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Reconsidering Constitutional Formation I National Sovereignty

A Comparative Analysis of the Juridification by Constitution

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Reconsidering Constitutional Formation I National Sovereignty

A Comparative Analysis of the Juridification by Constitution

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The positions expressed are those of the authors and do not necessarily reflect the official opinion of the ERC or the European Commission.

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Editor
Ulrike Müßig
Advanced Grantee of the ERC
Chair of Civil Law
German and European Legal History
University of Passau
Passau, Germany

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This volume reports on the first research results of the ERC Advanced Grant ReConFort, **Re**considering **Con**stitutional **F**o**r**ma**t**ion. The transdisciplinary project deals with selected constitutional discourses in eighteenth and nineteenth century Europe and focuses on the experimental ambiguity or indetermination of constitutional texts with regard to state-organisational core elements. At the invitation of the University of Macerata from 9 to 11 March 2015, the post docs and myself as principal investigator presented the research results on national sovereignty. The essays of this volume rely on the elaborated version of the papers given in Macerata. This book wouldn't have come into existence without the help of many I express my warmest thanks here. I am particularly grateful to Luigi Lacché (Macerata) who invited us for the spring conference 2015; to Brecht Deseure (Brussels), Giuseppe Mecca (Macerata) and Anna Tarnowska (Torún) for their excellent commitment to the project, to Shavana Musa (Manchester) for her native speaker's correction of my texts and to the doctoral students (Franziska Meyer, Passau; Joachim Kummer, Berlin) for their support with sources and literature. My thanks also go to the organisational masterminds of ReConFort Stefan Schmuck (Passau) and Elisabeth Schneider (secretary at my chair) who gave much of their time to bring my ideas into life.

Passau, July 2016 Ulrike Müßig

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Contributors

Brecht Deseure University of Passau and Vrije Universiteit Brussel, Passau, Germany

Giuseppe Mecca Faculty of Law, University of Passau, Passau, Germany

Ulrike Müßig Advanced Grantee of the ERC, Chair of Civil Law, German and European Legal History, University of Passau, Passau, Germany

Anna Tarnowska Faculty of Law and Administration, Nicolaus Copernicus University, Toruń, Poland

Juridification by Constitution. National Sovereignty in Eighteenth and Nineteenth Century Europe

Ulrike Müßig

Abstract In its first research period (2014–2015), the Research project ReConFort focused on national sovereignty/constituent sovereignty as a key category of its overall research on communication dependencies of historic constitutions. The topos was not only used as a search item, but also as *tertium comparationis.* On a comparative overview, national sovereignty is used to explain a legal starting point of the constituting process (the so-called 'big bang-argument'). All references to national sovereignty mark the process of juridification of sovereignty by means of the constitution, i.e. political legitimation is turned into legal legitimation. This is coincident with the normativity as goal of the modern constitutional concept arising out of the revolutions at the end of the eighteenth century.

The essay of the Principal Investigator examines the juridification of sovereignty in the French discourse around the works of Sieyès and the parliamentary pre-revolution. In the debates around the Great Sejm the old aristocratic understanding of the Polish Nation as one of the noblemen is found to be powerful. The procedural openness of the May Constitution 1791 is explained as a reflex onto juridification of national sovereignty. National sovereignty in the Spanish Cádiz Constitution 1812 is connected to the anti-Napoleonic context of the constitutional process. The general and extraordinary Cortes' claim to the constituent power by virtue of the recourse to national sovereignty cannot be understood as representing a Rousseauian national *volonté générale*. The natural origin of national sovereignty in the Cádiz' liberal understanding is influenced by late scholastical concepts and combines the supralegal limitations for the royal government with the historical legitimisation of the Cádiz constitution by the old fundamental laws of the Monarchy (*las antiguas leyes fundamentales de la Monarquía*). The constituent sovereignty in the Norwegian *Grunnloven* May 1814 is in various aspects comparable with the Spanish case: the constitutional process was received as guarantee of national independence. The Moss Process into the Swedish Union under the Fundamental Law of the Norwegian Empire of November 4, 1814 demonstrates the Extraordinary Storting as Constituent Assembly and the monarchy as constituted power. The statement of the Christiana

U. Müßig (✉)
Advanced Grantee of the ERC, Chair of Civil Law,
German and European Legal History, University of Passau, Passau, Germany
e-mail: ulrike.muessig@uni-passau.de; www.reconfort.eu

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Faculty of Law 1880 on the King's veto with regard to constitutional amendments relies on the differentiation between constituent and constituted sovereignty by explaining why constitutional amendments cannot be left to either of the constituted powers – neither to an ordinary parliamentary assembly nor to the King alone.

The French *Charte Constitutionelle* 1814, mixing constitutional binding and divine reign, avoids the term sovereignty. The reference to authority (*l'autorité tout entière*) in the preamble permits the prerevolutionary subsumption as divine right. The monarch by the Grace of God Louis XVIII appears as constituent sovereign, the label as charter (*charte*) tries to create the impression of a royal privilege. Due to his absolute power, the monarch is the sole bearer of executive power (Art. 13), of the exclusive right of legislative initiative (Art. 45, 46) and of jurisdiction (Art. 57). The *Charte Constitutionnelle* 1814 was imitated numerously until 1830, including its intrinsic systematic incompatibilities (between the monarchical principle and parliament's legislative and budgetary rights). Its revolutionary overcoming in the French July Revolution 1830 led to a European-wide constitutional movement, whose connection with national struggles for freedom, invigorated the people and its representation as constitutional factors. Like in France, a parliament took over the task of drafting a constitution in Belgium after the Revolution of 1830: The constituent assembly, dominated by the liberal-catholic legal minds, is *pouvoir constituant*, the newly-to-be-appointed King is just taking on the role as *pouvoir constitué*. Contrary to the French model, the Belgian Constitution is not negotiated with the monarch, but freely proclaimed by a national congress in its own right.

In the octroi of the Piedmontese *Statuto Albertino* 1848, the constituent act of granting the fundamental law (*statuto fondamentale*) was communicated to maintain the *plenitudo potestatis* of the absolute monarchy, to rationalize the old royal sacredness. Therefore, according to the preamble of the *Statuto Albertino*, the participation of the Council (*Consiglio di conferenza*) was simply advisory. The Piedmontese state was to remain based on the 'monarchical constitutional foundation' (art. 2) and 'the person of the King is holy and inviolable' (art. 4). The oath of the Senators and Representatives contained first the loyalty towards the King and then towards the constitution and the laws (art. 49). The Italian coincidence of the monarchical sovereignty in its absoluteness with the granting of the Albertine Statute was meant to avoid any scope for the differentiation between *pouvoir constituant* and *pouvoir constitué*. The improvised parliamentarism in the Frankfurt National Assembly corresponded with the openness of the 'Sovereignty of the Nation' whereby Heinrich von Gagern inaugurated the St. Pauls church-assembly. This avowal to the singular and unlimited *pouvoir constituant* of a not existant German nation did not make sense as a programmatic claim to self-government, but reflected the indecisiveness of the post-kantian liberalism between monarchical and popular sovereignty. It avoided the open commitment to popular sovereignty and thus the conflict with the monarchy, enabling a consensual framework between imperial government and parliamentary majority.

Keywords National sovereignty • Constituent sovereignty • Constitution • juridification • Normativity

1 On ReConFort's Research Programme in General

The traditional approach in legal history focuses on constitutional documents, believing in a nominalistic autonomy of constitutional semantics. Looking onto the European Constitutionalism of the late eighteenth and nineteenth century, even a written constitution cannot statically fix the administrative-legal relations of power, as they depend on the legal interpretation and the conflict mentality of the political decision-makers. In the context of ReConFort,[1] constitution is understood as an evolutionary achievement of the interplay of the constitutional text with its contemporary societal context, with the political practice and with the respective constitutional interpretation. Such a functional approach keeps historic constitutions from being simply log books for political experts. It makes apparent how sovereignty[2] as constituted power translates ways of thinking and opinions in the Burckhardtean sense[3]: sovereignty can only be exercised with the consent of the ruled. Even the constitutional cycle anticipated by Polybius has presupposed that the *politeiai* of monarchy, aristocracy and democracy degenerate, where sovereignty is not accepted or gambled away.[4]

The interest in the interdependencies between constitution and public discourse reaches the key goal legitimation: Thomas Paine's response to 'Mr. Burke's attacks on the French Revolution' rests on the argument that legitimacy is not transmitted through tradition or established institutions, but rather solely through the consent and agreement of the citizens.[5] Not the text-body of the constitution, but rather the agreement of those to be ruled by the *pouvoirs constitutés* creates sovereignty. For David Hume, the discourse-dependency of the state power is axiomatic: 'it is […] on opinion only that government is founded' (1758).[6] Sovereignty is considered to depend on the belief of the subjects and the political élites in its utility and legitimacy.[7] The 'belief in sovereignty' which went along with the founding act of forming a constitution becomes palpable in the 'religious affinities' of the constitutional pre-

[1] ReConFort, Reconsidering Constitutional Formation. Constitutional Communication by Drafting, Practice and Interpretation in eighteenth and nineteenth century Europe, 7th Famework Programme, "Ideas", ERC-AG-SH6 – ERC Advanced Grant – The study of the human past, Advanced Grant No. 339529.

