Constitutionalism

Past, Present, and Future

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Conditions for the Emergence and Effectiveness of Modern Constitutionalism

I. THE CONSTITUTION AS A NOVELTY

1. *Aim of the Study*

The emergence of the modern constitution in North America and France at the end of the eighteenth century is relatively well researched and documented. However, a satisfactory explanation as to *why* the constitution could emerge at that time and soon become the predominant topic of the era is still lacking. Such a radical and momentous new development naturally indicates the occurrence of certain conditions which did not previously exist and which could since have disappeared. Thus, it is not possible either to understand the constitution historically or to forecast its development without reconstructing these conditions. The question as to the future of the constitution is anything but superfluous. The global propagation of the constitution and its growing enforceability by means of constitutional courts must not distract us from the peculiar weakness and dissipation of meaning that it evidences in the face of the problems of the modern welfare state. The aim of this chapter is to offer an explanation of the past that is relevant to the present and the future; the emphasis is on the historical side, and the problems of the present are only addressed in outline at the end.

2. *Tradition and Innovation*

The fact that the constitution is a novel development is not self-evident in view of the much older use of the term and its continuing application to older epochs. Consequently, it is first necessary to identify those elements that make its development a novel occurrence. In this undertaking, the genesis of the phenomena that gave rise to the modern constitution can serve as initial clues. Both the constitutions of the North American states since 1776 and the American federal constitution of 1787 with its Bill of Rights of 1791 as well as the French constitution of 1791 with its integrated Declaration of the Rights of Man and Citizens of 1789 were products of revolutions that overthrew the old order and replaced it with a new one. Such events, of course, are not rare in history. But

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these two differed from previous overthrows in that their proponents were not merely concerned with a change in rulers, but had previously conceived of a structure of conditions of legitimate rule and realized this structure in the form of legally binding norms. Individuals were appointed to rule only on the basis of these normative conditions, and were authorized to exercise their rule on this basis alone.

However, the novel element did not consist in the theoretical construction of the conditions of legitimate rule nor in the legal binding of the power of rule in itself.[1] The legitimization of rule had always formed a core problem of social philosophy. Since the fading of the religious template for legitimization as a consequence of the Protestant schism, new answers were needed, and they were found in the doctrine of the social contract. Political rule was deemed legitimate when it could be considered as being based on a contract. Although legal validity was often claimed for the legitimization conditions developed in social-contract theory, this validity was not legal in nature. It received neither broad acceptance of rulers nor an implementation in positive law. Rather, the natural law derived from the social contract remained either a critical or an affirmative theory with respect to positive public law.

Evidently, the non-binding nature of natural law does not imply the existence of unrestricted rule. Jean Bodin's theory of sovereignty, which stated that the ruler had the right to determine law for all without himself being bound by law, legitimated the right of the ruler to dispose over the social order following the collapse of the medieval order, but did not provide a complete description of reality. On the contrary, the incipient concentration of territorial power in the hands of monarchs gave rise to a need for legal restriction. Indeed, a series of regulatory structures emerged in the mid-seventeenth century under the favourable circumstance of an absent or weak ruler, which limited the exercise of public power in favour of the endangered rights of the estates.[2] However, such attempts to normatively limit the rise of the modern sovereign state, which originated not from subjective despotism but the objective pressure of problems, were mostly failures. Few of the 'forms of government' enjoyed validity for very long.

Yet even the absolute monarch who was able to throw off the co-government of the estates and secure his own power base in the form of the army and civil administrators, did not enjoy legally unfettered power. Even where he succeeded in fending off the attempts at comprehensive regulation, which was the objective of the estates-based form of government, he was confronted by a series of 'fundamental laws' or 'contractual obligations' that bound the ruler through

[1] See Hasso Hofmann, 'Zur Idee des Staatsgrundgesetzes' in his *Recht – Politik – Verfassung. Studien zur Geschichte der politischen Philosophie* (Frankfurt am Main: Metzner, 1986), p. 261; Werner Näf, 'Der Durchbruch des Verfassungsgedankens im 18. Jahrhundert' (1953) 11 *Schweizer Beiträge zur Allgemeinen Geschichte* 108.

[2] See Gerhard Oestreich, 'Vom Herrschaftsvertrag zur Verfassungsurkunde. Die "Regierungsformen" des 17. Jahrhunderts als konstitutionelle Instrumente' in Rudolf Vierhaus (ed.), *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze* (Göttingen: Vandenhoek & Ruprecht, 1977), p. 45.

positive law and which he could not unilaterally alter. Usually established in writing and often enforceable through the courts, these fulfilled all the conditions for a higher-ranking law and were certainly understood as frameworks for the power of the ruler, including the exercise of legislative power.[3] On examination of their origin, most of them were contractual in nature. This origin indicates that the process was driven by social power groups that had at their disposal services vital for the continued existence of monarchical rule. They therefore possessed the capacity to demand that the ruler relinquish individual prerogatives as part of a quid pro quo and to have this secured in a legally binding manner. But since these were contractually based they always presumed the power of rule as a prerequisite instead of establishing it. Rather, they only regulated individual aspects to the benefit of individual privileged subjects.

The novel element of modern constitutions, by contrast, lies in the combination of both lines. They endowed the theoretically derived model with legal validity. The constitution differs from natural law through the validity of positive law. It diverges from the older legal bonds of state power through an expansion of its function and validity in three respects:

1. While governmental contracts and fundamental laws always assumed legitimate state power and only imposed regulation on isolated aspects of its exercise, the modern constitution brought forth legitimate state power in the first place. Its effect was thus not to modify, but to *constitute* rule.
2. Where the older forms of legally binding rules only related to individual aspects of the accumulated power, the modern constitution aspired to regulate rule in its entirety. Its action was thus not selective but *comprehensive.*
3. Finally, while the older forms of legal bonding were contractual in their origin and thus only applied between the parties to that contract, the modern bonds of constitutional law benefited all persons subject to rule. Their action was thus not particular but *universal.*

3. *Ancient and Modern Concepts of Constitution*

The revolutionary significance of the modern constitution often remained unrecognized on account of the linkage with existing traditions and the use of commonly used terms. Even before the revolutions, the term 'constitution' (or the equivalent term in the respective language) was in use. However, at that time this had a different meaning.[4] The term 'constitutio' was originally

[3] Cf. Vierhaus (n. 2); Heinz Mohnhaupt, 'Die Lehre von der "Lex fundamentalis" und die Hausgesetzgebung europäischer Dynastien' in Johannes Kunisch (ed.), *Der dynastische Fürstenstaat: zur Bedeutung von Sukzessionsordnungen für die Entstehung des frühmodernen Staates* (Berlin: Duncker & Humblot, 1982), p. 3; John W. Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 1955).

[4] See Ch. 4 of this volume; further Ernst-Wolfgang Böckenförde, 'Geschichtliche Entwicklung und Bedeutungswandel der Verfassung' in *Festschrift für Rudolf Gmür* (Bielefeld: Gieseking, 1983), p. 7; Charles H. McIlwain, *Constitutionalism, ancient and modern* (Ithaca, NY: Cornell University Press, 1966); Charles H. McIlwain, 'Some Illustrations of the Influence of Unchanged Names for Changing Institutions' in Paul Sayre

used to denote a family of laws that did not necessarily have to relate to the exercise of rule, while 'constitution' generally meant the condition or situation of a state—initially broadly, as it was shaped by historical development, natural features, and legal order; later more narrowly focused on the status accorded it by conventions, fundamental laws, and governmental contracts. Even in this narrower focus, the constitution remained a condition determined by law. It did not designate the legal form itself. Consequently, every state was in a certain 'constitution', and where no constitution could be identified, no state existed. The older concept of constitution was thus an *empirical concept*.

