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ORIGINAL PAPER

The Historical Contextualization of the Ideal-Types of Modern Constitution

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Abstract:
The object of this study is the historical contextualization of the modern constitution. Its stake is primarily methodological. When we operate a historical contextualization of an object of normative study, this contextualization should not be confused with a ‹‹ concretization ››, which would situate the analysis in its field ‹‹ what it is ››, but, on the contrary, it means maintaining the analysis in its field ‹‹ what it must be ››, « building » a context. Thus viewed, the historical contextualization of law does not mean the objective analysis of the history of legal systems, but the construction, through utopian rationalization, of an « analytical grid », which we can apply retrospectively and prescriptively to the history of law, to (re) construct the context of imposing a legal ideal-type. The use of the ideal-type represents a paradigm shift because it is not considered a fixed framework of evaluation, but an evolutionary process. The process has begun to transcend the constitution of feudal societies and remains necessary as long as the constitutions of contemporary societies must separate themselves from it. From the application of this methodology results a type-ideal constitution that organizes a power that has several defining features: it is extra-patrimonial, anti-senior, political, institutionalized, civil, temporal, centralizing and ensures the arbitration between various social forces. The analysis of these characters reveals the second stake of the study: determining the extent to which it is necessary to maintain the legal reality within the framework prescribed by the ideal-type of the modern constitution.

Keywords: *modernity; constitution; ideal-type; political power; feudalism.*

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The constitutional law is not universal. On the contrary, it is context-dependent from at least three angles: the historical epoch in which it was created, the cultural space that supports it, and the dominant philosophy on the basis of which its principles are configured. These three forms of contextualization will be the subject of the cycle of studies opened by the one you are reading.

The first form of contextualization of constitutional law is the historical one. „«The historical context » aims, in opposition to more traditional approaches, to separate from the schemes, developed especially in the nineteenth century, favourable to spiritualist and nationalist visions on the development of the law: the idea that exists (and that subsists) a « spirit » of Roman law, French law, German law, Belgian law or the *Common Law* [...]. It is preferable [that instead of spiritualism and nationalism] to choose the technique of the ideal-type, periodically proposing changes in the formulation and use of this instrument [...]" (Halpérin, 2013: 120-121).

This is the methodological perspective from which I will try to show what it means that a constitution is ‹‹ modern »". Firstly, the modern constitution is a constitution that is no longer ‹‹ feudal ». Secondly, it is a (re) constructed constitution against the totalitarianisms of the twentieth century. For the time being, I will only analyse the implications of building the modern constitution in opposition to the feudal one, the second point of view, although it obviously also implies a historical perspective, I will be concerned with the study dedicated to philosophical contextualization.

The inflection point between feudalism and modernity is, from a constitutional point of view, the constitution of the absolute monarchy. From some points of view, it is already ‹‹ modern », although from other points it is not yet. Consequently, I will use the ideal-type of absolute monarchy, sometimes in opposition to feudalism, sometimes in opposition to modernity. From this methodological perspective results some ideal-typical features of the power organized by the modern constitutions, which will form the object of the following considerations.

1. *The modern constitution organizes an extra-patrimonial power*

In feudalism, the power was considered a property, a ‹‹ good » that was ‹‹ appropriate ». It bore a ‹‹ right » over it, which was in the patrimony of the holder. The holder of power could behave towards it as towards any other good of his; he could dispose of it: he could alienate it, he could give it up, and he could pass it on by inheritance, and so on. The modernity begins with the extra-patrimonialization of power. The characters of this new - extra-patrimonial - power are constructed by opposition to the feudal - patrimonial - conception of power.

The feudal seniors had the power, because they owned the land. By opposition, the first typical feature of power organized by the modern constitutions is that the holder of power no longer ‹‹ possesses » it. The power ceases to be the property of its holder. The royalty separates from feudalism and begins to constitute a modern form of organization of power, of constitution, when "the king's right over his kingdom is of a different nature than the right of an owner over his patrimony" (by Terre-Vermeille, quoted from Barret- Kriegel, 1986). The modernization of the monarchical constitution is accentuated when the power is no longer considered a right, but a competence. Juvénal des Ursins marks this evolution when he states that the royalty is "a way of administration and use that the monarch exercises throughout his life, but of which he is not the owner" (Quoted from Barret-Kriegel, 1986). The consequences of this transformation of royalty from patrimonial power into a system of public service

