. The absolutist monarchy frees the serfs from the coercion exercised over their bodies. Thus, the centralization of power, against the feudal lords who had "parceled" it and against the Roman-Germanic empire[34] who maintained it, established a kind of "status of law", in which the good will of feudal *masters* feudal is replaced by a "political" relationship between the monarch and those he removed from servitude, offering them *habeas corpus* (mastery of one's own body) and thus turning them into "*sui juri*", in subjects of law. Theorized by J. Bodin and T. Hobbes, monarchical absolutism is liberating, creating a space of law, but, at the same time, unifying and monopolizing. The new sovereign power has «*Summa Potestas*» and is a legitimate authority, not a despotic one, because it is subject to natural law[35]. The law enunciated by it is only the transposition in the political order of this previous and superior right. Thus, absolute monarchy makes possible the state of modern public law in Europe, which innovates in the strict sense of Antiquity (not a return to either Roman law or Greek philosophy) two things: the separation of political power (public) from civil society and the consideration of man as a universal principle of law. "The doctrine of sovereign power, which is not according to classical jurists, neither the power of a warlord nor the domination of a master, the doctrine of individual rights that guarantees the right to security, the right to life, innovates in the strict sense"[36]. The liberation of "bodies" and the transformation of patrimonial relations based on their proximity into economic relations, on the one hand, and the liberation of spirits, through the (relative) autonomy of absolute monarchs from the Church, which leads to the demonopolization of ideology, on the other hand, is doubled by a monopolization of political power. Only the "sovereign power" dominates the political space, excluding any pluralism and goes beyond the patrimonial character of power, it becomes extra-patrimonial, excluding any territorial "parcelling" of power. Absolute monarchies liberate and build a "status of law" even if not an "état de droit", only at the cost of destroying political pluralism and federalism.

[33] André Tosel, L'Etat de droit. Figures et problèmes. Les avatars de la maîtrise, in Actuel Marx 1989/1 n° 5, p. 35-37.

[34] Blandine Barret-Kriegel, Les Chemins de l'Etat, Paris, Calmann-Lévy, 1986.

[35] The works of Blandine Barret-Krigel shows the importance of natural law and fundamental laws in the evolution of Western monarchies: Blandine Barret-Kriegel, L'État et les esclaves, Paris, Calmann-Lévy, 1980.

[36] Blandine Barret-Kriegel, Les Chemins de l'État, op. cit., quoted from the electronic edition, 2014.

This unifying tendency is the one that still dominates the Roman-German legal space, even if in terms of federalism some European countries, those formed on a confederate basis, seem to be exceptions. I say "even" because, in reality, their federalism concerns only the "territorial" exercise of power, not that of freedom, not being a "social" or "integral" federalism. This reluctance towards political pluralism and social federalism is what will mark the entire evolution of the "état de droit" in the Roman-German legal space and will determine its focus on sovereign power, the state that "masters" the public space (which defines political preferences) and the territory, without any sharing. In Europe, pluralism must be *recognized* by the state, even *promoted* by it, legal pluralism seems "foreign", as well as the ways of resolving conflicts that are alternatives to state jurisdictional litigation, and federalism boils down to a particular form of state. The French Revolution managed to kill the monarch, but failed to overcome the idea that sovereign power, from now on the *State*, masters politics and, through it, masters the law. It masters *all* law, along with the "burial" of natural law. The evolution of the "état de droit" is dependent on the search for a basis for the sovereign's submission to a right that he fully controls. The state of public law is a reinvention of a kind of "natural" law, which no longer results, this time, neither from the divine will, nor from the nature of things, but on the will of the subjects. But these subjects are *subjects* who never forgot that sovereign power is what gave them *habeas corpus*. Self-control is, in their minds, (and) a gift of the sovereign, of the state.

From the state of parliamentary law to the state of social law, the evolution of the "state of public law" (European) follows the evolution of democracy, i.e. the way in which political power is exercised. Political power is what defines and promotes the "état de droit", not the "état de droit" is what defines politics. Democracy is not perceived in this legal space as an arrangement of the people, but as an exercise, legitimized by the people, of state power. This is because political society absorbs civil society and public law is instinctively considered "superior" to private law. The consequence is that the "état de droit" based on a justice designed as a balance of rights is replaced by a state of public law. Unlike Roman law, and the one that actually continues it, which considers that "merum imperium and the right to prosecute crimes susceptible to capital punishment belong to the magistrate, for Bodin, it belongs exclusively to the sovereign. Imperial jurists define the judiciary through the activity of justice, Bodin defines it through the exercise of authority. From the inflections that Jean Bodin applies to doctrine of *imperium* to build the theory of sovereignty, there are a number of characteristics of our state, marked by the importance of the administration to the detriment of justice"[37]. The "état de droit" resulting from the doctrine of sovereignty is thus necessarily an administrative regime", i.e. one in which, regardless of the progress of the protection of rights through justice, the state remains "superior" to