By contrast, the modern constitution prescribed how state power *should be* established and exercised in the form of a systematic and exhaustive claim embodied in a legal document. In this way, the constitution became synonymous with the law that regulated the establishment and exercise of state power. It no longer designated the situation of a state as formed by its laws, but the law that formed the situation. 'Constitution' thus emerged as a *normative concept*. Certainly not all countries had a constitution in this new sense. Rather, the existence of a constitutional document that provided for basic rights and popular representation became a distinguishing feature of the categorization of the world of nations, and the question as to whether only the constitutional state in this sense could claim legitimacy was a dominant theme throughout the nineteenth century.

The older empirical concept of the constitution was correspondingly displaced by the increasing prevalence of the modern normative concept of the constitution. Admittedly, the disappearance of the older concept of constitution did not mean that the factual conditions of rule and its normative regulation disappeared as well. Consequently, it was later picked up by the new empirical science of sociology.[5] In addition, one can observe that the older, ontological constitutional concept was rediscovered by the opponents of the liberal content originally associated with the normative constitution, or emerges at moments of crisis for the normative constitution in the form of the so-called material or social constitution and serves as an explanation of the enforcement deficits or failures of normative constitutions.[6]

(ed.), *Interpretations of Modern Legal Philosophies. Essays in Honor of Roscoe Pound* (New York: Oxford University Press, 1947).

[5] Cf. in explicit divergence from the legal science the definition by Max Weber, *Wirtschaft und Gesellschaft* (Tübingen: Mohr, 5th edn., 1972), pp. 27, 194.

[6] See e.g. Friedrich Engels, 'Die Lage Englands', Marx Engels Werke vol. 1 (Berlin: Dietz, 1970), p. 572; Lorenz von Stein, 'Zur preußischen Verfassungsfrage' [1852] (Darmstadt: Wissenschaftliche Buchgesellschaft, 1961); Ferdinand Lassalle, 'Über Verfassungswesen' (1862) in Eduard Bernstein, *Gesammelte Reden und Schriften*, vol. 2 (Berlin: Cassirer, 1967); Carl Schmitt, *Verfassungslehre* (Munich: Duncker & Humblot, 1928); Carl Schmitt, *Der Hüter der Verfassung* (1931) (Berlin: Duncker & Humblot, 2nd edn, 1969); Ernst R. Huber, *Wesen und Inhalt der politischen Verfassung* (Hamburg: Hanseatische Verlagsanstalt, 1935); Gustav A. Walz, *Der Begriff der Verfassung* (Berlin: Duncker & Humblot, 1942).

II. PREREQUISITES FOR THE EMERGENCE OF THE CONSTITUTION

1. *Explanatory Model*

a) Preconditions

Characteristic of the modern constitution is its claim to comprehensively and uniformly regulate political rule in terms of its formation and means of execution in a law superior to all other legal norms. Even though the desire for limited political rule expressed therein is in no way new, it could only be satisfied in the form of a constitution under certain modern conditions. As a systematic determination of the conditions of legitimate rule, the constitution depended on the political order being subject to human decision-making. This only became the case in modern history when faith in the divine establishment and formation of secular rule was shaken, as in the course of the Protestant schism. The loss of a transcendental basis for consensus forced the new formation of rule on a secular basis,[7] which did not prevent the search for guiding principles with supra-temporal validity, but required their deliberate transformation into political reality. Thus, no constitution in the modern sense was possible without the previous positivization of law.

In its function as a comprehensive and uniform regulation of the establishment and exercise of rule, the constitution was also dependent on the existence of an object that permitted such a concentrated normative intervention. This too did not emerge until the collapse of the medieval order. The polyarchic system of prerogatives exercised as outgrowths of property ownership and objectively and functionally distributed among numerous autonomous holders of equivalent status, which did not recognize a differentiation between the state and society and public and private spheres, was not yet capable of constitutionalism in the modern sense.[8] Rather, it was the emergence of a public power in the singular, distinguishable from society, that furnished the possible starting point for a set of rules relating specifically to the establishment and exercise of rule and regulating them systematically and comprehensively. Consequently, the modern constitution was not possible before the amalgamation of the scattered sovereign rights and their concentration in the form of comprehensive state power, as was fuelled by the religious civil wars.

b) Actors

While it was the monarchical state that gradually emerged in the course of the religious civil wars of the sixteenth and seventeenth centuries that created a key prerequisite for the modern constitution, this state itself could not possibly

[7] See Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisation' in his *Staat, Gesellschaft, Freiheit* (Frankfurt am Main: Suhrkamp, 1976), p. 42.

[8] On the medieval situation, see Otto Brunner, *Land und Herrschaft* (Darmstadt: Wissenschaftliche Buchgesellschaft, 6th edn, 1970), p. 111. For the consistent and comprehensive state powers as a precondition for the modern constitution, see Helmut Quaritsch, *Staat und Souveränität* (Frankfurt am Main: Athenäum, 1970), p. 184.

be interested in the constitutionalization of public power. With constitutions in the sense described here, the monarch would have had to disavow his *raison d'être* as an autonomously legitimate ruler independent of consensus and be content with a role as an organ of a state conceived of as independent of him. For the same reason, ascribing constitutional character to the self-restrictions of rule as adopted under the influence of the Enlightenment in the drafts of the codification of Austrian and Prussian private law in the last third of the eighteenth century, which in some cases acquired the force of law, also appears problematic.[9] Although they shared the function of limitation of power with the later constitutions, they lacked three characteristics of modern constitutions: they did not constitute legitimate rule; they did not even refer to the so-called 'inner constitutional law', that is, the sovereign rights and the relationship between the state and the nation, but only the relationship between state power and the rights of individuals;[10] and they did not bind the ruler from a position of higher law. Rather, they were on the level of ordinary law and, in a system in which the monarch was the exclusive legislator, could be altered by the latter at any time.[11] Leopold II of Austria who as Grand Duke of Tuscany wanted to issue a formal constitution on his own initiative, remained a solitary phenomenon in the contemporary princely world.[12] He did not revisit these plans in his short reign on the Hapsburg throne following the death of Joseph II in 1790.

Nor can an interest in a constitution in the modern sense be assumed on the part of the privileged estates of the clergy and nobility. They did indeed have an interest in restricting monarchic power and participating in political decisions. But this desire challenged neither the monarch's inherent right of rule nor did it aim at including the entire population. This is most clearly expressed in the discussion that developed in connection with the convention of the Estates General in France from 1787 onwards.[13] The higher estates sought to return to the pre-absolutist forms of estate-monarchic dualism, and not project forward towards a representation of the whole nation in which they would be absorbed or at least mediated, as would be the consequence of a modern constitution. Thus, as estates, the clergy and nobility were not on the side of the modern constitution, which of course neither precludes the support of individual members,

[9] See Hermann Conrad, *Rechtsstaatliche Bestrebungen im Absolutismus Preußens und Österreichs am Ende des 18. Jahrhunderts* (Köln: Westdeutscher Verlag, 1961) and Hermann Conrad, *Das Allgemeine Landrecht von 1794 als Grundgesetz des friderizianischen Staates* (Berlin: de Gruyter, 1965).