competencies are constitutive for the ideal-type of the modern constitution. The first consequence is that the power is inalienable, that its holder cannot unalienable it. This principle is formulated by the modern constitutions as the inalienability of sovereignty, territory (in the sense of physical support of sovereignty, not land ownership (see, for example, Article 3 of the Romanian Constitution of 1991) and the public domain. The second consequence is that the holder of power is obliged to exercise it. In the constitutions of the absolute monarchies this principle was formulated as the inadmissibility of the abdication. The ideal-type of the modern constitution assumes the establishment of a general obligation to exercise the competencies, which assumes that the state bodies cannot refuse to exercise the competencies conferred and that there must always be a way of resolving negative conflicts of jurisdiction. The third consequence is that the transfer of power from one holder to his successor is no longer done according to the rules of transfer of property rights, by succession, but according to rules different from the rules of private law, which is an autonomous public law. These rules are unavailable for the holder of power. This is, for example, the foundation on which the Paris Parliament decision was based when it cancelled the Louis XIV's ‹‹ will » because the king was ”fortunately unable” to change any of the rules for the transfer of his power (Bart, 1999). All modern constitutions will apply this principle, because, even if the succession of holders of power is organized in various ways, its rules remain unavailable for the holder of the transmitted power. The fourth consequence is that the power is no longer a right. The state bodies have competencies, not rights, and their exercise is presumed to be limited, not, as in the case of rights, unlimited. The fifth consequence is that the patrimony of the holder of power and the public patrimony are separated: “The public domain and the patrimony of the Prince [are] different”, wrote Bodin in 1583 (Bodin, 1993: 501-502). This separation is what creates the premises for the establishment of a legal personality of public power which is distinct from the person of the king: the state. The appearance of the state is, in fact, inextricably related to the extra-patrimonialization of power. The state, in the modern sense of the term, (in fact, the extension of the notion of state to pre-modern epochs is only retrospective) appears only when instead of the patrimonialization of public power the opposite phenomenon occurs: the nationalization of the king's patrimony. The owner of the public patrimony is, from now on, the state, which implies the existence of rules distinct from the rules of private law for the establishment, allocation and control of public finances. There is no modern constitution that does not include a system of these rules. A final consequence of the extra-patrimonial character of the modern political power is the prohibition to transfer the benefits from the economic sphere to the sphere of public power or vice versa. For example, the public positions can no longer be ‹‹ bought », as was the case with some of the public positions in the pre-modern era, and the holders of public positions can no longer exercise them in order to obtain economic benefits. Over time, these prohibitions have elaborated and diversified, turning into a real separation of the spheres of justice.

2. The modern constitution organizes an anti-senior power

The feudal lords were ‹‹ masters ». Because they owned the land, they had *dominium*, that is, a power of disposition exercised ‹‹ *in corpore vili* » over serfs (one who is attached to a senior's land), and *imperium*: military power, the possession of law and the right to judge the facts that could lead to the death penalty. Some people had a special legal condition, situated between slavery and freedom: ‹‹ servitude ». This

condition is far from being unitary throughout Europe and fixed throughout the Middle Ages (see, for the diversity of the modalities of the servile condition, for example, Mélanges de l'École française de Rome, tome 112: *Moyen-Age*, no. 2 / 2000), but what matters, for the needs of the argument I am trying to make here, is not the diverse and progressive substance of this servile condition, but the kind of power relationship that the special legal bond between serf and senior (master) has maintained, because the modern constitution will be built as a denial of it. The servitude assumed that the senior could ‹‹ dispose » of the serf as a good, even if the status of the serf was not identical to that of the ancient slave. Any man who was sold or ceded, who could be sold or assigned, alone or together with the land he ‹‹ held », was in a relationship of servitude, this condition being hereditary (Freedman, 2000: 1043). Between seniors, the power relationships were based on contract, being interpersonal relationships. Three fundamental ideas result from this type of power relationship, ideas that will be denied by the modern constitution: 1) the feudal political relationship was built as a personal relationship, either between the master and vassals, or between seniors; 2) the political conditions were hereditary; 3) the power relationship was not subject to an autonomous right, which would have had the ability to extend beyond the ‹‹ concrete » relationship regulated by it.

The modern constitutions will build, through opposition, an *impersonal* political relationship. This means, first of all, that in modern constitutions there is no longer a ‹‹ master ». The people are subjects, not simple vassals, they are *sui juris*, which means that the right to which they are subject is impersonal, that they are not addressed *in personam*. The modern law is not an ‹‹ order » of any master, even if this master is conceived as sovereign. All people are subjects *of law*, which means that society exists only as a system of legal relationships between *free* people, any form of servitude being prohibited (the Romanian Constitution prohibits the forced labour in art. 42). Second of all, the modern constitutions build an impersonal political relationship in the sense that the power is no longer exercised in the name of its holder, but in the name of an abstract entity: the state. It is another reason why they will order that no person can exercise sovereignty in his own name (the Romanian Constitution provides for this in art. 2 (2)). The relationships between the holders of power are no longer personal either. They are no longer based on the agreement of their wills, but are independent of them, in the sense that what comes into the relationship are the competencies of the positions, and their holders cannot have the rules of their own competency. The public order is not *negotiated, but regulated*.

In the modern constitution, the social conditions are no longer hereditary and no longer constitute the foundation of the exercise of power. This is the reason why the ‹‹ social origin » is one of the criteria for non-discrimination (the Romanian Constitution provides for this in art. 4). The power relationships are no longer dependent on the social condition resulting from the membership to a group. Therefore, in modern constitutions no group can exercise sovereignty in its own name (the Romanian Constitution provides this in art. 2 (2)), regardless of whether the membership in the group is hereditary or political (therefore the Romanian Constitution lists among the criteria of non-discrimination and political affiliation). The modern social conditions are no longer political in themselves, that is, they no longer constitute the foundation of the competence to order and the obligation to submit, and the members of the deliberative bodies no longer represent the political group that supported them to be successful in the position, but the whole people (the Romanian Constitution provides in Article 66).