[2] *Müßig*, *Ulrike,* Giornale di Storia Costituzionale 27 (2014), 107 n. 2 and the discourses in *idem*., Recht und Justizhoheit, (Law and Judicial Sovereignty) 2nd ed., Berlin 2009, p. 90 et seq.; p. 141 et seq.; p. 205 et seq.; p. 208 et seq; p. 210 et seq.; p. 279 et seq.

[3] *Burckhardt*, *Jacob,* Die Cultur der Renaissance in Italien (The culture of the Renaissance in Italy), Leipzig 1869, p. 364.

[4] Cited by *von Fritz, Kurt,* The Theory of Mixed Constitution in Antiquity: A Critical Analysis of Polybius' Political Idea, New York 1954, p. 10 et seq.

[5] *Paine*, *Thomas,* Rights of Men: Being an Answer to Mr. Burke's Attack on the French Revolution, London 1792, p. 15, p. 134.

[6] *Hume, David,* Essays and Treatises on Several Subjects (1758), in: Political Essays, Cambridge 1994, p. 127.

[7] See also *Luhmann*, *Niklas*, Macht (Power), 3rd Edition, Stuttgart 2003, p. 4 et seq, who describes state authority as a "symbolically generalized communication medium".

ambles in the eighteenth century: Such an affinity does not mean the recourse of the constituents to divine authority for the written text, but rather the presentation of central constitutional guarantees as philosophical truths with a claim to eternal validity.[8] This is contextually why the constitutional debates in the northamerican colonies are read as 'creeds of the new time' ("*Glaubensbekenntnis der neuen Zeit*").[9]

The litmus test of the communication dependency of constitutions is their indecisiveness in crucial points. This is not only elaborated for the *pouvoirs constitués*,[10] but is also true for the *pouvoir constituant*, the constituent sovereignty. Under the impression of the Jacobinian reign of virtue and terror and the struggle for resistance of the allied monarchies against the revolutionary army of the *Republique Française*, the republic got discredited into antagonism with monarchy and there was a remarkable 'renaissance' of the monarchy in the early constitutionalism.[11] The constitutional formation in the strict legal sense, i.e. the act of constituting,[12] could 'defend the monarchy from the threat of the people', as explained for the Albertine Statute 1848,[13] could be a 'legal decision of a national constituent assembly' as in the Belgian Case 1831,[14] could borrow from the old notion of a fundamental law as in the Polish Case 1788–1792[15] or try to remain in between as the reference to the 'Nation as sovereign' in the French September Constitution 1791 does, which has

[8] The most prominent example is the French Declaration of the Rights of Men: The "natural, inalienable and sacred rights of man" (Preface to the French Declaration of the Rights of Men), are laid down catechistically as the basis of "all political society" (Art. 2, also Art. 16). Cf. *Sieyès*, Préliminaire de la constitution, Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen, Observations, cit. in: Orateurs de la Révolution française, édition Pléiade, vol. I, Paris 1989, p. 1004: "*Quand cela serait; une déclaration des droits du citoyen n'est pas une suite de lois, mais une suite de principes*." For the American Constitution cf. *Stolleis,* Michael, Souveränität um 1814, in: Müßig (ed.), Konstitutionalismus und Verfassungskonflikt, Tübingen 2006, p. 101–115, 103. Muß, Florian, Der Präsident und Ersatzmonarch, Die Erfindung des Präsidenten als Ersatzmonarch in der amerikanischen Verfassungsdebatte und Verfassungspraxis, Munich 2013 (Diss. iur. Passau supervised by Ulrike Müßig).

[9] *Dreier*, *Horst,* Gilt das Grundgesetz ewig? Fünf Kapitel zum modernen Verfassungsstaat, Munich 2008, p. 14.

[10] *Müßig*, *Ulrike,* L'ouverture du mouvement constitutionnel après 1830 : à la recherche d'un équilibre entre la souveraineté monarchique et la souveraineté populaire, Tijdschrift voor Rechtsgeschiedenis 79 (2011), 489 et seq.

[11] Therefore, trust in a strong representation of the people, as the French Constitution of 1791 breathes, is hardly found among European Constitutions around 1800. Apart from the Norwegian Grunnloven of Eidsvoll (May 1814), echoes of the French September Constitution are just found in the short-lived Spanish Constitution of Cádiz 1812.

[12] Deciding on the legal text in contrast to the broader sense of constitutional formation, on which ReConFort is based, comprising also constitutional praxis and interpretation.

[13] The *Omnipotence of Parliament* in the legitimisation process of 'representative government' during the Albertine Statute (1848–1861, in: Müßig (ed.), ReConFort I: National Sovereignty, here, p. 159.

[14] National sovereignty in the Belgian Constitution of 1831. On the meanings of article 25, in: Müßig (ed.), ReConFort I: National Sovereignty, here, p. 93 et seq.

[15] Sovereignty issues in the Public Discussion around the Polish May Constitution (1788–1792), in: Müßig (ed.), ReConFort I: National Sovereignty, here, p. 215.

influenced the Cádiz Constitution 1812. Therefore, constituent sovereignty is the perfect starting point for the research project on communication dependency of constitutions, as it is the legitimizing explanation of the constitutional process.

2 Method of Comparative Constitutional History

2.1 Targeted Sources of ReConFort

ReConFort's approach to the interplay of constitutional processes and public participation relies on a systematic analysis of constitutional documents in combination with reflective documents of acting political stakeholders.[16] The targeted sources comprise constitutions and constitutional materials,[17] relevant cross-border private correspondences of protagonists and their publicist activities including exile literature, regional/national and cross-border constitutional journalism in public media. The last category of sources opens up the research approach onto the reporting on constitutional affairs in a selected number of leading media[18] or specialised/exile media.[19] Both categories, the first being determined by the cut off-principle (largest readership) and the second by specialisation on certain opinions, have a special regard to the causative interdependencies between media dissemination and the politicisation of the population. Such an analysis of public media in the eighteenth and nineteenth century combine the quantitative reconstruction (surveying) with the subsequent qualitative elaboration of typological key passages (cognitive, classificatory or narrative). The following key passages (*topoi*) form the debates as semantic paradigms:

- Constituent Sovereignty/National Sovereignty =ReConFort, Vol. I
- Precedence of Constitution = ReConFort, Vol. II
- Judiciary as Constituted Power
- Justiciability of Politics.

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[16] Cf. www.reconfort.eu. The whole team comprises also the British post doc Dr. Shavana Musa (Dec. 2015 till August 2016), two doctoral students Franziska Meyer and Joachim Kummer, the project manager Stefan Schmuck and is supported by an international advisory board. Translations by the Advanced Grantee are marked here with UM.

[17] Constitutional drafts or official stenographic records of constitutional debates.

[18] For instance: Gazeta Narodowa i Obca, Journal Hebdomadaire de la Diète, Pamiętnik Historyczno-Politczny-Ekonomiczny (PL); El Constitucional: ó sea, Crónica científica, literaria y política, La Constitución y las leyes, Mercurio histórico y político, El Universal. Observador español (ES); Journal des Flandres, L'Union Belge; Politique (BE); Allgemeine Zeitung, Deutsche Zeitung, Kölnische Zeitung (DE); Il censore, giornale quotidiano politico polpulare, Il nazionale, Gazetta del populo, La Concordia (IT).

[19] Exile Lit.: El Español (London 1810–1814), El Español Constitucional (London 1824–1827), L'Avenir (Paris 1830–1831). For representing tendencious opinions: El Censor. Periódico político y literario, El Defensor del Rey, El Zurriago; Kreuzzeitung, Neue Deutsche Zeitung; L'Imparziale. Foglio Politico.