[10] Cf. Günter Birtsch, 'Zum konstitutionellen Charakter des preußischen Allgemeinen Landrechts von 1794' in Kurt Kluxen and Wolfgang Mommsen (eds), *Politische Ideologien und nationalstaatliche Ordnung: Studien zur Geschichte des 19. und 20. Jahrhunderts, Festschrift für Theodor Schieder* (München: Oldenbourg, 1968), p. 98, at 100.

[11] See Martin Kriele, *Einführung in die Staatslehre: die geschichtlichen Legitimitätsgrundlagen des demokratischen Verfassungsstaates* (Reinbek bei Hamburg: Rowohlt, 1975), p. 116.

[12] Cf. Joachim Zimmermann, *Das Verfassungsprojekt des Großherzogs Peter Leopold von Toskana* (Heidelberg: Winter, 1901); Adam Wandruszka, *Leopold II.*, vol. 1 (Wien: Herold-Verlag, 1963), p. 368.

[13] Cf. Eberhard Schmitt, *Repräsentation und Revolution* (München: Beck, 1969), pp. 89, 147.

nor the willingness of individual princes to place their authority to rule on a constitutional basis.

The third estate thus remains as the social bearer of the constitutional idea. But here also distinctions must be made. The third estate was united only in its exclusion from the privileges of the higher estates; otherwise it did not represent a homogeneous group[14] and thus possessed differing affinities to the constitution. In some cases an objective interest in fundamental systemic change was lacking, in others the subjective consciousness necessary to realize and benefit from systemic change. The former was largely true for the traditional feudal bourgeoisie. Its highest elements did not seek to abolish but to share in the privileges, and often enough attained this through ennoblement. But even the great majority of the broad class of urban tradesmen and merchants were not pressing for change; it derived its security from the estate-based structure and the guilds-based organization of trade, and regarded freedom and equality as threats rather than as progress. The latter case applied primarily to the peasantry, which may be assumed to have had an interest in the elimination of feudal burdens but not the degree of independence, education, and leisure that would have allowed it to implement this interest in a concept of altered structures of rule and represent it in an organized manner. This was all the more true for those classes below the estates, which constantly lived on the edge of starvation and lacked all prospect for improving their situation. Support for changes, once articulated, could be found among them, as among the peasants, but they rarely took the initiative.

Thus, only that part of the bourgeoisie which was created by the economic and administrative needs of the absolute state itself, and which is generally lumped together under the term educated or propertied bourgeoisie, remains. It was attributed to the third estate, but it essentially broke the bounds of estate-attribution and planted the seed of dissolution in the old order. The objective prerequisite for its role as standard-bearer in the emergence of the constitution lay in the increasing importance of the services it performed in preserving and developing the society, with the concurrent decline in importance of the social functions performed by clergy and nobility. Subjectively, the awareness of its own importance, based on ownership and education, and the perception of the growing discrepancy between social standing and legal/political position were the key factors.

Multiple indications of this change in consciousness from the mid-eighteenth century on may be observed. Initially culturally oriented, it was made manifest in literary salons, reading clubs, periodicals, concerts, exhibitions, and artistic works free of court and church services. With such aids, the new bourgeoisie satisfied its need for self-affirmation, identity, and meaning.

[14] Cf. for instance Georges Lefebvre, *La révolution française* (Paris: Presses universitaires de France, 3rd edn, 1963), p. 52; in general Régine Pernoud, *Histoire de la Bourgeoisie en France*, 2 vols. (Paris: Ed. du Seuil, 1960/62). For Germany cf. e.g. Reinhart Koselleck, *Preußen zwischen Reform und Revolution* (Stuttgart: Klett, 2nd edn, 1975), p. 87.

This gave rise to forums which challenged the state's monopoly of the public sphere and, for the first time, constituted public opinion as an actively reasoning part of society.[15] However, reasoning soon shifted from the seemingly interest-free realm of art and philosophy to social conditions and produced a rapidly growing body of literature in which the intellectual paternalism and the feudal and corporative bonds were subjected to a philosophically and economically justified criticism.[16] The criticism ultimately resulted in demands for autonomy for cultural and economic processes, which meant no less than a decoupling of these social functions from political control and their release into individual decision-making.

In exploring the question of the emergence of the constitution, it is enlightening to note that the postulate of autonomy was not initially associated with the call for a change in the conditions of rule. On the contrary, given the resistance of the privileged estates towards all reform demands that threatened their prior rights and economic basis, it was the absolute monarch who was expected to implement the reforms. This was equally true for the physiocrats, the encyclopaedists, the Voltairians, and the Kantians. However, the social reforms demanded could not leave the monarch's position entirely untouched, as autonomy of social subsystems and individual decision-making freedom also meant waiver of the state's entitlement to universal guidance.

Social philosophy arrived at this understanding in the second half of the eighteenth century, when it infused the social contract, with which initially unrestricted state power had been justified, with new content.[17] This now no longer called for the cession of all natural rights of individuals to the state to enable it to effectively guarantee the elementary prerequisites of peaceful coexistence, namely security of life and limb, as previously under the impression of the religious civil wars. Rather, the consolidated situation of the actualized absolute state, which suppressed the religious civil wars and restored social peace, made it possible to transfer the natural rights of individuals into the state and entrust the state with their protection, so that only the right to assert one's own rights by force remained to be ceded. In this context natural rights, which in the early stages of contract theory were only generally designated as freedom

[15] Cf. Jürgen Habermas, *Strukturwandel der Öffentlichkeit* (Neuwied: Luchterhand, 1962), p. 38; Dieter Grimm, 'Kulturauftrag des Staates' in his *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt am Main: Suhrkamp, 1987), p. 104; Dieter Grimm, 'Soziale Voraussetzungen und verfassungsrechtliche Gewährleistungen der Meinungsfreiheit' in his *Recht und Staat*, p. 232; Lucian Hölscher, 'Öffentlichkeit' in *Geschichtliche Grundbegriffe* (annotation 3), vol. IV (Stuttgart: Klett-Cotta, 1978), p. 413, esp. at p. 430.

[16] See Reinhart Koselleck, *Kritik und Krise* (Frankfurt am Main: Suhrkamp, 3rd edn, 1973); Ira O. Wade, *The Structure and Form of the French Enlightenment*, 2 vols. (Princeton: Princeton University Press, 1977); Paul Hazard, *La pensée européenne au XVIIIe siècle de Montesquieu à Lessing*, 2 vols. (Paris: Boivin, 2nd edn, 1963); Georges Weulersse, *Le mouvement physiocratique en France*, 2 vols. (Paris: Mouton, reprint 1968); Fritz Valjavec, *Die Entstehung der politischen Strömungen in Deutschland* (Kronberg: Athenäum, 1978); Diethelm Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts* (Paderborn: Schöningh, 1976).

[17] Cf. Klippel (n. 16), p. 186; J. W. Gough, *The Social Contract: a Critical Study of its Development* (Oxford: Clarendon Press, 2nd edn, 1957).

and property or life and limb, were developed into ever more detailed catalogues and, as the means of securing freedom, were linked with concepts for the division of power.