The modern constitution is the constitution of a society in which the legal transcends the concrete relationship that it regulates. The modern social order is not ‹‹ concrete », and the ‹‹ concrete » legal relationship is always regulated by an ‹‹ abstract » norm. The law is the one who substantiates any power and any relationship, not the other way around. Extrapatrimonializing power means overcoming the idea that some people can be treated by this power as ‹‹ goods ». In the modern constitution all people are subjects who have mastery of their own ‹‹ body », of their own existence. Habeas corpus is defining for the ideal-type of the modern constitution. The punishments are no longer available to those who ‹‹ have » power (imperium). They can therefore no longer be arbitrary. The offenses and punishments must be created as ideal-types, apart from the concrete relationship between the holders of binding force and those to whom it can be applied. They must be ‹‹ created » by law (the Romanian Constitution imposes the principle of legality of punishments in art. 23 (12) and the principle of legality of offences, requiring the form of organic law, in art. 73 (3) h.), and their ‹‹ contextualization », their application to a determined person and in a concrete situation, must be made by a court independent of those in the concrete relationship, therefore independent of the parties and of the one who can execute the sentence, of «executive». Unlike feudal power, the modern power must no longer have the right to apply the death penalty. However, the prohibition of the death penalty is not won today either in all western liberal democracies. From this last point of view, Romania configured well, and early on, the ideal-type of the modern constitution, prohibiting the death penalty since the nineteenth century.

The modern order is not rational because it is « natural », but because it is « lawfully established », which is what it means by *law*. Consequently, the application of the law is a matter of « knowledge », not « of will », which inevitably leads to the professionalization of legal positions, primarily of judges. These transformations are already evident in England during the reign of King John I (1166-1216) (John I is the king who signed the Magna Charta Libertatum, in 1215): “During a session of the Upper House, [...] the king declared that he would protect always the common law [Common Law]. « No, Sir Edward Coke would interrupt him; it is the common law that protects the king ». Furious, the king immediately claims, waving his fist in Coke's direction, « that he thought that the law was based on reason and that he, and others, possessed the reason as well as the judges ». Coke calmly replied that the king was undoubtedly excellently endowed with nature, « but that his Majesty is not instructed in the field of laws of the kingdom of England, and that matters concerning the life, inheritance, property, or wealth of his vassals [subjects] are not decided by natural reason, but on the basis of an artificial reason and by judgment based on laws, for the knowledge of which long studies and experience are required ”(unknown source) (Kantorowicz, 1995: 11).

3. The modern constitution institutionalizes *the political power*

The medieval society did not know the separation between political and social. The objective social divisions, such as classes or states, were directly political divisions. Some were born to lead, and others were born to obey. The modernity occurs when the political power separates from the social and transcends the division of society into groups whose criteria for constitution are unavailable to individuals. In order to understand the modern constitution, we must therefore see what the politicization of power means.

"Given the fact that there is power - wrote G. Burdeau - in any phenomenon where the ability of an individual to obtain from another a behaviour that he would not have adopted spontaneously is revealed, the deeds of power are innumerable. For them to take on a political character, it is necessary for their finality to be socialized". (Burdeau, 1970: 22) This socialized finality presupposes that the purpose of relationships is not exhausted in the inter-individual relationship, but must be appreciated in relationship to the global society". [..] Next to or beyond groups formed for a limited and specific purpose, the global society is a reality of a very different nature. It is not explained by a purpose beyond it; it is enough to exist in order to fulfil its purpose. It is its own finality, for it is, itself, the foundation of the values by reference to which the relations of Power occur within it. They are not determined by an external criterion (religious, economic, cultural or other); it results from their necessity as a condition of the existence of the collective being. Then there is a political society. The political connection ceases to have an instrumental value; it becomes an existential concept. It is important to understand, indeed, that only insofar as the global collectivity is composed of partial bodies of different essences, it is necessary to assert a value that is common to them, beyond the purposes of each of them. This value can only be the very existence of society. And the political society appears only when it is understood by the group, because the Power that externalizes its reality is afferent to a social purpose that transcends the finality of each secondary group" (Burdeau, 1970: 23). This type of society, which is both ‹‹ pluralistic ›› and ‹‹ unitary ››, was postulated as a necessary basis of the political society already by Bodin: "From several citizens [...] a Republic is made when they are governed by a sovereign power [...], even if they are diversified in terms of laws, languages, customs, religions or nations " (Bodin, 1993: 94).

We are, therefore, in the presence of a political society when the personal power is transformed into institutional authority, when the control of social roles takes the place of the arbitrary, when the social purpose transcends the individual roles. The institutionalization of power has precisely this role. It makes the transition from the head, so from the individualized and embodied power in a man who concentrates in himself not only all the instruments of power, but also the justification of authority, to a power that dissociates the authority from the individual who exercises it. "But, as the Power, ceasing to be incorporated in the person of the head, cannot subsist in a state of ectoplasm, it needs a holder. This support will be the state institution considered as the exclusive headquarters of public power. In the state, the Power is institutionalized in the sense that it is transferred from the person of the governors, who have only its exercise, to the state, which thus becomes, from now on, its sole owner "(Burdeau, 1970: 31). Therefore, the existence of the state should not be linked to the existence of the distinction of governed people/governing bodies, present in any political society, but to the existence of a separation between the position, role, institution of government and the people who exercise it.

