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»].