The content of the later constitution was thus largely anticipated in the new social-contract theory. Still, this failed to make the step to the modern constitution. Rather, the social contract was associated with the older concept of constitution even where it aimed at restriction of the state and division of power in the interest of individual freedom, or even, as in the case of Rousseau, took on a radical democratic character.[18] The contract remained a conceptual measure for the rational organization of states. It was the defining factor determining the constitution, but was not to be equated with the constitution itself.

c) Revolutionary Break

The step from the theoretically founded interest in social reforms to the promulgation of the modern constitution was triggered only by the conflict between the bourgeoisie, economically strong, aware of its strength, and supported by the sub-bourgeois classes, and the French state, neither willing to nor capable of reform. The pre-existing right of rule of the French king had been exempted from bourgeois demands for reform as long as the prospect existed of achieving the ends in view with him. It was not until the evolutionary path appeared to be permanently blocked, through a resolution of the third estate of the Estates General to constitute itself as a National Assembly and take control of France's destiny itself, that the revolutionary break occurred. This resolution did not initially affect the monarchy itself, but it did affect its basis for legitimacy and this did not pass unnoticed by contemporary observers.[19]

Although the resolution that marked the revolutionary break did not mention a constitution, it acquired enormous significance for the emergence of the constitution. The destruction of monarchic sovereignty and the proclamation of popular sovereignty left a vacuum—not a power vacuum, since the royal government remained in power, with committees of the National Assembly installed on a par with or above it, but a vacuum of legitimacy of its exercise. The revolutionary act of the National Assembly had stripped the monarch and his administration of their legitimacy. The National Assembly, self-appointed rather than elected by the people and formed from the estates of the *ancien régime*, could only exercise state power in a makeshift and interim manner. The people, to whom it was now attributed, were of themselves unable to act, but rather had to be rendered able to form will and unity by means of procedures and representatives. The revolutionary break with traditional state power, and emergence of popular sovereignty as a new legitimization principle of political

[18] Cf. Ch. 4 of this volume.

[19] Cf. Jules Madival (ed.), *Archives parlamentaires de 1787 à 1860*, vol. 8 (Paris: Dupont, 1875), p. 127; Schmitt (n. 13), pp. 131, 261, 277.

rule that was not realizable without representative bodies, almost inevitably resulted in a constituting act.

This necessary constituting *act*, however, should not be mistaken for the constitution itself. Authorized state power, the only possible form under the principle of popular sovereignty, always requires a legitimating legal principle by means of which the mandate is assigned; it necessarily takes precedence over the assigned power and the legal rules emanating from it. However, this legal principle need not necessarily condense into a modern constitutional law. Rather, the people can also unconditionally and irrevocably bestow the authorization to rule. The older social contract doctrine had proved this logically. In this case, the consequence is absolute rule, though admittedly by transferred and not from inherent right. Unlimited right of rule concentrated in a single individual, however, neither requires nor is it amenable to constitutional regulation. Public law is then limited to determining the omnipotence of the ruler and regulation of succession. Thus, if the commissioning character of rule does not by itself lead to the modern constitution, it can only be a specific form of bestowing this commission. This requires an examination of the bourgeois conceptions of the state.

d) Separation of State and Society

The bourgeois social model was based on the premise that society possesses self-regulatory mechanisms that, if allowed to operate unhindered, would automatically lead to prosperity and justice.[20] The prerequisite for their effectiveness was the autonomy of the social subsystems, which allowed them to develop according to their own criteria of rationality free from political direction. Equal individual freedom for all served as the medium for this autonomy. It promised a considerable increase in prosperity, as it released the talent and industry of the individual from the fetters of the old social order, left to each the wages of their work, and in this way spurred society's will to perform. Furthermore, because social bonds in this system of equal freedom were only conceivable as voluntarily assumed, that is contractually negotiated commitments, it also promised a fairer reconciliation of interests than was possible under central political control. Under these circumstances, the common good was no longer a materially defined quantity determined in advance, but resulted automatically from the interaction of individual decisions. It was formalized and proceduralized.

This system did not render the state superfluous because equal individual freedom, on which the function of the social order depended, required both organization and protection; on the other hand, society, dissolved into dissociated individuals and stripped of all authority to rule, lacked the collective ability to act and to organize and protect freedom itself. Rather, it had to reconstruct this ability to act outside of itself—in the form of the state.[21] However, in light of society's ability to regulate itself, the state lost its former range of powers. As

[20] For more details, see Dieter Grimm, 'Bürgerlichkeit im Recht' in his *Recht und Staat* (n. 15), p. 11.

[21] Cf. Niklas Luhmann, 'Politische Verfassungen im Kontext des Gesellschaftssystems' (1973) 12 *Der Staat* 5.

the common good was no longer the product of planned state action, but rather was viewed as the automatically occurring consequence of individual freedom, it lost its role as the central controlling instance for all social subsystems. On the contrary, these were decoupled from political influence and became autonomous, while the only role of politics was to protect the prerequisites for self-control, that is, freedom and equality, from interference. This led to a reversal of the principle of distribution that was valid until that point: private interests took precedence over public, society over the state; the latter was limited in principle, the former fundamentally free. The separation of state and society has become the common term for this model.[22]

This separation should not be understood as disaffiliation but as a reorientation of relationships. Bourgeois society was faced with a problem of construction. On the one hand, it had to provide the state with the monopoly of the legitimate use of force which the absolute monarch had sought but never attained, and thus once again increase the power of the state. On the other, society had to prevent the state from using this force against social autonomy and deploying it to advance its own ambitions of control. The modern constitution provided the answer to the compatibility problems between social and political order.[23] Its resolution capacity derives from the fact that all matters requiring regulation following the fundamental material decision in favour of social self-control by means of individual decisions were of a formal nature. One aim was to limit the state in the interests of social autonomy and individual freedom. The other was that the state, excluded from society, had to be reconnected with it such that it could not resile from the social interests it served in the process of performing its guarantee function.

At this point, it is important to recognize that the nature of this task was such that it could be satisfactorily resolved in law and specifically, as it concerned the regulation of state power, in constitutional law.[24] For the law develops its specific rationality best when it has to solve formal problems. Whereas material tasks can be ordered and initiated by legal norms, fulfilment is always secondary to the simple application of law. This only occurs with the realization of normative imperatives. However, it depends on a series of factors, such as money, acceptance, staffing, etc., over which law has extremely limited disposition. By contrast, the problem of the limitation and organization of state power can in principle be resolved only through the promulgation of corresponding norms. To be sure, these must also be realized. But the realization of formal norms is identical with the application of law. Resources are irrelevant in this respect: there is no scarcity of omission, and violations can generally be dealt with in the legal system itself, namely through the annulment of illegal acts. It is thus only a slight exaggeration to say that, under the conditions of the

[22] Cf. Ernst-Wolfgang Böckenförde (ed.), *Staat und Gesellschaft* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1976); Ernst-Wolfgang Böckenförde, *Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit* (Opladen: Westdeutscher Verlag, 1973).

[23] Cf. Luhmann (n. 21), p. 6.

[24] For more details, see Grimm (n. 20).

bourgeois social model, law did not just contribute to the solution of the problem, but was *itself* the solution.