2.2 *Methodological Challenges: Finding the* Tertia Comparationis

Any comparative legal historical approach is burdened with a double hermeneutical circle. First, there is 'an unalterable difference between interpreter and author that originates from the historical distance'.[20] Secondly, the past linguistic usage is enshrined in the constitutional development of different legal systems. The legal terms 'nation' and 'sovereignty' are not interchangeable in Belgian, English, French, German, Italian, Polish and Spanish sources and thus not comparable by themselves. Language has to be accepted as the frontier of its user's world.[21] Therefore, different historical formulations of the national sovereignty cannot serve as *tertia comparationis* in a historical comparison. This is obvious for everybody consulting the following linguistic expressions: In the introduction and in Art. 2 of the Polish May Constitution 1791 the nation is equivalent to the nobility, in the French September Constitution 1791 (Tit. III, Art. 1) the nation is a political point of reference next to the monarch, and the address of the General and Extraordinary Cortes of Cádiz to the sovereignty of the nation in Tit. 1, Art. 2 means to annul the declaration of abdication given in Bayonne in favour of Napoleon.

If one searches for benchmarks abstracted from the constitutional wording, the *contexts of the claims* for national sovereignty are useful *tertia comparationis*. So my paper does not deal with national sovereignty as an abstract perception of the political history of ideas, but as the *political polemics in concrete situations of conflict*. Common to all contexts is the use of national sovereignty as a legal starting point ('big bang-argument'). This is coincident with the normativity as goal of the modern constitutional concept arising out of the revolutions at the end of the eighteenth century.[22]

All references to national sovereignty mark a process of juridification of sovereignty, i.e. political legitimation is turned into legal legitimation. A constitution is a legal codification to fix the political order as a legal order. This solves the paradox of the Bodinian sovereignty, which could not explain the legal bindingness at the moment of concluding the social contract. According to Bodin binding obligation was only thought of in relation to already existent law.[23] It is only with the differentiation between the sacrosanct and the dispositive law that the legal term of the

[20] *Gadamer*, *Hans-Georg,* Wahrheit und Methode, Grundzüge einer philosophischen Hermeneutik, 3rd extended ed., Tübingen 1972, p. 280. Paraphrasing transl. by UM.

[21] *Wittgenstein*, *Ludwig,* Tractatus logico-philosophicus, in: Werkausgabe, Vol. 1, Stuttgart 1984, Vol. 1, p. 67, 5.6: "Die Grenzen meiner Sprache bedeuten die Grenzen meiner Welt" ("The limits of my language equate the limits of my world"). Paraphrasing transl. by UM.

[22] *Müßig*, *Ulrike,* Konflikt und Verfassung, in: idem (ed.), *Konstitutionalismus und Verfassungskonflikt*, Tübingen 2006, p. 2.

[23] Of course, the *lois fondamentales* were binding after conclusion between the parties as "*conuentions iustes & raisonables*" in contrast to the statutory "*lois de ses prédécceurs*". And the binding authority of natural or divine law is not questioned. *Holmes, Stephan*, Jean Bodin: The Paradox of Sovereignty and the Privatization of Religion, in: Pennock, James Roland/Chapman John W. (ed.), Religion, Morality and the Law, New York 1988, p. 17 et seq.

constitution of the eighteenth century manages to justify the self-commitment of political power without the concept of the state contract (*Staatsvertrag*). National sovereignty is the synonym for the juridification of sovereignty by means of the constitution.

2.3 Constitutionalisation by Public Sphere

2.3.1 Press Media as Roadster of Politicisation

In his leading titles 'The Structural Transformation of the Public Sphere'[24] and 'Communication and the Evolution of Society'[25] the German philosopher Jürgen Habermas argues that the emergence of the public sphere is twinned with the 'growth of democracy, individual liberty and popular sovereignty and the emergence of a self-conscious bourgeoisie and a reasoning public'.[26] As the countries of my comparative overview all share constitutional formation **(i)** in the stress field of external hegemonic powers (French Revolutionary Wars, Polish Partitions, French occupation of Spain during the Napoleonic wars, Belgian secession from the United Kingdom of the Netherlands, German Restoration under the big four of the Vienna Congress, Franco-Austrian rivalry over Italian territories) or **(ii)** in the light of internal rivalries between ethnic-cultural or language factions (competing models for citizenship in post-1815 German territories and the Habsburg Empire, conflicts between Flanders and Walloons), the constitutional formation has a key role for 'national' self-determination under external encroachments. Therefore publicistic debates on constitutional matters do not represent technical items for specialized elites, but are the mouthpiece of a general 'politicised' public. Due to the general atmosphere of upheaval, the reports of constitutional affairs are at the core of a fundamental politicisation of the broader population. The constitutional debates in the Belgian National Congress 1830–1831 are accompanied by the reports of the lead-

[24] *Habermas*, *Jürgen,* The Structural Transformation of the Public Sphere: An Inquiry into a category of Bourgeois Society, Cambridge 1962 transl 1989. On the self-conscious bourgeoisie and the public sphere, see p. 81: "The constitutional state as a bourgeois state established the public sphere in the political realm as an organ of the state so as to ensure institutionally the connection between law and public opinion". On the "reasoning public", ibid., p. 83; p. 107: the principle of popular sovereignty could be realized only under the precondition of a public use of reason. On popular sovereignty, liberty, and their connection to the public sphere, p. 101: The representative system does this, (1) by discussion, which compels existing powers to seek after truth in common; (2) by publicity, which places these powers when occupied in this search, under the eyes of the citizens; and (3) by the liberty of the press, which stimulates the citizens themselves to seek after truth, and to tell it to power."

[25] *Habermas*, *Jürgen,* Communication and the Evolution of Society, Boston 1979, p. 114.

[26] *Eisenträger, Stian A.E.,* The European Press and the Question of Norwegian Independence in 1814, Norwegian University of Life Sciences, Masterthesis 2013 (http://brage.bibsys.no/xmlui/bitstream/ handle/11250/187931/Eisentrager_master.pdf?sequence=1), p. 29. The following argumentation relies on Eisenträger's argumentation at p. 29 et seq.

ing journal *Politique* (Liège), which was the flagship of the independence movement.[27] And the national unification movement *il Risorgimento* (resurgence) is named after a newspaper founded in 1847 in Turin by the Sardinian politician and architect of the Italian unification Cavour. The outburst of political periodicals from 1848 onwards (*Il nazionale, Gazetta del populo, La concordia*) prove the Italian national liberation movement to be a product of the reciprocal communicative dimensions of constitutional processes. In the pre-revolutionary feudal society, people were born into certain estates of the realms, without the chance for change. Newspapers and journals as mass means of dissemination and communication motivated a broad politicisation and served as transmittors of the new ideas of the modern constitutional concept.[28] The *Allgemeine Zeitung, Deutsche Zeitung, Kölnische Zeitung, and the Neue Berliner Zeitung* were mouthpieces of the German liberalism and, together with other political writings,[29] accompanied the debates regarding the concept of national sovereignty in 1848/49.

Furthermore, the political impact of the press-based public sphere is mirrored by the rigorous censorships which governments of the eighteenth and nineteenth century invented to 'regulate the flow of ideas'.[30] Press freedom in the liberal understanding could first be found in England through the expiration of the Long Parliament's Licensing Act 1695.[31] The emancipation of the bourgeoisie was traced by the turn-up of the constitutional guarantees of Press freedom.[32]

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[27] Its spiritus rector Paul Devaux was secretary to the constitutional commission.

[28] *Kovarik*, *Bill,* Revolutions in Communications: Media History from Gutenberg to the Digital Age, New York 2011, p. 26. Eisenträger, ibid. (n.26), p. 30.

[29] Such as *Fick*, *Alexander Heinrich,* Denkschrift an die souveräne constituierende deutsche Nationalversammung, Marburg 1848 and *von Hermann*, *Friedrich,* Die Reichsverfassung und die Grundrechte, Zur Orientierung bei der Eröffnung des bayrischen Landtags im September 1849, Munich 1849.

[30] *Eisenträger,* ibid. (n. 26), p. 30; *Taylor*, *P. M.,* Munitions of the mind. A history of propaganda from the ancient world to the present day, Manchester/New York 2003, p. 129.