The causes of this institutionalization of power are very complex and difficult to generalize for all cultural spaces, especially if we take into account that this process is not yet complete everywhere, but I will outline some of them, valid for the European society, following the considerations of George Burdeau. "Because the state is an idea," he wrote, "it is obvious that it presupposes spirits capable of thinking it." Or, for a long time, the governed people saw in the man invested with the attributes of power the head, that is, the one who commands because no one dares to challenge the opportunity of his orders, or because his strength is a sufficient justification for obedience. [...] In these

young societies ‹‹ entirely built of people ››, according to the formula of H. Bergson (Bergson, 1932: 138), the idea never goes too far without embodying itself in a concrete form. : God in an image and Power in a victorious warrior" (Burdeau, 1970: 39). In order to move from such a ‹‹ head ›› to a state, the ‹‹ power ››, that is, the possibility of being listened to must be doubled by the ‹‹ authority ››, that is, by the *qualification* to give an order. And this transition, which involves a change in the psychology of governed people, but also of governing bodies, far from being based on metaphysical considerations, is based on *practical* advantages.

For governed people, the advantage is overcoming the insecurity due to the perpetual confrontations for maintaining or conquering the power, but also the uncertainty regarding the succession to power or the content of its orders. Thus, the governed people "do not care too much about the issue of legitimacy, but it is easy for them to understand that as long as the title of princes depends on the victory of their armies, the peace remains in danger" and that without peace there could be no prosperous business or flourishing fields.

The insecure roads, the scorched fields, the paralyzed trade, caused by the personalization of power, make the vassals to want a legitimate power other than by force of arms. On the other hand, "a society progresses only by ensuring tomorrow, and it is precisely this safety that is compromised by the individualized power. If everything disappears with the head, what project will survive? But also, if everything is based on his will, who guarantees that it is not arbitrary? The reign of the head causes social instability, because it implies the uncertainty of the rule." (Burdeau, 1970:41). The stability and safety could, practically speaking, be ensured only by a legitimation of the external power of the prince. It is thus stated, as P. Pot does, for example, as early as 1484, that royalty is a function, not an inheritance, and that power comes from the people.

For the governing bodies, the advantage of institutionalization is to find a foundation of their power, of its legitimacy, after the weakening of the influence of the Catholic Church, as a result of reform and rebirth, deprives the power of its sacred character. The laicization of public power is naturally followed by its institutionalization, because the prince, who can no longer justify his power by divinity, is obliged, so that his orders do not seem arbitrary, to justify it on the basis of a common good outside his own interests, so on a laic transcendence, which is the position, the service for the benefit of the community and so on. In fact, the characters of the sovereignty of this laic power follow step by step the characters of the divinity: it is a power of law (right), original, which is caused by itself, supreme and absolute. On the other hand, the transmission of power to the heirs, no longer justified by divine grace, must be justified by the permanence of the institution: the dynasty, as an institution independent of its successive incarnations, is the one that ensures the permanence of power and its peaceful transmission from a holder to another. The dynasty never dies. In other words, the practical interest of institutionalization comes also from the impossibility of personal contact with the vassals, due to the geographical expansion of the area of power, the distance of the governing bodies from the governed people. The personal qualities of the warrior and the head must be replaced by a symbolism of power, with an idea in whose name he acts, an idea that makes obedience more tolerable, because it creates the impression that people are no longer subject to people, but to a disembodied force. The head thus tends to exercise legitimate power, using an idea of law as its foundation. Not the mere fact that he can command makes him to

command, but the fact that this command is necessary to his vassals. The search for legitimacy thus contributes to the genesis of the state and this is a distinctive feature of the state power: it is a force of law, because it is legitimate.

The state is a privileged framework of political power. Which automatically implies that he is not the only one. Not every politically organized society, that is, in which, according to the theory that has become classical, there is a distinction between governing bodies and governed people, is a state. There is a dissociation of the two notions, as there is a necessary complementarity. What reveals the existence of the governed people - governing bodies hierarchy is the existence of ‹‹ power ››. "Or, if the foundation of power is universal, there are many forms of its manifestation that are not state" (Burdeau, 1970: 21). The state is divided between these various manifestations of political power by certain "characters that we do not find elsewhere" (Burdeau, 1970: 21). The first of these is the institutionalization, not of any power, but of the political one.