In terms of specifics, the boundaries and limits of the state were established in the form of fundamental rights, and the mediation between state and society in the form of the division of power. Fundamental rights excluded those areas from the state's authority to rule, previously conceived of as comprehensive, in which the private and not the public interest was primary. They thus marked the boundary between the state and society. Therefore, from the perspective of the state, these represented restrictions on action, while from the viewpoint of society they were seen as defensive rights. Naturally, the freedoms guaranteed by fundamental rights could not be unbounded, as this would protect exercises of freedom that themselves threatened freedom and therefore the foundations of the system. Consequently, the freedom of the individual had to be limitable in the interests of the freedom of all others. As a result, the state also retained action capabilities in the area of freedoms. In view of the fundamental decision in favour of individual freedom, however, these actions represented interventions and the objective of the entire organization of the state was the restraint of the dangers inherent in state intervention.

Accordingly, the state itself was not competent to judge when it was authorized to infringe on freedoms in order to protect them. Rather, society itself, through its elected representatives, determined what restraints on freedom each individual had to tolerate in the interests of equal freedom. The law served as the means for this, and in this way could appear as the 'expression of the general will'. The state received its action programme through laws enacted through parliamentary procedure. It could only intervene in the sphere protected by the fundamental rights on the basis of an authorization in law. Courts petitioned by affected individuals could determine whether the state's action was covered by a legal programme and put the illegally acting state in its place. In this system, the classical model of division of power, which aimed to prevent the abuse of public power by dividing it among different mutually independent and mutually monitoring poles of authority, emerged spontaneously.

e) Interim Summary

The foregoing analysis brings the conditions for the emergence of the modern constitution (though not necessarily for its subsequent spread) into sharper focus:

The general conditions were:

- First, the emergence of an object capable of being regulated by a constitution, in the form of modern state power; and
- Secondly, the decidability of problems of order or, in other words, the transition to positive law.

Following early attempts, both conditions emerged in the course of the Protestant schism and characterize, to a more or less advanced extent, the modern sovereign state.

The specific conditions were:

- First, a population group formed on account of progressive functional differentiation as a standard-bearer that had an interest in changes in the structure of rule and possessed the strength necessary for asserting this interest;
- Secondly, a guiding concept of order, according to which society could create prosperity and justice by means of its own efforts through the medium of free, individual decisions, so that the state could relinquish its central controlling role and restrict itself to a guarantee function for the pre-established and independent order as assigned to it by society—in short, the separation of state and society.
- Thirdly, a revolutionary break with the previous conception of state power and the resulting necessity to reconstitute legitimate state power and make it compatible with the newly autonomous society.

To the extent that these conditions obtain for the modern bourgeoisie, the bourgeois social model and the bourgeois revolution, one can describe the constitution as a bourgeois phenomenon.

2. *Test Cases*

a) France and America

In explaining the emergence of the modern constitution, the French case has been used as a model. Naturally, the purpose of this is not to cast doubt on the American priority in the establishment of a constitution. When the French National Assembly set about drafting a constitution, they could already refer to the American examples. However, the French decision was not merely an imitation of the American process. The French Revolution did not primarily aim to establish the constitutional state following the American pattern. Rather, its aim was to change the social order. However, this aim required a reconstitution of political rule, and only when this point was reached did France embark independently on its own path to modern constitutionalism.

That may be seen very clearly in the decisive stages of the revolution. The *cahiers de doléances*, which were prepared to inform and instruct the representatives of the various estates and districts following the king's decision to reconvene the Estates General, contain numerous constitutional demands, but no demands for a constitution in the modern sense.[25] The awareness within the National Assembly that the matter at hand concerned a new foundation of rule was equally lacking. Rather, in their pursuit of the ends of 'national restoration' and 'regeneration of France',[26] representatives vacillated between a restoration of the traditional powers by way of a contract with the monarch and a new foundation for state power by means of legislation. It was not until the king had

[25] Cf. G. V. Taylor, 'Les cahiers de 1789' (1973) 28 *Annales* 1495.

[26] Declaration of 17 June 1789, Archives parlamentaires, vol. 8, p. 127.

rejected the fundamental reform resolutions of 4 August 1789, which abolished the differences and privileges of the estates and the feudal system, that the representatives understood that the primary ends of social reform could only be asserted in opposition to traditional state power. This determined once and for all that the task was not the modification of rule; it was the foundation of rule and the ultimate result was a constitution in the modern sense.

America's path to the modern constitution, by contrast, was easier and more direct, as it received the necessary ingredients from Europe, yet had left the European obstacles on the continent behind.[27] Accordingly, France represents the more complicated, yet historically more powerful case, in that though the American events generated much interest in Europe, they were not seen to have great relevance to the European situation. Rather, it was the French Revolution which raised the constitution as a political issue in other states on the continent. For these reasons, the explanatory model must first demonstrate its validity using the French example. Certainly, it will soon become apparent that this also encompasses the American case.

b) England

First, however, the model explains why England remained without a formal constitution even though it was the most economically advanced and politically and economically liberal nation in the old world. England had succeeded in transitioning its society to bourgeois conditions without a revolutionary break with traditional rule. The most important reasons for this are to be found in the early decline of the feudal system which, in contrast to the continent, made the barriers between the nobility and the bourgeoisie permeable and thus facilitated both the ennoblement of deserving bourgeois and entrepreneurial activity of nobles, and the circumstance that the effect of the reformation was not to strengthen monarchic power but enhance the role of Parliament, whose support Henry VIII sought for his schism with Rome. In this way, England's nobility and bourgeoisie had more interests in common than on the continent, and possessed in Parliament a politically effective representation of interests, while at the same time suppressing assemblies of the estates and the establishment of absolute state power that was underway in the progressive continental states of that era.

Although England was not entirely uninfluenced by absolutism, the claims of absoluteness which the Stuarts asserted in the seventeenth century without the support of the legitimating circumstance of religious civil wars aroused the joint resistance of the nobility and bourgeoisie. The overthrow of Charles I in 1649 and Cromwell's elimination of the monarchy was the only revolutionary situation in England. The fact that in this phase England received a written constitution in the modern sense, the 'Instrument of Government',[28] affirms

[27] Cf. Dieter Grimm, 'Europäisches Naturrecht und amerikanische Revolution' (1970) III *Ius commune* 120.

[28] Text in S. R. Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution 1628-1660* (Oxford: Clarendon Press, 1968), p. 405; in addition Gerald Stourzh, *Fundamental Laws and Individual Rights in the*

the relationship between revolutionary breaks and the modern constitution postulated here. In spite of the similarity in language, this document must not be confused with the contemporary 'forms of government' of the continent, which lacked the character of constituting rule. The short lifespan of this first constitution is due to the fact that Cromwell's new order quickly collapsed following his death, which increased the willingness of Parliament to restore the monarchy. The constitution that emerged out of the break with the traditional ruler and the necessity of re-establishing rule on a new basis became obsolete with the curing of the break.