[31] Also called "An Ordinance for the Regulating of Printing". Regarding the expiration compare *Deazley, Ronan,* On the Origin of the Right to Copy, Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775), Oxford 2004, p. 1 et seq. Yet the effect of the expiration of the Licensing Act on press freedom should not be overestimated: *the same*, p. 5: "In May 1695, […] the Lord Justices declared that the offences of criminal and seditious libel were, when detected, still punishable at common law. In one sense then, nothing had really changed".

[32] Compare Willoweit, Dietmar/Seif, Ulrike (=Müßig) ed., Europäische Verfassungsgeschichte (European Constitutional History), Munich 2003: First Amendment of the Constitution of the United States from November 3, 1791: Art. I *"Congress shall make no law (…) abridging the freedom of speech, or of the press (…)."*(p. 277); Constitution Française from September 3, 1791: Titre premier *"La liberté à tout homme de parler, d'écrire, d'imprimer et publier ses pensées, sans que les écrits puissant être soumis à aucune censure ni inspection avant leur publication (…)"* (p. 295); Constitution du 5 fructidor an III from August 22, 1795: *"353. Nul ne peut être empêché de dire, écrire, imprimer et publier sa pensée. – Les écrits ne peuvent être soumis à aucune censure avant leur publication. – Nul ne peut être responsible de ce qu'il a écrit ou publié, que dans les cas prévus par la loi."* (p. 387); Constitutión política de la Monarquía Española from March 19, 1812: Capítulo VII. "Art. 131. *Las facultades de las Córtes son: (…) 24° Proteger la libertad política de la imprenta.*" (p. 448). The Cádiz Constitution lacks a general press freedom, but rather, only a

2.3.2 Importance of Cross-Border News: The American Revolution in the Polish Public Discourse

With the French revolution and the Napoleonic wars the demand for news increased, and especially for news from abroad. In his monograph on French, German, English and American journalism Jürgen Wilke illustrates the dominant position of foreign affairs in news coverage[33] and explains[34] the substitute-function of foreign matters over domestic matters: It was safer against censorship to report on external political variables. In my contribution to the Polish Legal History Conference in Krakow 2014[35] I reported in length about the American Revolution in Polish journalism. The main lines of argumentation are recapitulated here, as the rhetorical use of the American struggle for freedom against Westminster both by the 'patriotic' reform minds as well as by the 'old-Republican' sustainers is a masterpiece of

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mere political press freedom is laid down. Compare also Art. 371, which only talks about the freedom to publish "political ideas". (http://www.congreso.es/constitucion/ficheros/historicas/cons_1812.pdf, 13.01.2016). Charte Constitutionelle from June 4 – 10, 1814: Art. 8 "*Les Français ont le droit de publier et de faire imprimer leurs opinions, en se conformant aux lois qui doivent réprimer les abus de cette liberté.*" (p. 485 f); Constitution for the Kingdom of Bavaria from May 26, 1818: § 11. "*Die Freiheit der Presse und des Buchhandels ist nach den Bestimmungen des hierüber erlassenen besondern Edicts gesichert.*" (p. 498)*;* Constitution de la Belgique from February 7, 1831: Art. 18. "*La presse est libre; la censure ne pourra jamais être établie; il ne peut être exigé de cautionnement des écrivains, éditeurs ou imprimeurs. Lorsque l'auteur est connu et domicilié en Belgique, l'éditeur, l'imprimeur ou le distributeur ne peut être poursuivi.*" (p. 512)*;* Fundamental law for the Kingdom of Hannover from September 26, 1833: § 40. "*Die Freiheit der Presse soll unter Beobachtung der gegen deren Mißbrauch zu erlassenden Gesetze und der Bestimmungen des teutschen Bundes stattfinden. Bis zur Erlassung dieser Gesetze bleiben die bisherigen Vorschriften in Kraft.*" (p. 538)*;* German Federal Act from June 8, 1815: Art. XVIII. d) "*Die Bundesversammlung wird sich bei ihrer ersten Zusammenkunft mit Abfassung gleichförmiger Verfügungen über die Preßfreiheit und die Sicherstellung der Rechte der Schriftsteller und Verleger gegen den Nachdruck beschäftigen.*" (p. 558) Yet, in 1819 the Carlsbad Decrees were issued. The Frankfurter Constitution from March 28, 1849 [Paulskirchenverfassung] guarantees in Art. IV, § 143: "(…) *Die Preßfreiheit darf unter keinen Umständen und in keiner Weise durch vorbeugende Maaßregeln, namentlich Censur, Concessionen, Sicherheitsbestellungen, Staatsauflagen, Beschränkungen der Druckereien oder des Buchhandels, Postverbote oder andere Hemmungen des freien Verkehrs beschränkt, suspendiert oder aufgehoben werden. Ueber Preßvergehen, welche von Amts wegen verfolgt werden, wird durch Schwurgerichte geurtheilt. Ein Preßgesetz wird vom Reiche erlassen werden.*" (p. 582).

[33] 1796, only the Parisian *Gazette nationale ou le Moniteur Universel* was an exception.

[34] *Wilke, Jürgen,* Foreign news coverage and international news flow over three centuries, Gazette 39 (1987), 147–180, p. 174: "A need for information could be satisfied this way, and at the same time, attention could be diverted from more pressing internal matters. A 'clamp-down' of news on the home front could be reconciled with an openness to news from the outside world".

[35] Reconsidering Constitutional Formation – The Polish May Constitution 1791 as a masterpiece of constitutional communication, CPH 67 (2015), 75–93. I owe the retrieval strategy into the publicism around the Great Sejm to *Libiszowska, Zofia*, The Impact of the American Constitution on Polish Political Opinion in the Late Eighteenth Century, in: Samuel Fiszman (ed.), *Constitution and Reform in 18th-Century Poland, The Constitution of 3 May 1791*, Indiana Press 1997, p. 233 et seq.

communication dependency on constitutional debates. Yet the presentation of the constitutional draft[36] to the representative chamber on May 3, 1791 was connected to the Anglo-American republican discourse.[37] Kołłątaj's[38] dedication for the representation of the cities in the Sejm referred to the democratic ideas of Franklin and Washington[39]. The role model of the American society lacking estate differences inspired the editor of the *Pamiętnik Historyczno-Polityczny* Piotr Świtkowski to discuss the rights of the townspeople in his article about the United States. In America, it was 'the personal accomplishment and not noble birth (paraphrased)'[40] that counted, George Washington being a favorite example. Reading the pro-patriotic *Gazeta Narodowa i Obca*, one is convinced by Julian Ursyn Niemcewicz: 'Nobody of us knows who the father of Washington or the grandfather of Franklin was. … But everybody knows and will remember in the future that Washington and Franklin freed America (paraphrased).'[41] Washington and Franklin leave even more marks in the *Gazeta Narodowa i Obca* as media vehicles for the Polish Constitutionalism; the introductory speech of President Washington in the first Congress is printed in two

[36] Together with Sejmmarshall Stanisław Małachowski (1736–1809) there are the following protagonists considered as the editors of the May constitution: Scipione Piattoli, royal secretary, Ignacy Potocki, spokesman of the patriots in the Sejm, Hugo Kołłątaj, since 1791 royal vice chancellor and the monarch himself (compare *von Unruh*, *Georg-Christoph*, Die polnische Konstitution vom 3. Mai 1791 im Rahmen der Verfassungsentwicklung der Europäischen Staaten, in: Der Staat 13 [1974], 185 et seq.).

[37] "In this century, there were two pivotal Republican constitutions, the English and the American, ours [the Polish] outperforming the two of them; it guaranteed liberty, security and all freedoms." Paraphrasing translation of the speech, cited in: Gazeta Narodowa i Obca, no. 37, 7 May 1 1791. It may be due to political calculus that Małachowski does not mention the French Revolution. These associations of Małachowski with the Anglo-Saxon constitutions mirrors the importance of the English constitutional model and the American constitutional movement in the journalism during the Great or Four-Year Reichstag (*Sejm Wielki* or *Czteroletni*) from October 6, 1788 until May 29, 1792. Materiały do dziejów Sejmu Czteroletniego [Sources concerning the deeds of the Four-Year Sejm], published by Michalski, Jerzy, Emanuel Rostworowski, Woliński, Janusz, vol. 1–5, together with Eisenbach, Artur, vol. 6, Warszawa 1955–1969.