The modern constitutions are centered on institutionalization. The meaning of this institutionalization is evolving. It is no longer just a question of the fact that the state replaces the heads, but also of a certain form of internal organization of the state. An organization that, in addition to being ‹‹ political ››, becomes ‹‹ legal ››. The theory of the legal institutions owes a lot to Maurice Hauriou, so I will follow him to explain how the institution should be understood in the modern ideal-constitutional type. Hauriou wrote that, “the main lines of this new theory are the following: an institution is an idea of work [in the sense of object of activity] or enterprise, which is realized and lasts in a social environment; to realize this idea, a power is organized that procures its organs; on the other hand, between the members of the social group interested in the realization of the idea, there are manifestations of communion directed by the organs of power and realized through some procedures.”(Burdeau, 1970: 96). The idea of ‹‹ work ››, central to the existence of institutions, should not be confused with either the purpose or the function (Burdeau, 1970: 98). The difference between the idea of a work and that of a purpose is equivalent to the difference between a program of action and a result. Thus, the central idea of a legal institution that constitutes itself as a social ‹‹ body ›› synthesizes the purpose and the means necessary to achieve it (Burdeau, 1970: 99). The difference between the guiding idea of the legal institution and the idea of function is the one that is obvious when we differentiate, for example, the state as a political institution from state functions, because viewed as a political institution the state has "a part of indeterminacy and virtual that leads beyond the position”, because the political government “works indefinitely”, creating new rules while acting, while seen as a function the state appears as the “part [...] already determined of the joint venture”, it appears as „administration and services ”, which acts on the basis of rules determined in advance (Burdeau, 1970: 99). The guiding idea of the legal institution must rather be identified with that of the ‹‹ object ››. The institution has an ‹‹ object of activity››. Hauriou finds that there are two types of institutions: those that are personified, that form social bodies constituted as legal persons, whose central element is the internalization by group members of an ‹‹ object of activity›› of the joint venture, which are called person-institutions (the state, associations, and so on.) and those which do not personify, which are made up of legal rules already determined, which constitute an ‹‹ object of regulation ››, which the French jurist calls working institutions. The fundamental difference between the two types of institutions is that the personified ones are autonomous in fulfilling their social function, which makes them able to pursue their

goals and fulfil their functions as individuals, while those who do not access personification lack autonomy. Hauriou defines the first type of institution as "a social organization, in relation to the general order of things, whose individual permanence is ensured by the internal balance of a separation of powers and which has achieved within it a legal situation" (Hauriou, 1910 : 129). Due to the object of action distinct from the individual goals and its own independent organization, based on a separation of powers that makes the whole distinct from the will of the associated subjects, the legal institution is "true social reality separable from individuals" (Hauriou, 1910: 129).

If we change the angle of view, from the organic vision to the normative vision, the legal institutionalization has at least two meanings: 1) the sense of making unavailable the rules of one's own competence and 2) the sense of ‹‹ organic ›› grouping of the existing norms. For now, I will be concerned only with the first meaning, to show what is the difference between a modern legal institution and a pre-modern institution. The personified legal institutions exist as distinct ‹‹ realities ›› of social life. For example, no one doubts that the Government of a state ‹‹ exists ››. The problem is ‹‹ how is it? ››. Factually speaking, it is a ‹‹ assembly of politicians ››. Obviously, this description is too broad: not every assembly of politicians constitutes a Government. First of all, those politicians must have arrived at that assembly in a certain way. Before there was the assembly of politicians that we can consider a government, there was a procedure that serves to choose the politicians who will form the government from the wider mass of politicians. This procedure must not be changed by the assembly which is its result; it must be institutionalized in the sense that it is unavailable for the institution which is its result. Second of all, for the assembly of these politicians to constitute a Government, it must have a certain *object of activity*. They do not meet to make trade or to make laws, but to *govern*. It is not just about the purpose of the action, nor only of means, but of a unity of purpose and means, which, as we have seen, Hauriou calls the ‹‹ idea of work ››. When legal theories are unable to clearly situate the Government within the state institutions, stating that it is an executive body, that is, one that ensures the execution of laws, subsequent, therefore, to the ‹‹ work ›› of the legislative body, although even the most inexperienced analyst sees that he does much moreover, this incapacity is due to the fact that the analysis made is not institutional, even if it claims to be. The government is an institution in the sense that it is autonomous as a subject that achieves its object of activity. The government builds an ‹‹ idea of social work ››, that is, it directs the national policy towards a goal, making available certain means. These means include the law-making. From the Government's point of view, the Parliament is only a body that makes the normative means available for government. The national policy is directed by the Government. It is the one who chooses the policies that the legislature transposes into norms. Third of all, the politicians meet to govern constitute a Government only if they decide according to certain procedures and express their will in certain predetermined forms. The establishment of these procedures and forms limits the power of the Government. It may freely choose the policies by which it carries out the work which is its object of activity, but it may choose them and make them manifest only through procedures which are not at its disposal. It may make available all legal resources necessary for the implementation of its policies, but the procedures for such dismissal must remain unavailable to it. From this point of view, the competencies of the body are *limits* of its power, not just its *ability* to act. The institutionalization is this synthesis of the availability of legal resources and the unavailability of the procedures for setting up and exercising one's own competence. *The unavailability of the rules of*

one's own competence is what distinguishes an ‹‹ institution ›› from a ‹‹ power ››. When, for example, the state is seen as a power, it has the competence of its competences, when it is seen as an institution; it is no longer the master of its own competences. As a power it is sovereign, as an institution it is limited. The ideal-type of the modern constitution presupposes the institutionalization in this particular sense.