The bloodless Glorious Revolution of 1688 permanently cemented the monarchic tradition, and at the same time secured the political primacy of Parliament. The leading classes of society were thus enabled to shape the social order legally according to their own concepts and needs. Consequently, economic freedom prevailed in England long before Adam Smith provided the theoretical foundation. But particularly due to the gradual liberalization, the problem of maintaining the compatibility of social subsystems with the political system, which was solved on the continent by the constitution, emerged in England as well. In this respect also, England could build on existing institutions and Parliament could grow into the mediator function, while on the continent, where absolute state power had become the norm, such a mediating agency had to be invented in the first place.

c) America

England's North American colonies surpassed the mother country in several respects. In contrast to Europe, they never knew the feudal system and the class barriers of the estates and were not restricted in their development even by scarce resources. The social order that emerged through evolution in England and was the goal of revolution in France was the American reality from the beginning, even though based on a slave economy. Aside from this problem, which also plagued the French Revolution, the theoretical premises for the bourgeois social model were actualized nowhere as nearly as here. Consequently, America did not need a constitution to assert the bourgeois social order.

Still, America took the lead over Europe in the constitutionalization of rule. The reason for this may be found in the revolutionary break with traditional rule. This break cannot be attributed to a bourgeoisie in the continental European sense as a standard-bearer, as the term cannot be applied directly to the estate-less American society. In a non-estate sense, however, all of America at that time can be regarded as bourgeois.[29] This assumption is corroborated by the circumstance that the white inhabitants were not only politically free,

18th Century Constitution (Claremont/Calif.: Claremont Institute for the Study of Statesmanship and Political Philosophy, 1984).

[29] Cf, for an overview Heide Gerstenberger, *Zur politischen Ökonomie der Bürgerlichen Gesellschaft. Die historischen Bedingungen ihrer Konstitution in den USA* (Frankfurt am Main: Athenäum Fischer, 1973), p. 24.

but the great majority of them were also economically independent and they derived their independence from economic activity and not from official functions or land rents. This is not to say that the society was egalitarian. But class boundaries were significantly more permeable than the estate boundaries in Europe. In the course of the eighteenth century, this bourgeoisie not only gained considerably in economic strength, but also developed a strong political consciousness, which was nourished by the high level of self-administration that English colonial government permitted.

Admittedly, the colonists did not cause the revolutionary break in order to establish a social order based on freedom, as is the case for the French Revolution. Still, the reference point was the same. In America, the objective was to defend the already existing freedom-based social order against state encroachments. The special taxes imposed on Americans to pay for the Seven Years War, which was expensive for Britain but profitable for the colonies, was viewed as such an encroachment. These taxes were imposed by Parliament, which did not include any American representatives. However, under the prevailing theory of representation, the colonists were considered represented. This fiction could be maintained as long as Parliament did not distinguish between British and American subjects. It broke down once representatives began to discriminate against Americans. Thus, on the matter of taxation, the British Parliament behaved towards the colonies an a quasi-absolutist manner, and drove them, once the appeal to valid English law had proved fruitless, to their revolutionary break with the mother country—which, like the French Revolution later, was justified on the basis of natural law.[30]

America thus found itself facing the same situation that had remained an episode in England, but was to prove determinative in France: the vacuum of legitimate state power and the necessity of constituting legitimate power anew. This reconstitution occurred without deeper awareness of the epochal new development in the form of the modern constitution. This is understandable when one considers that a tradition of comprehensive, fundamental structures of order set down in writing already existed in the colonies.[31] In terms of their content, they did not vary appreciably from the norms of English common law. However, the new beginning and the founding character of colonization had promoted the enumeration and documentation of rights. Still, it would not be correct to see modern constitutions prefigured in the contracts of settlement and colonial charters, as these lacked any relevance to the highest state power. Situated below the English state order and valid only within its framework, these documents represented structures of order with merely regional or local scope.

In the vacuum situation of the revolutionary break, however, recourse to these basic charters in order to constitute a new state appeared natural. Some

[30] Jürgen Habermas, 'Naturrecht und Revolution' in his *Theorie und Praxis* (Neuwied: Luchterhand, 1963), p. 52; Grimm (n. 27), p. 120.

[31] See Stourzh (n. 28).

colonies elevated them unaltered to the status of a constitution, although most used the old documents as a basis for drafting a new constitution.[32] In accordance with social-contract theory, which appeared to have been realized in the founding of the colonies, rule was uniformly understood as a mandate by the people, and the constitution, in a naive and literal understanding of social-contract theory, was interpreted as the fundamental contract between all persons with all others which established the mandate and defined the terms of its exercise. Admittedly, the same degree of concentration of the object of regulation, that is, state power, as achieved by the absolute monarchies of the European continent could not be expected. The absence of the historical burdens of the continent meant that the colonies, like the mother country, also lacked their product, the rationally organized state supported by its army and administration.[33] Yet, they had in no way preserved the polyarchic system of the Middle Ages, but were capable of a unified formation and assertion of will, and thus capable of sustaining a constitution.

Given their origin, the American constitutions did not diverge appreciably from the English legal situation with respect to content. Functionally, however, they went beyond the English legal situation in one important aspect. English constitutional law was based on the principle of parliamentary sovereignty. Under these circumstances, the legal significance of the 'rights of Englishmen', considered fundamental, was necessarily reduced to placing limits on the executive. Parliament, as the representative of the rights-holders, was regarded as the bulwark of fundamental rights, but could dispose of them at will in the exercise of its function. The American colonies had experienced Parliament as a threat to, rather than a guardian of, fundamental rights. Consequently, they placed these rights above the legislative branch, thus constituting them as constitutional rights, and so taking an important step towards the constitution in the modern sense.[34]

d) Sweden

Although the American constitutions fit seamlessly into the explanatory model, it must ultimately prove its soundness in those constitutions that emerged, in part before the American and French Revolutions and in part subsequent to these, without the prerequisite of an ascendant bourgeoisie asserting a liberal social model during a break with the traditional state power. The Swedish 'Instrument

[32] Cf. Francis N. Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters and other Organic Laws of the States, Territories, and Colonies* (Buffalo, NY: W.S. Hein, 1909); Willi P. Adams, *Republikanische Verfassung und bürgerliche Freiheit. Die Verfassungen und politischen Ideen der amerikanischen Revolution* (Darmstadt: Luchterhand, 1973).

[33] Cf. Dieter Grimm, 'The Modern State: Continental Traditions' in Franz-Xaver Kaufmann et al. (eds), *Guidance, Control and Evaluation in the Public Sector* (Berlin: de Gruyter, 1986), p. 89.

[34] Cf. Gerald Stourzh, 'The Declarations of Rights, Popular Sovereignty and the Supremacy of Constitution: Divergencies between the American and the French Revolutions' in C. Fohlen/M.J. Godechot (eds), *La Révolution américaine et l'Europe* (Paris: CNRS, 1979), p. 347.

of Government' of 1772 is widely considered a 'constitution before the constitution'. This instrument was not the first of its kind. Rather, Sweden was able to look back on a long tradition of such instruments of government dating back to 1634.[35] Thus, chronologically the first instrument of government coincides with the regulatory structures that originated from the estates, also often referred to as instruments of government, which emerged in the mid-seventeenth century and were mentioned previously. But the instrument in question is comparable to these others materially as well. Enacted by the estates on the occasion of the regency for the minor heir to the throne following the death of Gustav Adolf, it reinforced the rights of the estates with respect to monarchic power and reorganized the structure of the administration.