[37] Idem, Chapitre «Jean Bodin et la naissance de l'État administrative».

other subjects of law and "escapes" ordinary justice, building a special administrative law, distinct from civil law, applicable to individuals. Institutionally speaking, this type of "état de droit" is characterized by separation of *authority* from *jurisdiction*, the latter losing both the legislative competence and that of judging the state administrations according to the common procedure, i.e. to reduce the state to the quality of being subject to the legal rules created by the justice itself. As Blandine Barret-Kriegel rightly judges, in Bodin's construction of the theory of sovereignty "there is a gain and a deficit. For the promotion of the administrative state to the detriment of the state of justice, which is the structural feature of our public power, results, perhaps, due to the considerable influence that the author of the paper *Six Livres de la République* will exert, this double definition of citizenship by sovereignty and public office by authority. We will gain from this the escape of the dispersion of feudal justice and the questioning of the hierarchical and unequal idea of Aristotelian natural law, which are the remnants of the Empire, but we will lose judicial decentralization, jurisprudential fairness, experimental fabrication of law, which are the wings of England. […] The quintessential political act will be a decision of the authority. The general will shall prevail over the jurisprudential agreement. We will lose confidence in justice"[38]. Even if the evolution of the European "état de droit" presupposes a phase described as a state governed by the rule of law, this "état de droit" is not a "state of justice"; it remains an *administrative* regime. This regime is continuously present in the background of the evolution of democracy, which, in this type of legal culture, "will be difficult [...] to avoid the ways of the state"[39] and to become an organization of the people themselves, not of political power.

Democracy was first based on what we might call "philosophical reason". The central figure of this democracy is the representative. It represents the general will, a will that is not reduced to the sum of individual wills, but is more, it is a "reason" of the collectivity. The expression of this will is the law. It is always in accordance with the general will, therefore, uncontrollable. The administration is, in this phase of evolution of democracy, framed by law, but the legislator enjoys full freedom. Representatives are thus considered infallible, and the law, the result of their will but irrefutably presumed to be the expression of the general will, cannot be controlled by any jurisdiction. However, with the progress of the media and the increase in the level of education, this presumption can no longer be refuted. The prestige of parliaments declines dramatically in a second phase of the evolution of European democratic society. With the decline of parliaments, the law itself and even "philosophical reason" fell as a foundation of it and of democracy. A new type of legitimacy is required, that based on "scientific reason" and, with it, a new figure becomes the centre of democratic

[38] Idem.
[39] Blandine Barret-Kriegel, Les Chemins de l'État, op. cit., quoted from the electronic edition, 2014.

organization, the "specialist", the "technician". Politics and, with it, democracy become technical. The key element of the state organization is no longer the deputy, but the clerk. The law is limited to general principles, which the Executive is called to specify. He is the new real centre of political impetus, which turns parliament into a docile instrument, because it responds better than the latter to the new attributions of the state, the evolution towards the so-called social state[40]. Administrations dominate the state system. They are removed from the rule of common law and a distinct legal regime is built for them: administrative law. The bureaucracy, thus established, is proving suffocating for individual rights and for civil society, demanding a new type of democracy. As individual rights and freedoms become central to society, their guarantee becomes the fundamental element for democracy, which brings to the fore the figure of the judge, the only one independent enough from the state to guarantee rights against it. In this third evolutionary phase, European democracy becomes jurisdictional, which does not mean, as we have shown before, that the state becomes a "state of justice". There is now a jurisdictional control of administrative acts and even one of the constitutionality of laws, but their primary purpose is to ensure compliance with the normative hierarchy and only as a derivative purpose the protection of rights. But, like any formal means, judicial review of laws or administrations cannot in itself be satisfactory. Therefore, a material vision of democracy tends to impose itself, in a fourth phase of development, a vision that establishes a primordiality of society over the state. It can lead to the establishment of popular democracies, self-declared "real" and which would have wanted, as provided by Marxist doctrine, to go beyond the state organization, establishing communism, but also to a certain type of "état de droit", *social*. At this stage, the foundation of democracy is no longer instrumental reason[41], but axiological reason, that is, one that is based on values, not on formal logic. These four phases of the evolution of democratic reason correspond, even if the transposition is not perfect, to four forms of the "état de droit" under public law: the state of parliamentary law, the state of administrative law, the state of jurisdictional law and the state of social law.