4. *The modern constitution organizes a civil power*

The medieval power indissolubly united the civilian power and military power in the senior patrimony. The accumulation of powers was due to the continuation of the Roman conception of the *imperium*, because "in Rome, the *imperium* was the usual word to describe the highest form of public power, which combined the military command and jurisdiction" (Barret-Kriegel, 1986: ‹‹ Jean Bodin et la naissance de l'Etat administratif (de l'imperium à la souveraineté, de l'Etat de justice à l'Etat administratif)››). The modern constitution of power differs from the feudal one in that it separates them. The modern power becomes ‹‹ civil ›› primarily because the jurisdictional function is autonomous from the military. Although the coercive application of the law presupposes the possibility of acting *manu militari*, those who have *jurisdictio* no longer have military power, and those who have the power to act *manu militari* no longer have *jurisdictio*. In modern constitutions, even if the law involves force, it never results from force.

Secondly, the modern power is ‹‹ civil ›› because the modern public order is no longer an order that results from military conquest, but from pacification. "Thus, there was a change of universe, because [...] the path was travelled from the power obtained through conquest, to the authority inscribed in the universe of peace. [...] The public power was endowed, according to the expression formulated later by Max Weber, with the monopoly of legitimate violence; *merum imperium* is no longer the prolongation of the war inside the fortress, made by magistrates, but an instrument of demilitarization of society through the civil power "(Barret-Kriegel, 1986).

Finally, the power arranged by the modern constitution is ‹‹ civil ›› in the sense that the army is subject to civil, political power. The army is not, and should not be, a deliberative body. It must be a *passive* instrument in the hands of civilian political power. The principle therefore excludes the possibility for commanders of the armed forces to refuse, under any pretext, to submit to government orders. If the political power loses the control of the military force, it loses the monopoly of coercion, hence the sovereignty. To prevent such a possibility, the modern constitutions require a civilian as the supreme commander of the army, usually the head of state, and the ministerial defense portfolio must also be occupied by a civilian. Regarding the bodies that ensure the *manu militari* application of the law in the internal order of modern states, a first option to guarantee their civilian character is to place the police and gendarmerie under the leadership of a civilian minister, and the second, preferably, involves their demilitarization. The police and gendarmerie are no longer, in this modern form of organization, composed of soldiers, but of officials, which has major consequences in terms of the law applicable to them and the control of their acts. The modern principle is, therefore, that the army cannot be used in internal repression. On the other hand, the fact that the power becomes civilian means that in modern states, the soldiers are not allowed to do politics and to be part of political parties.

5. *The modern constitution organizes a power of centralization*

The modern governments are centralized. Of course, there is a permanent concern for limiting this centralism, which, when it becomes excessive, is perceived as a danger to individual freedoms, but it does not deny, but rather it put in the light the centralist character of the power of modern states. There are many who, for several decades, have been trying to determine the origins and context of the organization of modern central government [...]. In addition to the historical interest inherent in this research, its importance lies in the idea that many of the problems of modern government are determined by the conditions present at the time of its creation. It also applies to the institutional origins of the governmental system. The institutional form and order created at the time of the organization's appearance is a predominant and determining factor in its subsequent life" (Groenveld, Wagenaar, Van Der Meer, 2010: 51-52). The fact that the power of modern states was created against the feudal system, which had ‹‹ divided ›› the power according to the land ownership, into relatively autonomous ‹‹ fiefs ›› and built a system that centralized only through war or feudal contracts, marks the later history of the system, in the sense that the centralist tendency is in its nature and that the struggle for decentralization must be permanent. This centralist tendency is not typical of monarchical regimes that have evolved into absolute monarchy, but also of republican ones (for the case of the republican Netherlands, see Groenveld, Wagenaar, Van Der Meer, 2010: 51-70). The legislative absolutism, that is, the system in which the law prevails over any alternative sources of law, is the legal form of this centralization. Its political form, even if it may vary from the point of view of the impersonal or collegial character, is the concentration of power in a single center of command. When I use the term ‹‹ centralization ›› I mean the synthesis of the two perspectives, that is, a system in which the law, as a priority formal source of legality, applicable throughout the territory of a state, emanates from a single political authority. Sometimes, the modern republican constitutions concentrate the power more than the monarchical ones, which were forced to share the legislative power between the national representation and the monarch (the Romanian Constitutions of 1866, 1923 provided that "the legislative power is exercised collectively by the King (Lord) and national representation". The one from 1938 provided that "the legislative power is exercised by the king through the National Representation"), because they state, as it does, for example, the Romanian Constitution of 1991, that " the Parliament is the *supreme* representative body of the people and the *only* legislative authority of the country "[unknown source] (Art. 61).

The modern state emerged as a separate form of political and legal power when all intermediate political powers related to feudalism were suppressed. It turns out that all local or territorial communities, usually former fiefs, no longer have, in fact, an autonomous power over the political power of the state. Even in regionalized or federal states, the power of intermediate communities is framed by the state. Therefore, it is difficult to accept that the federated states would be sovereign states in the true sense of the term. In the unitary states, this absolute political centralism is more obvious, the local collectivities having only an administrative vocation and the principle of free administration not questioning the political monopoly of the state. Centralism is therefore *tempered* by federalism, but it remains in the DNA of the modern state. This is why all federal states are evolving towards forms of centralization and unification of power, even those originally conceived as federal, such as the United States, which has rightly been said to be gradually turning into the United States.