In Sweden's varied history, which never overcame the dualism of monarchy and estates but rather swung back and forth between the primacy of the estates and the king, every subsequent change in the balance of power resulted in the alteration of the existing instrument of government of the promulgation of a new one. The Instrument of Government of 1772 also marked a phase in this contest, one in which the monarch largely succeeded in circumscribing the rights of the estates and attempted to permanently seal this victory in writing. The Instrument of Government of 1772 thus does not represent an early form of the modern constitution suitable for challenging the explanatory model, but rather a late form of the tradition of estates-based government that had elsewhere died out. Like these, the Instrument of Government shares with the modern constitutions the aim of comprehensively regulating state power. However, it lacks both the constitutive element and the universal character. Rather, it operates within the traditional framework of the dualistic state.

e) Germany and other Countries

Following the French Revolution, constitutions spread throughout Europe. Even before the enactment of the first French constitution, Poland received a constitution on 3 May 1791. Based on the current French model, the constitution then spread with the French armies across Italy, Switzerland, Holland, Germany, and Spain.[36] The end of the Napoleonic hegemony over Europe also meant the end of these constitutions, but not of the constitutional movement. Rather, the constitution in the modern sense remained the dominant issue of domestic politics in Europe, and in many countries in Europe, specifically in a series of individual German states, constitutions heavily influenced by the French *Charte constitutionelle* of 1814 were enacted without pressure from abroad. For the great majority of these constitutions, particularly the German

[35] E. Hildebrandt (ed.), Sveriges Regeringsformer 1634-1809 (1891); Michael Roberts, 'On Aristocratic Constitutionalism in Swedish History' in his *Essays in Swedish History* (London: Weidenfeld and Nicholson, 1967), p. 14: Oestreich (n. 2), p. 53; Nils Herlitz, *Grundzüge der schwedischen Verfassungsgeschichte* (Rostock: Hinstorff, 1939), p. 185.

[36] Cf. Dieter Grimm, 'Die verfassungsrechtlichen Grundlagen der Privatrechtsgesetzgebung' in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/1 (München: Beck, 1982), p. 39.

ones, the conditions that have been set forth here as constitutive for the modern constitution were not entirely attained. Rather, at the time the constitutions were enacted an assertive bourgeoisie was generally lacking and thus also the type of revolutionary break that gave rise to the first modern constitutions in America and France.

To determine whether this invalidates the explanatory model, one must first examine what exactly it explains. The explanation relates to the *emergence* of the modern constitution. This was linked to the conditions described herein. Its *spread* was not. Once invented, it could also be applied to other conditions or used for other purposes. One factor in this process was the growing demand of peoples lacking either the occasion or the strength for a bourgeois revolution for constitutional attainments, and the corresponding possibility for regents to additionally legitimate their rule using constitutional forms; a further influence was the necessity to once again mediate between the state and society in the context of increasing functional differentiation, which was also occurring in the non-bourgeois states or was even politically accelerated for reasons of competition. However, it must be noted that to the same extent the conditions for emergence were lacking, these constitutions too could only be a weaker form of the modern constitutional type that emerged in America and France. This could be pushed to the extent of largely meaningless constitutions, so that they no longer served their original purpose of legitimizing and restricting political rule, but only gave the formal appearance of these benefits, as in Napoleonic France.

The Polish constitution of 1791, which might raise doubts about the soundness of the explanatory model on account of its chronological priority in Europe, also proves on closer inspection to be a truncated imitation of the new invention.[37] It originated in efforts at a governmental reform that was triggered by the first partitioning of Poland in 1772. The partitioning had made Poland, in which the primacy of the estates under a monarchy had been largely preserved, and even the *liberum veto* retained, painfully aware of its backwardness and set out to limit the role of nobility and strengthen the monarchical government. The intended aim was similar to that held under the absolute monarchies under the influence of the Enlightenment, but from the opposite position. After the emergence of the American constitutions and the efforts to draft a French constitution, whose section on fundamental rights was finalized in 1789, it was easy to transpose the Polish plans into a constitutional form, particularly as many Polish reformers had fought in the American Revolutionary War and were in communication with French revolutionaries. Unburdened, by absolutism, the country was also open to ideas about division of power. By contrast, the constitution leaves no doubt that the function of constituting rule on the basis of bourgeois freedom was in no way considered.

[37] Cf. Georg-Christoph von Unruh, 'Die polnische Konstitution vom 3. Mai 1791 im Rahmen der Verfassungsentwicklung der europäischen Staaten' (1974) 13 *Der Staat* 185.

When one ignores the constitutions promulgated in Europe between 1796 and 1810, as almost none of them was an autonomous creation but enacted under French pressure and thus meaningless in this context, this review must conclude with a look at Germany, where autonomous constitutions emerged following the end of the Napoleonic era. Their common characteristic is that they were voluntarily granted by the monarchs in the interest of dynastic preservation.[38] Their legal validity thus derived from the will of the ruler. As a consequence, the latter's right to rule preceded the constitution and was not founded on it. The German constitutions thus lacked the constitutive element that is characteristic of modern constitutions. These constitutions related solely to the exercise of rule and therefore were similar to the older legal bounds of rule.

They resembled modern constitutions, however, in the way in which they regulated the exercise of power. Unlike the older contractual bonds, they set out to comprehensively regulate the exercise of rule. Consequently, the presumption of competence continued to apply to the monarch on the basis of his pre-constitutional right of rule, insofar as the constitution did not explicitly provide for the participation of other bodies in the decision-making process. However, each monarchical act could be examined to ascertain its conformity with the constitution. Furthermore, constitutions no longer related to the relationship between the monarch and the estates, as the older forms of government did, but were universal. They regulated the relationship between the monarch and the people. They were based on the concept of a separation of state and society, even though this was realized much less thoroughly than in the bourgeois nations due to the lack of a bourgeois revolution and the persistence of estate-based, corporative structures. There existed, however, fundamental rights that justified an autonomy that, while limited, possessed scope for expansion and that were only subject to state intervention with the consent of society in the form of acts of parliament.[39]

Even though the monarch had granted the constitution voluntarily, he was no longer able to shake off these bonds at will. Constitutional changes now needed a legislative process and thus required the consent of the parliaments as their prerequisite. Once granted, therefore, the constitution liberated itself from the will of the monarch and became an external limit on his powers. In practice, the aim of comprehensive regulation, the universality of constitutional norms, and a bond that was not unilaterally dissoluble moderated the lack of the constitutive element and rendered the German constitutions of the nineteenth century similar to the modern constitutional type. However, its evolutionary convergence with this type was obstructed, so that in Germany as

[38] Cf. the characterization in Ernst-Wolfgang Böckenförde, 'Der deutsche Typ der konstitutionellen Monarchie' in his *Staat, Gesellschaft, Freiheit* (Frankfurt am Main: Suhrkamp, 1976), p. 112.

[39] Cf. Wolfgang von Rimscha, *Die Grundrechte im süddeutschen Konstitutionalismus* (Köln: Heymann, 1973); Rainer Wahl, 'Rechtliche Wirkungen und Funktionen der Grundrechte im deutschen Konstitutionalismus' (1979) 18 *Der Staat* 321; Dieter Grimm, 'Grundrechte und Privatrecht in der bürgerlichen Sozialordnung' in his *Recht und Staat* (n. 15), p. 192.

well the revolutionary break with traditional rule was ultimately required in order to finally, and with much delay, assert the modern constitution entirely.