a. The state of parliamentary law

This type of "état de droit" is a reflection of the first phase of the evolution of democracy, in which there is a tendency to absolutize the value of law and representation. Its purpose is to limit the executive power and administrations, by regulating their action. Administrations can only act in application of the law, which means that administrative action can only intervene if a law authorizes it and that it

[40] To deal with the crisis of the welfare state, Jacques Chevallier, La fin de l'Etat Providence, Projet, March 1980; Pierre Rosanvallon, La Crise de l'Etat Providence, Seuil, Paris, 1981.

[41] Max Horkeimer, Theodor Adorno, La dialectique de la Raison, Gallimard, Paris, 1974.

can neither add to the law nor act against it. Parliament is the exponent of the general will, which is presumed to be the basis of any law. The law can only be in accordance with the general will, which makes it infallible and, therefore, uncontrollable. Parliament confiscates national sovereignty, as it tends to be confused with legislative sovereignty. It is the *supreme* body of the state. The Executive is located in a position of logical inferiority, as it does not have its own regulatory power, its activity being limited to the execution of laws. The judge is also confined to law enforcement: he/she is "the mouth that speaks the words of the law" (Montesquieu).

From a structural point of view, the state of parliamentary law presupposes a normative hierarchy that has the law at its top. The Constitution enjoys only a logical priority, not a real supremacy, because there is no control over the constitutionality of laws. Administrative acts cannot have a normative character, and autonomous sources cannot exist unless the law expressly offers them legal value.

b. The state of administrative law

This second type of "état de droit" corresponds to the second phase of the evolution of modern European democracy, in which instrumental reason, the clerk, the executive and the administrations, are its central elements. This "état de droit" is also characterized by the legal framework of state action, only that administrations acquire their own regulatory power, are subject to special law, administrative law, and special control through special administrative courts, separate from the ordinary judicial courts. The priority given to the Executive and the administrations, due to the efficiency of the administrative action, as opposed to the slowness and inefficiency of the parliaments, makes the law to be reserved its own field, and the general regulatory power to belong to the Executive. Therefore, the administration is strictly legislated only in certain areas, in the others it is either legally empowered or allowed to act normatively on its own initiative. Parliaments retain a right to control this administrative regulation, as well as the administration itself, but this right is largely illusory.

The law applicable to this increasingly powerful and independent administration is no longer the common law, but a special, administrative law, which derogates from the common law, especially since the parts of the concrete legal relations governed by it are no longer on position of legal equality, as in private law, but the administration subordinates its other subject. Equality in rights works between citizens, not between them and state bodies. The superiority of the administration is also manifested by evading the control of the legality of the administrative action from the competence of the ordinary judge and assigning the control to an administrative judge, i.e. to an administrator who performs judicial functions, but who remains a civil servant. It is a control of the legality of administrative acts made from within the administration, not from outside. As a result, the judicial order is doubling. This "état de droit" is, therefore,

a "well-ordered administrative "état de droit"[42]. Organization and administrative action are central to it. The principle of legality is its keystone. Fundamental rights constitute only "he case-by-case statement of administrative law"[43].

c. The state of jurisdictional law

The focus of democracy on the judge, on the guarantee of fundamental rights through the control he/she exercises over the administration and the Legislative, leads to the emergence of a third form of "état de droit", the state of jurisdictional law. This "état de droit" is an institutional reaction to the inefficiency of parliamentary action in guaranteeing the rights and freedoms of individuals. The "état de droit" presupposes, on the one hand, a valorisation of fundamental rights and freedoms, first by their constitutional provision, then by their judicial guarantee against the state itself, by a judicial review of the constitutionality of laws, which doubles a review of administrations achieved through the ordinary courts and, on the other hand, an independence as close as possible to the judges from the Executive, Legislative and civil society. The judge becomes the arbiter between the state and the citizens. He/she is the keystone of the "état de droit".