[38] Hugo Kołłątaj (1750–1812), Former dean of the University of Krakau and later royal vice chancellor in 1791, had great influence on the Sejmmarshall Stanisław Małachowski. Concerning Kołłątaj's person and oeuvre compare *Pasztor, Maria*, Hugo Kołłątaj na Sejmie Wielkim w latach 1791–1792, Warsaw 1991. H. Kołłątaj, the spiritual cornerstone of the "forge" (Kuźnica), became the reform motor due to its Listy Anonima (1788/90) and a constitutional draft (prawo polityczne narodu polskiego, 1790). The Polish writings of Kołłątajs were newly edited during the 50s by *Leśnodorski, B.,* who also wrote an article on Hugo Kołłątaj in: Z dziejów polskiej myśli filozoficznej i spolecznej, Volume 2, Warsaw 1956.

[39] *Kołłątaj, Hugo,* Uwagi nad pismem… Seweryna Rzewuskiego… o sukcesyi tronu w Polszcze rzecz krótka [Remarks about Seweryn Rzewuski's short essay on the throne succession in Poland], Warsaw 1790, p. 71–77.

[40] "Stan prawdziwy wolnej Ameryki Północnej" [The true state in the free North America], Pamiętnik Historyczno-Polityczny, April 1789.

[41] Gazeta Narodowa i Obca*, no. 27* of March 9, 1791. A selection from Niemcewicz's speech was cited in The Newport Mercury of July 30, 1790. Compare *Haimann*, *Miecislaus,* The Fall of Poland in Contemporary American Opinion, Chicago 1935, p. 35.

consecutive editions in January 1791[42] when the Polish constitutional draft was more and more opposed by the old-Republican opposition of conservative noblemen led by Seweryn Rzewuski (1743–1811). Franklin's praise of the American constitution[43] was published in order to advertise for the Polish reform project.[44] Occasionally, the press reports about America were formulated as letters from America – with a clear tenor against the intrigues of the aristocratic opposition.[45] In the *Pamiętnik Historyczno-Polityczny*, one finds Piotr Świtkowski's history of America, 'which had only shortly come into its political existence under the flag of liberty (paraphrased)'[46] and whose success was meant to promote the acceptance of the Polish constitutional efforts.

Not only the patriotic reform powers, but also the old-Republican constitutional opponents make use of the American role model. In his chronological information about the loss of liberty under a hereditary monarch (*Wiadomość chronologiczna, w którym czasie, które państwo wolność utraciło pod rządem monarchów sukcesyjnych* 1790), the Field-Hetman and old-Republican spokesman Seweryn Rzewuski devalued the English hereditary monarch by viewing the American struggle for liberty as being incompatible with liberty: The Americans did not have 'any other option but to fight the English crown (paraphrased)'.[47] Franklin and Washington had 'unmasked the true spirit of the English liberty (paraphrased)'.[48] The equation of the hereditary monarch and despotism is explained through the English suppression of the American colonies.[49] According to Rzewuski's essay on the succession to the throne in Poland (*O sukcesyi tronu w Polszcze rzecz krótka* 1789), the traditional

[42] Gazeta Narodowa i Obca*,* no. 4, of January 14, 1791.

[43] Gazeta Narodowa i Obca, no. 46, of June 8, 1791.

[44] [*Potocki, Ignacy*], Na pismo, któremu napis "O Konstytucji 3 Maja 1791."… odpowiedź [Answer to the publications with the title "About the May constitution 1791"], Gazeta Narodowa i Obca, no. 46, of June 8, 1791. Compare *Smoleński*, *Władyslaw,* Ostatni rok Sejmu Wielkiego [The last year of the Great Diet], Kraków 1897, p. 77.

[45] For instance, a letter supposedly originating from Boston opposes the cabinet intrigues, the wars and disagreements in Europe to the wealth, calm and openness in the self-administered and independent United States of America in the *Gazeta Narodowa i Obca* of May 1791. Gazeta Narodowa i Obca, no. 63, of July 6, 1791.

[46] "Stan prawdziwy wolnej Ameryki Północnej" [The true state of the free North America], Pamiętnik Historyczno-Polityczny, April 1789, p. 1128–1142.

[47] [*Seweryn Rzewuski*], Wiadomość chronologiczna, w którym czasie, które państwo wolność utraciło pod rządem monarchów sukcesyjnych [Chronological information on when and what state lost its liberty due to a hereditary monarch], Warszawa, without a year [1790]. Zofia Zielińska convincingly shows that Rzewuski was himself the author of most of he pamphlets (Republikanizm spod znaku buławy. Publicystyka Seweryna Rzewuskiego z lat 1788–1790 [Republicanism under the Field-Hetmans Streitkolben. Political articles of Seweryn Rzewuski 1788–1790], Warsaw 1991, p. 23 et seq.

[48] [*Seweryn Rzewuski*], Uwagi dla utrzymania wolnej elekcyi króla polskiego do Polaków, w Warszawie roku 1789 [Remarks for the Polish on the assurance of free elections of the Polish king].

[49] List z Warszawy do przyjaciela na wieś o projektach Nowey formy Rządu [A letter from Warsaw to a friend on the countryside about the proposals of a new governmental form], 9 August 1790.

old-republicanism with elective monarchy and *liberum veto* corresponds to American federalism if transferred to Polish circumstances.[50] A few anonymous authors supported Rzewuski's position of the elective kingdom as a guarantee for liberty by reference to the newly founded Republic of America.[51]

Stanisław (Wawrzyniec) Staszic (1755–1826)[52] though, answers Rzewuski's polemics with the warning that the (noble) Republic cannot exist between despotic monarchies.[53] For the liberal reform wing the American role model strengthens the conviction that the executive power is best vested in a hereditary monarch,[54] as it had been idealised by Montesquieu's description of the French monarchy (II, 4 De l'Esprit des Lois).[55] In his series of essay in *Pamiętnik Historyczno-Polityczny,* Świtkowski compares the Polish and American constitutional circumstances[56] and draws the reader's attention to the fact that the exterior political threat of Poland demands a strengthening of the executive as well as the introduction of a hereditary

[50] *Rzewuski*, *Seweryn,* O sukcesyi tronu w Polszcze rzecz krótka [A short essay on the throne succession in Poland] 1789). Compare *Zielińska*, *Zofia,* Republikanizm spod znaku buławy. Publicystyka Seweryna Rzewuskiego z lat 1788–1790 [Republicanism under Feldhetmans Streitkolben. Political articles of Seweryn Rzewuski 1788–1790], Warszawa 1991, p. 57 et seq.; "O sukcesyi tronu w Polszcze 1787–1790" [About the succession to the throne in Poland 1787–1790], Warsaw 1991.

[51] [*Seweryn Rzewuski*], Myśli nad różnemi pismy popierającymi sukcesyą tronu [Thoughts on the different essays on the support of the succession to the throne], 1790.

[52] *Stanisław Staszic* influenced the reform discussion immensely with his articles on Uwagi nad życiem Jana Zamoyskiego (1787) and Przestrogi dla Polski (1790) (*Suchodolski, Bogdan*, Art. zu Stanisław Staszic, in: Z dziejów polskiej myśli filozoficznej … Volume 2, Warsaw 1956; *Goetel*, *W.,* Stanisław Staszic, Kraków 1969). Staszic later became President of the influential society of the friends of science (1808).

[53] *Staszic*, *Stanislaw,* Przestrogi dla Polski [Warnings to Poland], in Pisma filozoficzne i społeczne, published by Suchodolski, Bogdan, vol. 1, Warsaw 1954, p. 192.

[54] In the same direction goes the pamphlet "Krótka rada względem napisania dobrej konstytucji" (Short advice on how to elaborate a good constitution) which was published in 1790 in its paraphrased translation: "Even if a nation has no king, the legislative and executive power have to be separated. Then, the executive power is vested in the administration; the legislative power is vested in the national representatives. This is the situation in the thirteen American provinces … where each province has its own administration, its own courts, its own tax and military and all together have their House of Representatives with their President which only differs from the English King by his name [sic!] and enjoys the executive power and the might to make laws for the whole territory." ([*Kajetan*] *Kwiatkowski*, Krótka rada względem napisania dobrej konstytucyi [Short piece of advice on how to elaborate a good constitution], without a place of publication 1790, p. 28).