III. ON THE CURRENT CONDITION OF THE CONSTITUTION

1. *Continued Need*

The conditions under which the modern constitution was able to emerge more than two centuries ago have since changed. This forces the question as to whether the constitution can be maintained when severed from its originating conditions and under altered prerequisites. Admittedly, the outward signs would indicate the demand, because the constitution has spread across the globe and is to be found not only in those political systems with a tradition of bourgeois liberalism. However, this circumstance initially testifies only to the continuing attraction of, and possibly the lack of alternatives to, the idea of the constitution as a solution to the problem of legitimation and limitation of political power. This also endows it with a certain usefulness for rulers themselves, for whom the constitution promises greater security and acceptance of their rule. By contrast, the current global propagation of the constitution says nothing about its effectiveness today.

In one respect, however, the special situation out of which the constitution originally emerged has become the rule. It is no longer accepted that a ruler is legitimated by reasons that are pre-existing, transcendental, or inherent in the exercise of power. The vacuum left after the revolution against a consensus-independent ruler, which formed the reason for the necessity of reconstitution of rule, has thus become permanent, although in a latent way. The authority to rule depends on authorization and consent. Under these circumstances, however, legal rules that define how state power is to be created and exercised are required if the rule is to have any pretensions to legitimacy. This is not implemented in all political systems with the aim of limiting power. Still, the constitution's most dependable pillar is the need for the derivation and organization of rule.

Independently of that, however, one can observe developments that weaken the regulative power of constitutional law with respect to state power, thus calling into question its ability to solve problems in the present. This refers neither to the widespread pseudo-constitutionalism nor the lack of means of asserting constitutional requirements through legal proceedings that prevails in many places. Both have existed from the very beginning. Rather, at issue are structural limitations of the legal control of the political process, which in this form are new. They originate in an altered problem constellation that distinguishes highly complex industrial societies from preindustrial bourgeois societies. These problems have transformed both the function and the nature of the state. With regards to the originating conditions of the modern constitution, these impact the social model that underlies constitutional law and the object of constitutional regulation.

2. *Materialization of State Tasks*

The bourgeois model of society failed to fulfil the promises associated with it. Certainly, it unleashed the economy, thus contributing to an unimagined increase in prosperity. However, the reconciliation of interests that was also anticipated never took place. Developed under preindustrial conditions, the bourgeois social model renounced its claim of extending its benefits to the entire society following the Industrial Revolution. On the contrary, it left in its wake a class division that was every bit as abhorrent as the previous system of estates. This undercut the premise of society's ability to control itself. If the goal of equal freedom was to be preserved, the means had to be changed. Social justice could no longer be expected as the natural consequence of the free play of social forces, but rather once again had to be effected politically. This led to a materialization of the justice problem. Consequently, the state also had to move out of the role of simply the guarantor of a presupposed order assumed to be just, and once more actively shape this order with an eye to specific material objectives.

This has consequences for the constitution, as it is not designed to resolve material problems, nor can it be adapted to this task without difficulty. Thus, the regulative power of the constitution declines in proportion to the scope of the transformation from a liberal order-oriented state to the modern welfare state. The reduced congruence between the social problems and the constitutional response is initially associated with the fact that the new type of state is characterized not by individual interventions in the sphere of freedom reserved in principle to individual choice, but by planning, guiding, and establishing services of all kinds for society. However, that vitiates the constitutional law, which aims to tame state encroachment, to a corresponding extent. As modern state activities do not represent encroachments in a legal sense, they do not need a legal basis. Where no legal basis exists, the principle of the lawfulness of administrative action also does not apply. As the administration operates in a legal vacuum, judicial oversight of administrative acts also declines. The most important manifestations of the rule of law and democracy are thus rendered partially inoperative.

This danger has not gone unnoticed and judges and scholars have attempted to remedy democratic and constitutional deficits by extending the concept of encroachment and of the necessity for a basis of action in law. However, it has become apparent that, for two reasons, this is only possible to a limited extent. First, unlike formal issues, material problems cannot be resolved on the legal level. Although law can mandate a solution, the realization of the normative requirement depends largely on extra-legal factors, and the realization of the constitution, for which scarcity problems did not exist as long as it only imposed barriers, becomes contingent on what is possible. Secondly, unlike the state's guarantor functions, the structuring functions escape comprehensive legal regulation. In the fulfilment of its guarantor function, the state acted retroactively and selectively. State activities of this type are relatively easy to determine on

a normative level. The norm defines what is to be considered a disturbance of order and determines the actions the state may employ to restore order. By contrast, material state activity operates on a prospective and comprehensive basis. This activity proves to be so complex that it cannot be anticipated completely and therefore not entirely determined by law. Whenever the realization of prospective objectives is concerned, the requirements of constitutional law can be fulfilled to only a limited extent due to structural reasons.

3. *Diffusion of State Power*

The modern constitution was based on the difference between state and society. Society was stripped of all means of political power and set free, while the state was equipped with the monopoly of power and then restricted. It is this difference that enabled the rational binding of state power by law. Although it regulated the relationship between state *and* society, the latter held the entitled position as a matter of principle and the former the obligated position. But this differentiation is also disappearing in the face of new state tasks, and with it the regulatory potential of the constitution. This is true in two respects.

For one thing, the extension of suffrage was inevitably associated with the emergence of political parties, for which no provision was made in the original constitutions. Even today, many constitutions take no notice of them, yet they are the determinative forces of political life. Where they are subjected to constitutional norms, however, these reveal a curious regulatory weakness. The reason for this is that the parties cannot be localized within the dualistic system of state and society. They operate as mediating instances between the people and the organs of the state, and by virtue of their function necessarily pierce the boundary between state and society that lies at the heart of the constitution. These are the organizations that staff the state's organs in the name of the people and determine their programme of action. As a consequence, it becomes clear on examination that political parties can be seen behind all state institutions. They have already completed their task before the separation of powers has the chance to become operative. As a result, independent state organs do not check and balance each other, as provided for under the constitution; rather, the political parties cooperate with themselves in different roles.

Secondly, the altered form of state activity blurs the system boundary between state and society. No longer merely the guarantor of an underlying order, the modern state today assumes the global control of social development. However, this expansion of its mission has not been accompanied by an enhancement of its powers. In particular, the economic system, protected by basic rights, remains in the private domain. As a consequence, the state cannot rely on its specific means of command and coercion but has only indirect methods at its disposal for performing its new tasks. To that extent, the state becomes dependent on the willingness of private actors to follow its lead. This places private actors in a negotiating position, and what seems to be a formal state decision is, in material terms, the result of negotiation processes in which

public and private power are involved in a mixture not easily dissolved. In this way, privileged social groups participate in the fulfilment of state functions, thus pushing the system further along on the path back to the older order of scattered and independent centres of rule. The binding force of the constitution declines to the same extent, as it no longer includes the entire creation of collectively binding decisions and not all participants in the decision-making process. In spite of its aspiration, the constitution is relegated to the function of a partial order, acquiring characteristics of the older localized and sectional bond of rule.[40] It is to be anticipated that this process will refocus interest in the material constitution as awareness of it grows.

[40] The considerations that substantiate this conclusion are presented in Dieter Grimm, 'Die sozialgeschichtliche und verfassungsrechtliche Entwicklung zum Sozialstaat' in his *Recht und Staat* (n. 15), p. 138.