The hierarchical juridical order is only one of the formal mechanisms of this type of "état de droit". Central become the control mechanisms for compliance with this hierarchy, but not for the logical beauty of the system, but for the precise purpose of guaranteeing the rights and freedoms of citizens. We are, therefore, in the presence of a right that is no longer completely indifferent to values, aiming at individual freedom and the rights of citizens. Formal mechanisms are subordinated to achieving this goal, but they still remain central.

d. The state of social law

The state of social law denies the priority of formal mechanisms, which is typical of the other three forms, pushing further the trend already present in the state of jurisdictional law. It is a substantial, material state of law, not a mere formal mechanism. This revolt against formalism can lead in two directions: to a socialist state, which would be only a transition to a stateless society, the communist society, or to a welfare state, a state in which the social problem becomes central, imposing on the state ensuring not only justice as a formal balance, but also social justice, which involves a redistribution of social benefits and a material conception of equality. The rule of social law therefore presupposes an overcoming of the formal vision, not by its pure and simple denial, as in the case of the socialist state, but by the incorporation of formal mechanisms for guaranteeing rights and freedoms. – separation of powers,

[42] Otto Meyer, apud Olivier Jouanjan, (dir.), Figures de l'Etat de droit. Le Rechtsstaat dans l'histoire intellectuelle et constitutionnelle de l'Allemagne, Presses Universitaires de Strasbourg, 2001, p. 33.

[43] G. Anschütz, 1912, p. 98, apud O. Jouanjan (dir.), op. cit., p. 34.

normative hierarchy, judicial control of its observance and legal and jurisdictional guarantee of rights and freedoms – in a material vision of the "état de droit", which presupposes a determination of the state by society.

The material consequence of imposing this type of "état de droit" is the imposition of social rights, rights-claim whose debtor is the state and the generalization of a public system of social security. From a formal point of view, the imposition of this type of "état de droit" has several consequences. A first formal consequence is the presence of a control of the constitutionality of the constitution itself. Because the state is determined by society, the social constitution subordinates its political constitution. The latter is only formal at the top of the normative hierarchy, materially being located in this position the social constitution, i.e. a certain state of collective consciousness, certain principles and values intrinsic to society, which require and determine a certain constitution and not another, a certain right and no other. Values thus become central to the "état de droit", which is no longer the state of any right, but the state whose right complies with the dominant values in society. Constitutional justice ensures in this "état de droit" a control of the content of the law, through a control of the conformity of the laws with the social values and principles, a control of the constitutionality of the constitution.

A second formal consequence is the autonomy of the concept of the "état de droit" from the related concepts of modern constitutionalism: separation of powers, controlled normative hierarchy, guarantee of fundamental rights and freedoms, democracy etc. It acquires its own legal consistency. Another consequence of the affirmation of the state of social law is the completion of the formal, politico-legal vision on equality. The principle of formal equality is expressly stated in contemporary constitutions. But the universalism of formal equality often implies unequal access and opportunities.

By affirming the social character of the "état de droit", discriminatory derogations from formal equality are allowed, if they ensure equal opportunities for those in unequal situations and equal access to some social benefits for those who suffer because of a relevant difference. The state governed by social law therefore imposes a social mission on the state. This mission is not to erase real differences, but to open the way for participation to the most disadvantaged. If the liberal "état de droit" does not authorize, in principle, derogations from formal equality, the reference to the social character of the "état de droit" extends the material idea of the "état de droit" to the organization of work and the distribution of wealth. If justice is typical of the "état de droit", social justice is the key concept of the welfare state. This type of "état de droit" plays, for the (re) distribution of material benefits produced by society, the role that providence plays for the distribution of saving spirits, it is a welfare state. This type of state is a questioning of the relationship between democracy and capitalism. I will study it in detail later.

III. The cultural contextualization of liberal constitutions against totalitarianisms

The modern state is a liberal state[44]. Its essence is the priority of freedom. Unlike other political systems, even if they call themselves democracies (as did the communist ones, which defined themselves as *people's* democracies), liberal democracies aim at freedom and as a means of limiting power, even when it belongs to the people or the nation. Today's European constitutional law is a right confined to the sphere of this type of democracy: liberal. It is based on a particular philosophy, which is in a perpetual evolution, but whose contemporary contours can be sketched on the basis of the following principles: 1) the individual is the goal of any social system; 2) freedom takes precedence over power; 3) man is self-determined, self-constructing; 4) the right is a priority over the good, 5) the public space is based on the man detached from the primary identification groups (the citizen); 6) equality is dynamic and 7) the state is neutral towards moral or comprehensive doctrines that can establish the *good* society, to the existing interests in society and to the social structures that promote them. The essence of this basic structure is, when it is related to its opposite – totalitarian philosophy –, anti-perfectionism. Liberalism does not aim to achieve the perfect society, nor to achieve the perfect man. That is why it is against perfectionist values and morals.