[55] Compare concerning the convincing power of the idealised monarchy as it is portrayed in *Montesquieu* in II, 4 De l'Esprit des Lois (Pléiade-Edition, Oeuvres complètes, published by Roger Caillois, tome II, Paris 1994, p. 247 et seq.) *Konic*, *Charles-Etienne-Léon*, Comparaison des Constitutions de la Pologne et de la France de 1791 (thèse doct. Univ. de Neuchatel), Lausanne 1918, p. 45 et seq. More generally on II, 4 De l'Esprit des Lois see *Seif (=Müßig), Ulrike,* Der mißverstandene Montesquieu: Gewaltenbalance, nicht Gewaltentrennung, ZNR 22 (2000), 149–166 (157 et seq.).

[56] The United States, a confederation of colonies having gotten rid of George III. were said to be eager to find a surrogate for the king when modelling the presidential office.

monarchy.[57] Support comes from Ignacy Potocki who regrets that Poland cannot be a general republic or confederation according to the given circumstances, but only a constitutional monarchy.[58]

3 References to the National Sovereignty in the Historic Discourses of the Eighteenth and Nineteenth Century Europe

3.1 In General: The Nation's Start as Singular State Organisational Legal Point of Reference

'Long live the nation!', the exclamation of thousands of soldiers from the French Revolutionary Army during the cannonade of Valmy on September 20, 1792 astonished the Prussians. The infantry banners of the Revolutionary Army showed the maxim 'The King, the Nation, Freedom, the Law'. The war correspondent and companion of the Duke Karl August von Sachsen-Weimar Johann Wolfgang von Goethe noted in his late (1820/1821) autobiographical report *Kampagne in Frankreich* (*Campaign in France*): 'Here and on this day begins a new era of world history'.[59] Leaving aside the doubt of the literary studies,[60] the French perception as a victory of the nation is more important than the popularity of Goethe's words concerning Valmy. It was no longer a victory of the French King: on September 21, 1792, one day after the cannonade, the King was declared to have abdicated and the Republic was proclaimed. The Victory at Valmy was historic since the Revolutionary Army consisting of unexperienced volunteers was unlikely to win against the higher ranked Prussian army. And the news of the victory at Valmy was decisive for the consolidation of the rule of the convent in Paris.[61] It is not by chance that the Republic Constitution of (24 June) 1793 contains elaborate provisions on who is a

[57] *Świtkowski*, *Piotr,* "Dalsze myśli i uwagi względem Konstytucji 3 Maja" [Further thoughts and remarks on the constitution of May 3], Pamiętnik Historyczno-Polityczny, August 1791, p. 737–745.

[58] Ignacy Potocki an Eliasz Aloe, 7 August 1790. Mss. Potocki Papers, no. 277 vol. 303, AGAD, Central Archives of Historical Records in Warsaw. Ignacy Potocki was the spokesman of the patriots in the Sejm.

[59] *Von Goethe*, *Johann Wolfgang,* Die Kampagne in Frankreich [Campaign in France], in: Goethes sämtliche Werke, Stuttgart 1902, p. 60: "Von hier und heute geht eine neue Epoche der Weltgeschichte aus, und ihr könnt sagen, ihr seid dabei gewesen" [From here and today, a new epoch begins in the history of the world, and you could say to be witnesses].

[60] *Borst, Arno,* Valmy 1792 – Ein historisches Ereignis?, in: Der Deutschunterricht, Vol. 26/6, 1974, 88–104 (101): "This is the purest example of a history of effects of pieces of art that can be imagined".

[61] Keyword "Valmy" in Jeschonnek, Bernd: Revolution in Frankreich 1789–1799. Ein Lexikon (Revolutions in France 1789–1799. An encyclopedia) Berlin 1989, p. 232–233.

member of the nation and who is not.[62] The *Acte constitutionnel de la République* attributes in Art. 7 the sovereignty to the people, defined as the entity of the French citizens.[63] Art. 4 defines the citizenship precisely for any French men born and bred of 21 years, for any foreigner of 21 years living in France for one year, who sustains himself by his work or has acquired ownership, married a French woman, adopted a French child or supported a French old man, and for any foreigner who was declared by the legislative corps to have merits for humanity.[64]

Napoleon declared the day of Valmy the beginning of the French triumphal procession in Europe, which was 'crowned' with his emperorship and had the canons brought into position before *Les Invalides* where even nowadays they can still be marvelled. And the 'King of the Citizens' Louis-Philippe I (reg. 1830–1848) who served as an officer in the Revolutionary Army[65] let immortalize the canonade of Valmy by means of painting (1835) by Jean Baptiste Mauzaisse (1784–1844) in the gallery of heroes in the *Chateau de Versailles*. What Goethe's genius had seen was that the term 'nation' had entered the stage of world history as an abstract point of reference. To make this turning point clear we have to go back to the pre-revolutionary French Enlightenment.

The Marquis d' Argenson (1696–1764),[66] a close friend of Voltaire, noted in his *Memories*[67] that 'the words nation and fatherland were not common under Louis XIV

[62] The actual text of the constitution is preceded by a declaration of human and civil rights. Its article 23 in the French original reads: "*La garantie sociale consiste dans l'action de tous pour assurer à chacun la jouissance et la conservation de ses droits: cette garantie repose sur la souveraineté nationale*." The latter is translated as «sovereignty of the people » by Gosewinkel/Masing (p. 195). Yet article 25 reads: "*La souveraineté réside dans le peuple* ; elle est une et indivisible, imprescriptible et inaliénable and article 26: "*Aucune portion du peuple ne peut exercer la puissance du peuple entier ; mais chaque section du souverain, assemblée, doit jouir du droit d'exprimer sa volonté avec une entière liberté*." In fact, article 28 seems to attribute the constituent sovereignty to the people: Article 28. Un peuple a toujours le droit de revoir, de réformer et de changer sa constitution. Une génération ne peut assujettir à ses lois les générations futures.

[63] *Pölitz*, *Karl Heinrich Ludwig,* Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit, Mit geschichtlichen Erläuterungen und Einleitungen (The European Constitutions from the Year of 1789 to the Modern Age, Including Historical Explanations and Introductions), Second Volume, Second, Restructured, Corrected and Revised Edition, Leipzig 1833, p. 24, Art. 7, Von der Souverainetät des Volkes.

[64] *Pölitz*, ibid. (Fn. 63), Vol. 2, p. 23, Art. 4, Von dem Bestand der Bürger.

[65] As the Duke of Orléans Louis Philippe III (1773–1850) he got access to monarchical power in 1830 under the name of Louis-Philippe I[er].

[66] From his literary remains was published: *Considérations sur le gouvernement ancien et présent de la France* (Amsterdam 1764), a luminous document for the understanding of the internal conditions in France at the time.

[67] *De Voyer de Paulmy, Marquis d'Argenson, René-Louis,* Mémoires et journal inédit du marquis d'Argenson, éd. Rathéry, Edme Jacques Benoît, vol. 4, Paris 1858, p. 189 et seq., Note of 24. Juillet 1754: "*On remarque qu'on n'a jamais autant parlé de nation et d'État qu'aujourd'hui. Ces deuz noms ne se prononçoient jamais sous Louis XIV, on n'en avoit seulement pas l'idée. On n'a jamais été si instruit qu'aujourd'hui sur les droits de la nation et de la liberté. Moi-même, qui ai toujours médité et puisé des matériaux dans l'étude sur ces matières, j'avois ma conviction et ma conscience tout autrement tournées qu'aujourd'hui: cela vient du parlement et des Anglois*".

and that there was not even yet an idea of them.' Since the adjective 'national' was not existent as a keyword in the *Encyclopédie*, it was consequently also not contained in Voltaire's *Dictionnaire philosophique* 1764. For the lemma 'nation'[68] the *encyclopédists* (1765) follow the lexical tradition of a geographic connotation since the *Dictionnaire Furetière* 1690.[69] Up to the revolution, the relations which described the (state) organisational subordination were defined personally from human to human: the civil servants were servants of the King; the commanders in chief of the army, the ambassadors, the members of the judiciary were all the King's. There was no unity or national coherence beyond the social ranks and above all, the élite of the Enlightenment was predominantly cosmopolitan.

Rousseau's and amongst all others Sieyès' ideas were the masterpieces to explain the new legal state organization since the victory at Valmy was evidently no longer a victory of the French King.