The centralization of power implies the establishment of a direct political and legal connection between the state and its subjects. The liberation of dependent peasants creates this premise, because the central power (monarch or collective government) eliminates (at least partially) from the vertical structure of the exercise of power the intermediate level of feudal seniors, building a new category of subjects directly dependent on it. This direct connection between the state and the citizen is ideal-typical for the modern constitution. But this direct dependence sometimes means that the protection provided by intermediate levels is removed. It is the reason why the fact that the power of modern states is by nature centralist results from the need to structure it vertically in order to guarantee the freedom. The vertical separation of powers is, in turn, ideal for this type of state. Consequently, a state that does not know one way or another of a ‹‹ vertical ›› separation of power, to share it between a center and some peripheries, in order to guarantee the freedoms of the citizens located in these peripheries, is not a modern state.

6. *The modern constitution organizes a power of arbitration*

In the process of centralizing the power during the transition from the medieval to the modern constitution, one of the privileged means used by monarchs was the centralization of justice in its own competence or in the competence of the royal courts. In addition to the effect of the centralization of political power, this process results in its contamination with one of the fundamental features of the jurisdiction: its character as a power of arbitration. The fact that even today some heads of state have this type of power, in regimes in which they no longer govern directly, is due to the epoch in which the heads of state cumulated the political and judiciary power. Their power of arbitration places them in a position of neutral power or, as Montesquieu said about the judiciary power, "somewhat null" (Montesquieu, *De l'Esprit des Lois*, L. XI, Ch. 6.). Their power is impartial and negative, in the sense that they exercise only a power to prevent, not a politically active one.

But the contamination goes much further: the power of the modern state as a whole is considered to be one of arbitration between social forces. In order to be, therefore, in the presence of the modern state as a sovereign power, it must not be possible for this power to be exercised by any social group in its own name. The state of a class, an ethnicity, a race, and so on, is no longer a state. Only the equidistance from the social forces, which does not allow any of them to ‹‹ confiscate ›› the sovereignty, makes the state exist as a sovereign power. It is another reason why in the ideal-type of the modern constitution must be a provision forbidding groups from exercising sovereignty in their own name.

7**.** *The modern constitution organizes a temporal power*

The Middle Ages were characterized by two tendencies to unite the temporal power and the spiritual power: the one promoted by the papacy and the one promoted by the Holy Roman Empire. The modern state is being built in Western Europe on the basis of the denial of these two claims. Against the papacy, the absolute monarchs used two fundamental ideas: the king is independent of the Pope in terms of temporal problems (not about saving souls, but life in this world) and the power of the Pope is limited to holy canons, ideas that contradict the papal doctrine that it had been clearly formulated by the bubbles *Augusta, fili* (1301) and *UnamSanctum* (1302): the power of the Pope is

double, spiritual and temporal, because the temporal power is subject to the spiritual due to the need to save souls.

From this denial of the unity of the temporal and spiritual, the modern constitutionalism derives several principles that will become ideal-typical for the modern constitutions: 1) the separation of state and churches, which implies that churches cannot have a political role, that the state cannot interferes in the organization and functioning of cults and that it is equidistant from them, 2) the religious freedom, which implies that the state cannot impose any religion or atheism on its vassals and that the practice or non-practice of a religion cannot be legally connected, which is transposed in the inclusion of religion in the enumeration of the criteria of non-discrimination and 3) the separation of the legal from the moral doctrines.

The second form of unity of temporal and spiritual power, promoted by the Holy German- Roman Empire, was based on a metaphysical conception, which involved (in addition to the unity of laic and priestly power in the person of the Emperor, who was the Pope's competitor) the subordination the whole reality towards a single principle and the whole humanity towards a single center of power. The German-Roman Emperor did not conceive of himself as a monarch among others, but as the only legitimate holder of power, who must rule over the whole world, to be *Dominusmundi*. His laws were not conceived as the laws of a state, but as the laws of humanity as a whole, applicable to all men, which meant that the German-Roman Emperor was conceived as *Dominusuniversalis*. He claimed that he ruled independently of the passage of time, for *millennia*, that his power ruled not only the space but also the time.

The modern states are built by denying these Universalist claims. First of all, the legitimacy of the power of modern states no longer results from any metaphysics of religious or laic power, but from the use of law as the foundation of any state action. The *legitimacy* in modern states ultimately refers to *legality*, because, as Max Weber stated, "the [people's] willingness to submit to formally correct and customary prescriptions" has become "the most followed form of legitimacy." (Weber, 1995: 72.). The fact that the laws replace the sacrum as a form of legitimation of power is transposed into the transformation of obedience to the laws into a ‹‹ faith ››. People *believe* in the laws as they believed in God. The modernity begins when this belief is generalized and ends when it no longer exists. Here is what the author of a repertoire of definitions of the legal terms stated in the twelfth century: “There are holy things that are human, and these are the laws; there are other holy things that are divine and these are those that belong to the Church. And among the priests, some are divine priests, like the servants of the altars, others are human priests, like magistrates, who are called priests because they spread holy things, that is, the laws.” (*Pétri Exceptionum appendices*, I, 95, ed. H. Fitting, Juristische Schriften des früheren Mittelalters, Halle, 1876: 164, quoted from Kantorowicz, 1995: 17). But, like any faith, the faith in the legitimacy of laws can degenerate. The modernity ends with the generalization of this degeneration, which translates into the ‹‹ mastery ›› of the legal over the social, in the idea that the law is ‹‹ the master, as the feudal nobles were the masters, in the idea that the use of law is the solution to any problem. From the point of view of the subjects, the modernity ends when people come to consider freedom “as a source of inequality and insecurity” (Henry, 1977: 1209), when they are more interested in security than freedom and, consequently, allow in normative form which would never have allowed a personalized power.