Some of these principles have been clarified in the previous exposition, and I will deepen others when I deal with the state, so now I will only refer to the fact that the individual is the goal of any social system, to the fact that his freedom is a priority and in the sense of the priority of the right over the good in liberal democracies. What interests me is that their explanation as constitutive principles of a philosophy opposed to totalitarianism to demonstrate why and in what sense the right of liberal democracies is based on principles, not on (perfectionist) values and why and in what sense it separates itself from moral, which is, in turn, perfectionist, an aspect that I will deepen in the part of the paper dedicated to the constitutive principles.

§1. The individual is the goal of any social system

The first fundamental idea of liberal constitutionalism is that the individual (and not the group, society, or state) is the finality of any social system. In order to guarantee this finality of the social system, the legal system must guarantee that the state and the general interest, embodied in various forms of order (public order, national security, public morality etc.), are only instruments used to guarantee people's rights and freedoms, not purposes in themselves. The constitutional law of liberal states is

[44] Liberalism is understood in this work by opposition to totalitarianism, not as a political doctrine situated in the frame of reference of Western pluralist democracies.

the law that limits the autonomy of the state towards the individual, the possibility of it turning from a means to a purpose.

It is the first thing that differentiates liberal states from totalitarian states. When the state becomes totalitarian, it tries (like any independent structural social existence which, although it does not exist in reality as something extrinsic and material, claims to have, in a way, a body distinct from that of individuals) to deepen its own unity, to become something qualitatively superior to its elements, to pass from the position of totality to that of whole. It tends to become autonomous, acquires a will of its own, which manifests itself as a form of resistance to any attempt by individuals to evade the logical coherence of its ideational basis. It thus contradicts the individual, whom it tries to control completely, regulating the smallest details of their behavior.

Or, no matter what philosophy is circulated in society, the individual tends to understand his/her freedom as the possibility to do what he/she wants. An antagonism is thus established between freedom and authority. The state, which should be a simple tool to ensure the coexistence of freedoms, tends to become an end in itself. The constitutional law of liberal states is the law that prevents the state from overcoming its hypostasis of instrumental existence, from becoming autonomous, from becoming an end in itself, from becoming a totalitarian state. It is, therefore, built in opposition to the constitutional law of totalitarian states. For totalitarian society, order and justice are priority. The purpose of society is to maintain order through justice. In relation to the need to protect these forms, the individual is, for society, only an abstraction. Order presupposes him/her, but not in its concreteness, taking into account the qualities that characterize him/her in relation to other individuals, but as an agent of society, who performs a function for society, as a *citizen*, identical with other citizens, i.e., in its *quantitative* appearance. Therefore, individual considerations have no value for the order itself; individual goals do not form it, but *deforms* it. Order is the life of the norm for itself. Consequently, the law will first defend the social relationship, it will restore it when it is broken, that is, it will restore the form, the individual does not matter, his protection being only a consequence, not a purpose. It seems, therefore, that, from the point of view of society, the protection of order and justice always takes precedence over the protection of individual interests. The general interest, the common good, what it is *public*, morality, order, good morals[45] take precedence over individual freedom. And it's not about *imposing* this priority. On the contrary, people feel it as being natural, as part of the order of things. This is what Hegel stated when he said that the individual has no objectivity, truth and ethical character except that he is *member of the state*[46].

[45] Diana Dănișor, Bonnes mœurs et ordre public: notions relatives en droit, termes qui ont conservé leur valeur métaphorique dans le Nouveau Code civil roumain, The Proceedings of the European Integration between Tradition and Modernity Congres, nr. 6/2015, p. 647-660.

[46] G.W.F. Hegel, Principles of the philosophy of law or elements of natural law and science of the state, Academiei Publishing House, Bucharest, 1969, p. 278.

And yet, society is *of people*. Although the natural tendency is to assert the priority of the social whole, individuals are those who constitute society, a society that should meet their needs. So if we change the angle of view and look at society from the point of view of the individual, order and justice must exist to meet *our* needs. For the individual, the order has a concrete content. It must exist *in the form necessary for his/her protection*. Justice aims at this protection. The law turns for the individual into rights. The purpose of law is the protection of rights. From the point of view of the individual, it is, of course, indisputable that justice must crystallize a social order, but this only as an affirmation of individuality, which means that if its existence is for formal society, its action must not have a formal purpose: order, but substantial: the individual. The guarantee of order is subsequent to the guarantee of individual freedom. By guaranteeing order, the general interest, public morality etc., *anyone's* rights and freedoms must be guaranteed; they are not protected values for themselves. This type of constitution of the society in which freedom is a priority is generically called a liberal constitution.