For the first time, the modern term 'nation' appears in the article *Essai sur la constitution de la Corse* where Jean Jacques Rousseau wrote: 'All people are to have a national character and if it were to be missing, it would have started by giving it one'.[70] And he explains it as identification with the nation by both his body and spirit, his will, his feeling to belong to it with all his might[71] and even more pathetic by dying for the nation and – what is more relevant for us legal historians – by obeying all its laws and its commands.[72]

This text is pivotal for the coinage of the modern term of nation; for Rousseau, the nation is the point of reference of participation, the laws and the political decision-makers. The nation is no longer the collective term for all those who live within the borders of the territorial state or under the centralised monarchical

[68] In addition to the geographic understanding ("*mot collectif dont on fait usage pour exprimer une quantité considérable de peuple, qui habite une certaine étendue de pays, renfermée dans certaines limites, et qui obéit au même gouvernement*.") the Encyclopédie (vol. XI) describes the medieval universitarian use ("La faculté de Paris est composée de quatre nations; savoir, celle de France, celle de Picardie, celle de Normandie, celle d'Allemagne… "La nation d'Allemagne comprend toutes les nations étrangères, l'Angloise, l'Italienne").

[69] "*Se dit d'un grand peuple habitant une même étendue de terre, refermée en certaines limites ou sous une même domination*." Cit. according to *Pasquino, Pasquale* (Sieyès et l'invention de la constitution en France, Paris 1998, p. 56) who also refers to the equivalent definition in the dictionnaire de Trévoux 1752. The Dictionnaire de l'Académie (4.éd. Paris 1762) defines the 'nation' as '*Terme collectif. Tous les habitants d'un même État, d'un même Pays, qui vivent sous les mêmes lois, parlent le même langage*.' (cit. ibid.). Cf. also *Clere, Jean-Jacques*, Etat-Nation-Citoyen Au Temps de la Revolution, in: Conrad, Marie-Françoise/Ferrari, Jean/Wunenburger, Jean-Jacques (ed.), L' Idée de Nation, Dijon 1987, p. 97.

[70] "*tout peuple doit avoir un caractère national et s'il manquait, il faudrait déjà commencer par le lui donner*" *Rousseau, Jean-Jaques,* Oeuvres complètes, Edition Pléiade vol. III (du contrat sociale, écrits politiques), Paris 1964, Projet de constitution pour la corse, p. 913.

[71] *Suratteau, Jean-René,* La nation de 1789 a 1799. Sens, idéologie, évolution de l'emploi du mot, in: Gilli, Marita (ed.), Région, Nation, Europe: Unité et Diversité des processus sociaux et culturels de la Révolution française, Paris 1988, p. 687.

[72] "*je jure de vivre et de mourir pour elle, d' observer toutes ses lois et d' obéir à ses chefs en tout ce qui sera conforme à ces lois*" *Rousseau, Jean-Jaques,* Oeuvres complètes, Edition Pléiade vol. III (du contrat sociale, écrits politiques), Paris 1964, Projet de constitution pour la corse, p. 943.

administration, but for the first time appears as a singular self-sustaining political subject, as a state organisational legal point of reference. Nevertheless, the Rousseauian sovereign formed by the common will (*volonté générale*) is not on the mainroad of the French discourse, even if it served as justification that the Third Estate made itself the constitutional assembly by abolishing the estatal representation and the despotic majority of the first two estates. The metaphor of the *volonté générale* as combination of natural law contractual theory and popular sovereignty in the *Contrat Social* (1762) is constantly realised in the state,[73] namely in the form of statutes – *actes de la volonté générale.*[74]

Rousseau declares the content of sovereignty to be found exclusively in legislation, which is reserved for the people as a whole. The executive is a non-sovereign organ for carrying out laws. The Rousseauian sovereign as political body (*corps politique*) of the legal rules about the rights and duties of the citizens is absolute. With the passing of the social contract, every citizen alienates his rights of the state of nature to the sovereign (*aliénation totale*).[75] The absolute freedom, which the individual transfers to the sovereign, enables him to do everything in absolute freedom.

Deriving sovereignty from the general will leads to the following pivotal question: the identity of individual and common interest. As an expression of societalisation,[76] the common will (*volonté générale*) is 'not an agreement between the superior and the inferior.'[77] Neither is it the sum of the particular wills (*volontés particulières*). Rather, to work out the general will, it has to be filtered from the particular wills in a dialectical process of decision. The general will aiming at this can be found in the judicial-political decision making procedure of the legislature, where the particular wills, by mutual contradiction, cancel out each other. Rousseau holds the so-formed general will to be the guarantee of the objective good, the

[73] "*La souveraineté n'étant que l'exercice de la volonté générale ne peut jamais s'aliéner et … le souverain, qui n'est qu'un être collectif, ne peut être représentée par la même raison qu'elle ne peut être représentée par lui-même*" (*Rousseau*, *Jean-Jaques,* Du contrat social II, 1, p. 368. Compare ibid. III, 15, p. 429: "*La Souveraineté ne peut être représentée, par la même qu'elle ne peut être aliénée; elle consiste essentiellement dans la volonté générale, et la volonté ne se représente point.*" [Edition Pléiade, vol. III (du contrat sociale, écrits politiques), Paris 1964 ; the Roman numeral refers to the book, the Arabic one to the chapter].

[74] *Rousseau*, Du contrat social II, 6, p. 379: "*Alors la matière sur laquelle on statue est générale comme la volonté qui statue. C'est acte que j'appelle une loi.*"

[75] *Rousseau*, Du contrat social I, 1, p. 360: "*Ces clauses bien entendues* [les clauses Du contrat social – Annotation of the author] *se réduisent toutes à une seule, savoir l'aliénation totale de chaque associé avec tous ses droits à toute la communauté* […]." Thus, the subjective rights are negated both by Rousseau's contract construction as well as Hobbes since they are being consumed by sovereignty.

[76] *Rousseau*, Du contrat social II, 4, p. 375: The 'volonté générale' is a *"convention légitime, parce qu'elle a pour base le contract social […]"* (legitimate convention because it is based on the social contract).

[77] *Rousseau,* Du contrat social II, 4, p. 375: "*Qu'est–ce donc proprement qu'un acte de souveraineté? Ce n'est pas une convention du supérieur avec l'inférieur, mais une convention du corps avec chacun de ses membres* […]."

'*bonum commune*' of classical philosophy; the danger of a dictatorship of truth of the majority arose only under Robespierre and the Jacobins. The *volonté générale* is the phrase for the central statement of the Rousseauian constitutional draft for Poland[78] and Article 6 of the *Declaration of the Rights of Man and Citizen* of 1789: freedom arises from participation in legislation.[79]

The absoluteness of the sovereign and the fact that it is rooted in the will of the citizens has two consequences: sovereignty is based on the political and legal equality of all people, which is acquired through the social contract, and is inalienable and indivisible.[80] The intellectual precondition is the equality of all people under natural law laid out in the *Discourse on the Origin and Basis of Inequality among Men* (1755).[81] Representation and separation of powers are excluded.[82] The indivisibility of governmental power is the consequence of the indivisibility of the sovereignty of the people.[83] The irrepresentability of sovereignty ('*l'irréprésentabilité*') leads Rousseau to the denial of any representative assembly or estates' assembly in which the right to vote of the representatives of the people called by the monarch is not based on the person but rather their social class.[84]

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[78] *Rousseau*, Considérations sur le gouvernement de Pologne, et sur sa réformation projetée en avril 1772, cap I (État de la Question), p. 954: "*Je vois tous les Etats de l'Europe courir à leur ruine. Monarchies, Républiques, toutes ces nations si magnifiquement instituées, tous ces beaux gouvernements si sagement pondérés, tombés en décrépitude, menacent d'une mort prochaine* […]." And he continued, cap VIII. (Moyens de Maintenir la Constitution), p. 978 et seq.: "*Un des plus grands inconvénients des grands Etats, celui de tous qui y rend la liberté le plus difficile à conserver, est que la puissance législative ne peut s'y montrer elle-même, et ne peut agir que par deputation. Cela a son mal et son bien, mais le mal l'emporte. Le Legislateur en corps est impossible à corrompre, mais facile à tromper. Ses répresentans sont difficilement trompés, mais aisément corrompus, et il arrive rarement qu'ils ne le soient pas*."

[79] This idea is totally unknown in the American constitutional discourse, which never associates *legislation* with the word *will*.

[80] *Rousseau*, Du contrat social II, 2, p. 369. See ibid. II, 13, p. 427: "*l'autorité souveraine est simple et une, et l'on ne peut la diviser sans la détruire*."