The modern states no longer have universality claims. Their power is applicable

to a particular community, not to all of humanity. The ideal legal community is, for modern constitutionalism, the ‹‹ nation ››. Consequently, the modern state is a nation-state. This preference for the nation is due, conjuncturally speaking, to the desire of the French and English monarchs to become autonomous from the German-Roman Empire, but also to a profound movement, situated at the level of the evolution of knowledge. The modernity changes the way in which the reality is approached in order to be known and, starting from here, the way in which the society is governed. If the domination of metaphysics in the field of knowledge (which presupposed that we must discover the unique, sovereign principle that explains the whole reality) inevitably led to the attempt to subsume all people to a single government, with the imposition of scientific knowledge (discovering various laws for various spheres of reality: laws of physics, different from chemistry, biology, and so on), a new type of relation of man to reality, science is established, and politics is forced to relativize itself (Kantorowicz, 1995: 5-22).

The new way of understanding requires that each human group that has a certain internal cohesion (such as spheres of scientific knowledge), which differentiates it from other human groups (ethnic, linguistic, religious, cultural cohesion, and so on) and thus transforms it into a collective being (the nation), to govern itself by its own laws and, therefore, to build a particular political system. Against imperial political universalism, the modernity promotes national particularism. On the other hand, the new states no longer claim to dominate time, but are more modest, thinking of power as *secular*, not *millennial*. The secularization of power in the modern age is built not only against the claims of power to distribute the salvation of souls on earth, but also against the perpetual character of a certain form of power. The power of the modern state is ‹‹ temporal ›› in the sense that it is limited in time. The modern human group can decide at any time to offer another form of self-organization.

8. *General conclusions*

The general conclusions of the previous considerations are based on the methodology. First of all, it should be noted that when we operate a historical contextualization of a normative object of study, as in this case the ‹‹ constitution ››, this contextualization should not be confused with a ‹‹ concretization ››, which would place the analysis in the field of ‹‹ what it is ››, but, on the contrary, it means maintaining the analysis in the field of ‹‹ what it must be ›› and it means ‹‹ building ›› a context. Second of all, the contextualization does not mean the prevalence of the objective social environment in relation to legal norms, but, on the contrary, it provides the premise for the right to remain normative in the conditions of objective social evolutions that constantly try to escape them. Thus viewed, the historical contextualization of law does not mean the objective analysis of the history of legal systems, but the construction of a ‹‹ grid of analysis ››, which we can apply, retrospectively and prescriptively, to the history of law, in order to (re) construct the context of imposing a legal ideal-type and to determine the extent to which it is necessary to maintain the legal reality within the framework prescribed by it. Third of all, the use of the ideal-type represents a paradigm shift because it is not considered a fixed framework of evaluation, but an evolutionary one. The ideal-type of the modern constitution is not a reality, but a process.

The method by which the ideal-type is created is referred to by generalizing the data. The ideal-type is “a mental image obtained [...] by utopian rationalization” (Grosclaude, *Introduction* to Max Weber’s work, 1986. The citation is made after the

digitized edition in e-pub format, which is why the page cannot be indicated), that is, through a form of rationalization that involves the establishment of ideal principles, which represent ‹‹ guidelines ›› that help us to make intelligible a set of phenomena that are actually diffuse, confusing, sometimes irrational. The ideal-type ‹‹ modern constitution ››, which has been outlined above, does not exist as such in reality, but it is only an instrument for evaluating the constitutions actually in force in the various states that seek to be modern states. The ideal-type is, in this particular way, *normative*. It shows us *how a constitution must be built for the state it organizes to become modern.* It remains normative only as long as the need to eliminate the undesirable features of the model by opposition to which the ideal-type was built persists.

The ideal-type is always chosen as a reference for the concrete reality in an ideological way, because it is formed "unilaterally emphasizing one or more points of view and linking a multitude of isolated, diffuse and discrete phenomena, which we sometimes encounter in large numbers, sometimes in small numbers, sometimes not at all, which we order according to the mentioned points of view, chosen unilaterally, in order to form a homogeneous picture of thinking." (Weber, 1965: 81) A change of ideological perspective leads, therefore, to a change of ideal-type. The modern constitution, as we have outlined above, is therefore not the ‹‹ ideal ›› constitution and is not a form of constitution applicable to all cultural spaces. It has been and remains dependent on a cultural context, absolutely necessary to avoid constitutional imperialism, in the name of which a particular form of constitution would claim to be universalized. This type of contextualization will be the subject of the next study.

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