The liberal constitution is a standard ideal. There is in reality no pure liberal constitutional system, just as there is no entirely totalitarian constitutional system. We can rather speak of a tendentious identity of systems. The preponderance of one or the other of the tendencies does not necessarily depend on the existence of a democratic or dictatorial political regime, because these forms of state organization refer to means, and the tendencies in question refer to ends. The printing of totalitarian tendencies in the legal system is not necessarily linked to the existence of a particular political system. Any system has totalitarian tendencies. Democracy is not in itself a guarantee against this drift. The legal system can become totalitarian in very subtle ways of manifesting political power. Only one fundamental change can hinder the trend: the acceptance of freedom as a formal condition of social existence. It is the demand very suggestively formulated by Benjamin Franklin: "Those who give up liberty for security deserve neither". Totalitarian law cannot exist if people place their freedom above the security offered by order. Liberal constitutionalism tends towards this prioritization of freedom. This is his first defining feature in its opposition to totalitarianism.

§2. The priority of freedom over power and the general interest

Liberal constitutional law is what limits and controls totalitarian tendencies to transform order into end. In order to succeed in this change of perspective, it must consider freedom as a formal condition for the existence of society. In other words, if for the totalitarian state and its constitutional law, freedom results from order, for the liberal state and the law that constitutes order, it results from freedom. But is freedom a formal condition of social existence? In other words, can society exist without people being free? Order is naturally considered the fundamental condition

for the existence of society. In fact, society is not a "bunch" of people, but this *order* itself. Not from *individuals* the society is constituted, but from the *relations* between them, from their *ordered structure*. Does freedom have the same character? The seemingly non-relational character of freedom makes it difficult to understand it on the same level of affections and knowledge on which we instinctively place the social order. Freedom seems to be mine *versus* the other, while the order is mine *together* with the other. In fact, the order is desired only because it protects me from the other. It is not order that is paramount, but the preservation of my freedom towards the other, guaranteed by the existence of a limit of his action, of his freedom to affect my freedom. Order is needed to limit *his* freedom, for *me* to have freedom. Freedom is what determines the need for order. It is true that in a seemingly negative way: as the limit of the other's freedom. Order is, in this view, only a limit. The law that imposes and protects it is, in turn, only a normalization of limits. This is exactly what the French Declaration of the Rights of Man and of the Citizen has been saying since 1789: "Political liberty consists in the power of doing whatever does not injure another. The exercise of the natural rights of every man, has no other limits than those which are necessary to secure to every other man the free exercise of the same rights"[47].

Freedom is the formal condition (constitutive, indispensable) of the existence of any society. Only free people can form society. It is true that limiting everyone's freedom to coexist with others seems paramount. But, in fact, the preservation of the rest of the freedom, after this cohesion is achieved, is the primordial condition of the association, of the society. The law is the protective structure of this freedom. It regulates only what is necessary to guarantee the autonomy of each one towards the others and towards society as a structure. The field of law is limited.

As we have already shown, liberal law, unlike totalitarian law, cannot regulate consciences or all social relations. It leaves part of the social sphere autonomous. It is what ensures social malleability and, therefore, the possibility of progress. Law is thus an open system, even if this openness is relative and limited. On the other hand, law must respect the priority of freedom[48], to regulate only to the extent that regulation is necessary to protect the freedom of others. The system of exercising rights is in principle a repressive one, i.e. the one that leaves the subjects free to exercise their rights or freedoms and represses only the exceeding of certain limits. This type of law therefore starts from the idea that the legal system does not regulate freedom, but only its abusive exercise. In the legal system that aims at freedom, everything that is not expressly forbidden is allowed, but the state cannot forbid anything, but only what is necessary for the exercise of the freedom of others. This type of legal system does not absolutize either equality or hierarchy, natural or resulting from the exercise of freedom. Regulation thus remains equidistant from the basic structural principles of society, the

[47] The Declaration of the Rights of Man and of the Citizen from 1789, art. 4.

[48] Gheorghe Dănișor, Le droit au service de la liberté, Romanian Journal of Philosophy of Law and Social Philosophy, no. 6/2007.

constitutive principles which are freedom and equality; justice in liberal states becomes a constitutive means that balances the excesses of one of the two principles in a particular conjuncture and not, as in totalitarian states, an order enforcement mechanism.

Liberal constitutional law is a right that limits state law. The state is not the master of the legal order, but subject to it. In this sense, it is governed by the rule of law, as we have seen above. Liberal constitutional law is the law that constitutes the state, not a law constituted by the state. Liberalism does not accept the statist idea that law is a set of rules enacted by the state and nothing more. This idea slips the state towards totalitarianism. Liberalism believes, to varying degrees, that we cannot reduce the law to the state normative fact, because the state itself is nothing but a legal phenomenon, the legitimacy of which is ensured by the fact that it is the expression of an idea of law. As L. Duguit said, "if the foundation of law cannot be established outside of its creation by the state, we will have to state, *as a postulate*, the existence of a law prior to and superior to the State" (s.n.)[49]. This law postulated as prior and superior to the state is the law that constitutes it, it is its *constitutional* law. In this first sense, constitutional law no longer means a set of norms at all, but the premise of any norm. It is the law that underlies the state, the idea of law that commands one state and not another, the *a priori* concept of the constitution, as we have explained since the introduction.

In another sense, constitutional law means the right of the state to be constituted, the justification to exist of this power which has the particularity of imposing itself on its own creators as a sovereign power, its justification to act by imposing norms of conduct. Is the state entitled to exist? Under what conditions and with what limits? These are the questions that constitutional law is called to answer as a science, following the substance of the law imposed by the state. Constitutional law, in this primary sense, the broadest of all, is equivalent to the *raison d'être* of the state. It emphasizes the instrumental condition of the latter and constitutes the guarantee against the tendency of autonomy of the state structure, the guarantee against the totalitarian tendencies of any statism.

From the fact that the individual is the goal of the existence of the state and of all social mechanisms derives the idea, fundamental for the liberal state, that people cannot be treated as means. This prohibition of the instrumentalization of human beings is transposed into the prohibition of slavery, forced labor, but also, more broadly, in respect for the dignity of all human beings. In the liberal state, people have rights that no one can achieve, just because they are people, not because some state or some power grants them.

The liberal state and its constitutional law ensure the priority of freedom. Once the individual is an end, not a means, his/her freedom takes precedence over any social structure, even if it is considered sovereign, and over anything of interest, even

[49] Léon Duguit, Manuel de droit constitutionnel, Paris, E. de Bocard, 1918, p. 2.

if it is defined as *general*. Social structures and the general interest are only tools through which people reconcile their freedoms and satisfy their needs or interests.

Freedom is defined, from a liberal point of view, by reference to itself, not by reference to the law or the general interest. My freedom means my autonomy of action, which finds no other limit than the freedom of the other. The law can only affect it by the means that are *a priori* able to fulfill the general purpose of this society, the safeguarding of freedom. Liberal constitutionalism forbids experiences of freedom. The state cannot reach the social result pursued by successive attempts. People can't be guinea pigs. This is another sense of the prohibition of their instrumentalization.

Liberalism does not deny the general interest. But it gives it a special meaning. It is general not because it is a result of particular interests, nor because it is situated above them, but because it is *accessible to all*. It is *general* because it serves everyone, not because it is above all. It is available[50]. This gives it generality. "We say that something is available when that something can be disposed of by anyone and whenever, when that something is not something specific, it is *non-something* in itself"[51]. The availability of the general interest involves three aspects: general accessibility, accessibility at any time and lack of substantial content. In a liberal state, the invocation of the general interest in order to restrict the exercise of rights or freedoms must be made in such a way that it remains available in all three senses. In totalitarianism, the general interest justifies the restriction of freedom, while in liberal society the generalization of an interest is not sufficient to limit freedom, even if this generalization is obtained by democratic means.

Art. 1 (3) of the Romanian Constitution provides that "human dignity, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism are supreme values". All supreme values belong to individual freedom. Some directly, such as dignity, rights, freedoms and the free development of the human personality, others perhaps more mediated, but without denial, such as justice or pluralism. It is certain that no supreme value is in the general interest. None of the causes that belong to the general interest and can constitute justifications for the restriction of the exercise of rights or freedoms, provided by art. 53 (1) of the Romanian Constitution, are not listed among the supreme values of the Romanian state. This can only be interpreted in the sense that individual freedom (or the joint exercise of it) is superior in value to the general interest, national security, public order etc. The very structure of the Romanian Constitution demonstrates that the general interest is a limit of freedom that can only be validly used by the state to protect supreme values, i.e. the main manifestations of individual freedom, what Rawls called "basic freedoms". The liberal conception of the Romanian constituent is obvious.

[50] Dan Claudiu Dănișor, Garantarea disponibilității interesului general – limită a restrângerii exercițiului libertății (Guaranteeing the availability of the general interest – limit of the restriction of the exercise of freedoms), in Revista de Științe Juridice (Journal of Legal Sciences) no. 1/2015, p. 111-118.

[51] Gheorghe Dănișor, The metaphysics of freedom, op. cit., p. 109.

§3. The priority of right over the good

People find it difficult to agree on *good* society which they should build. In any society, several doctrines about *what is good* and *how is good* to do together coexist. Comprehensive and moral pluralism is natural. It translates into the existence of several organizations in which people associate around such a doctrine and through which they try to build the kind of good society they believe in. Thus, associative pluralism is, in turn, *natural*.

What position should the state take towards these doctrines and associations that promote a certain good society? Totalitarian states turn one of them into official truth and impose it by law. They eliminate the pluralism of comprehensive doctrines. The natural reflection of this legal imposition of one of the variants of good society among the countless possible variants is the destruction of associative pluralism, at least at the political level. In totalitarian states there is only one political party, the others are eliminated, because they no longer find their purpose. In contrast, liberal states do not impose a good version of society. They are equidistant from the various doctrines that refer to it and from the associations through which people try to impose them. They shall arbitrate between them by a fair procedure. For the liberal state, the right is, in this particular sense, a priority over the good. Fair procedures that allow the coexistence of comprehensive or moral doctrines are a priority for the liberal state over any of them. The liberal state is pluralist. Temperate conflict is the engine of any liberal society. There is no liberal democracy without civil society, and it exists only if it is structured in a pluralist way and if these structures, which constitute various centers of influence and social impulse, are independent of the state and of each other.

Liberal democratic consensus is not just any consensus. There is a maximum limit to the agreement for it to remain democratic because consensus must not stifle pluralism. For the latter to survive the consensus, no moral or comprehensive doctrine must become the sole foundation of politics. The intensity of consensus must not destroy ideological pluralism. The diversity of doctrines – "the fact of pluralism" – "is not a simple historical condition that must disappear quickly; on the contrary, it is, at least I believe, a permanent feature of the public culture of modern democracies"[52]. Consensus cannot, therefore, have as its object, in modern liberal democracy, the ideological basis of society. Democracy is based precisely on questioning this basis. Consensus can only lead to totalitarianism when it has such an object. What J. Rawls proposes then seems logical: consensus can result only on the basis of ideas that are common to comprehensive doctrines. The result is an overlapping consensus, which exists in a society when the political conception of justice that governs its basic institutions is accepted by each of the comprehensive moral, philosophical, and

[52] John Rawls, Justice et démocratie, Seuil, Paris, 1993, p. 251.

religious doctrines that have endured in this society for generations[53]. This consensus is primarily procedural. Everyone agrees that we may disagree, as long as we agree that we must resolve our conflicts peacefully. And this regardless of the nature of the violence.

The constitutional law of liberal democracies ensures this peaceful coexistence of social structures that promote various conceptions of *good* society. It is equidistant from parties, from religious cults, from economic structures, from employers, trade unions etc. For the liberal state, pluralism is a condition and a guarantee of freedom. At the constitutional level, the priority of the right over the good means that the procedures for judging the fair balance of conceptions of good are, from the point of view of establishing the legal order, logically prior to judging the substance of the rules that transpose one conception or another about good society. In other words, the "judgment" of the formal validity of the legal rules precedes the "judgment" of their material conformity with the constitutive principles or with the values actually dominant in the respective society at a given moment. Only by doing so can law be a priority over policy, it can frame and limit it. Any judgment of an imposed rule must begin with an assessment of whether the rule is "right" and continue with an assessment of whether the rule is "good". This does not mean that rules are actually created this way. In fact, in reality, they are the expression of a particular conception of good, which is outlined by a political majority. However, in order for this majority not to be able to eliminate alternative conceptions of what is good to do, it is necessary that it be limited by some rights of those who are, from a political point of view, in the minority, rights that are guaranteed, through an independent justice, against the rules that the majority has the power to create. The "right" nature of a rule must be judged first by reference to the guarantee of those rights and only subsequently by reference to the general interest or the dominant values in the given society.

[53] Idem, p. 245-283.