[81] Rousseau's *Discours sur l 'Origine et les Fondements de l'Inégalité parmi les Hommes* 1755 inspired Kant's autonomy of pure practical reason. Kant changed both Rousseau's state of nature as well as the term social contract "from an experience into an idea, he believed not to be devaluating but rather to found and secure this value in a narrower sense" (*Cassirer, Ernst,* Rousseau, Kant, Goethe, ed. and introduced by Rainer A. Bast, Hamburg 1991, p. 24 et seq., p. 37).

[82] *Rousseau,* Du contrat social II, 1, p. 368; ibid., III 15, p. 429.

[83] *Rousseau,* Du contrat social II, 2, p. 369: "*Par la même raison que la souveraineté est inaliénable, elle est indivisible. Car la volonté est générale, ou elle ne l'est pas; elle est celle du corps du peuple, ou seulement d'une partie. Dans le premier cas cette volonté déclarée est un acte de souveraineté […]. Mais nos politiques ne pouvant diviser la souveraineté dans sons principe, la divisent dans son objet […]; ils font du Souverain un être fantastique et formé de pieces rapportées.*"

[84] *Rousseau,* Du contrat social II, 2, p. 369. Cf. also his Considérations sur le gouvernement de Pologne, et sur sa réformation projetée en avril 1772, chap. VIII, p. 978 et seq.

Rousseau's logical connection between lawmaking and equality was refined by the polemic paper 'What is the Third Estate?' (1789) into the representation of the *volonté nationale*, i.e. of the will of the majority of the National Assembly.[85]

3.2 The Various Interpretations of National Sovereignty in the Works of Sieyès

The actual architect of national sovereignty is Emmanuel Sieyès, the author of the pamphlet 'What is the third estate?' and the protagonist in the political discussion after the convocation of the general estates up to the debate on the royal veto. The declaration of the Third Estate as the National Assembly on June 17, 1789[86] which resembled a coup d'état, was not enough to transfer the sovereignty of the King onto the nation.[87] For that, the development of a new collective identity and a new political subject was necessary: the nation. The creation of the modalities of the exercise of the sovereignty[88] was also necessary: the constitution. Sieyès himself defined the

[85] *Sieyès*, Qu'est-ce que le Tiers État?, Edition critique avec une introduction et des notes par Roberto Zapperi, Genève 1970, p. 178 et seq., chap. 5: "*Les associés sont trop nombreux et répandus sur une surface trop étendue, pour exercer facilement eux-mêmes leur volonté commune. Que font-ils ? Ils en détachent tout ce qui est nécessaire, pour veiller et pourvoir aux soins publics; et cette portion de volonté nationale et par conséquent de pouvoir aux soins publics ils en confient l'exercice à quelques-uns d'entre eux. Nous voici à la troisième époque, c'est-a-dire, à celle d'un gouvernement exercé par procuration. […] ce n'est plus la volonté commune réelle qui agit, c'est une volonté et par conséquent représentative.*" Together with the brochures *Essai sur les privilèges* (Paris 1788) and *Vues sur les moyens d'exécution dont les Représentans de la France pourront disposer en 1789* (Paris 1788) the script *Qu'est-ce que le Tiers-État?* (Paris 1789) form the most influential brochures on the eve of the French Revolution.

[86] After the unsolvable dispute of the voting issue 'by estates' not 'by head', the representatives of the 3rd Estate began to meet on their own as the *Communes* (Commons), from June 17 onwards they called themselves National Assembly. The majority of the clergy and some of the nobles joined them on June 19. The royal counter with the closing of the assembly room led to the famous moving to the tennis court with the Tennis Court Room Oath on the 20th June "*de ne jamais se séparer, et de se rassembler partout où les circonstances l'exigeront, jusqu'à ce que la Constitution du royaume soit établie et affermie sur des fondements solides*." The King recognised the National Assembly on June 27.

[87] By *Pasquino*, (n. 69), p. 54 referring to Mirkine-Guetzévitch, Boris, La Souveraineté de la nation, Revue politique et parlementaire CLXVIII 43 (1936), p. 130.

[88] In the terminology of Sieyès, representation is another word for the perception of duties – also in politics and in all public functions – by agency or division of labour. Cf. *Loewenstein, Karl,* Volk und Parlament nach der Staatstheorie der französischen Nationalversammlung von 1789: Studien zur Dogmengeschichte der unmittelbaren Volksgesetzgebung (People and parliament according to the theory of the state of the French National Assembly in 1789: Studies on the history of the doctrine of direct popular legislation), Munich 1922, repr. Aalen 1964; *Schmitt, Eberhard,* Repräsentation und Revolution: Eine Untersuchung zur Genesis der kontinentalen Theorie und Praxis parlamentarischer Repräsentation aus der Herrschaftspraxis des Ancien régime in Frankreich (Representation and Revolution: An appraisal of the genesis of continental theory and practice of parliamentary representation in the government practice of the Ancien Régime in France) (1760–

constitution in his hardly known Discours of the Second Thermidor III (July 20, 1795) as 'almost complete in the organisation of the central public creation' and he defined the central public room as 'the political machine that you create to create the law, for … the execution of the law under all aspects of the Republic'.[89] For Sieyès, national sovereignty and represented government are logical twins.

Following the French historiographical state-of-the art,[90] the studies of Elisabeth Fehrenbach[91] and their profound elaboration by Pasquale Pasquino[92] three interpretations of nation were present in the political vocabulary of 1789, predominantly influenced by Sieyès.

3.2.1 Anti-estate Societal Meaning of National Sovereignty

The nation is a homogeneous and self-sufficient entity as opposed to the estate society, which the convocation of the general estates by Louis XVI on May 5, 1789 tried to reactivate. The nation, which was constituted by the declaration of the Third Estate as the National Assembly developed as a new political subject and embodied the (revolutionary) claim to representing everything of a part (of the Third Estate) for the entirety. This exclusionary consequence for the privileged estates was criticised by the speaker of the moderate monarchists in the *constituante* Pierre-Victor Malouet[93]: 'But they [the clergy and the nobility] are part of the Nation […] and

1789) Munich 1969; *Hafen, Thomas,* Staat, Gesellschaft und Bürger im Denken von Emmanuel Joseph Sieyès (State, society and citizens in the thinking of Emmanuel Joseph Sieyès), Bern 1994; *Pasquino*, *Pasquale,* Sieyès et l'ínvention de la constitution en France, Paris 1998.

[89] "*presque entière dans l'organisation de l'établissement public central"* ("almost complete in the organisation of the central public creation") *"la machine politique que vous constituez pour donner la loi, pour… l'exécution de la loi sous tous les points de la république*" ("the political machine that you create to create the law, for … the execution of the law under all aspects of the Republic") Published in *Bastid, Paul*, Les Discours de Sieyès dans les débats constitutionnels de l' an III, Paris 1939, p. 13 et seq. and in: *Bastid, Paul*, Sieyès et sa pensée, Genf 1978, p. 373.

[90] *Bacot, Guillaume*, Carré of Malberg and the distinction between sovereignty of the people and national sovereignty, Paris Édition du C.N.R.S. 1985; *Clere*, (n. 69); *idem*, L' emploi des mots nation et peuple dans le langage politique de la Révolution française (1789–1799), in: Nation et République, les éléments d'un débat, actes du colloque de l'AFHIP des 6–7 avril 1994 à Dijon, Presse Universitaires d' Aix-Marseille 1995, p. 51–65; *Slimani, Ahmed*, La modernité du concept de nation au XVIIIe siècle (1715–1789): Apports des Thèses Parlementaires et des Idées Politiques du Temps, Presse Universitaires d' Aix-Marseille 2004.

[91] Art. Nation, in: Reichardt, R./Schmitt, E. (ed.), Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680–1820, booklet 7, Munich 1986, p. 75–107.

[92] *Pasquino*, (n. 69), p. 55 et seq.

[93] As spokesman of the moderate monarchists in the constituante he explaines his use of sovereignty in his manuscript "Sur la révolte de la minorité contre la majorité" (1791): "*Le Corps législatif est seul indépendant, dans le royaume, de toute personne et de toute autorité. Le Corps législatif, et le roi à la tête, voilá la représentation exacte de la souveraineté nationale; mais le monarque représente à lui seul la souveraineté de la loi*." (Orateurs de la Révolution française, édition Pléiade, vol. I, Paris 1989, p. 499). He pleads for the royal veto (ibid., p. 507) and seems to quote from Montesquieu's ideal monarchy (ibid., p. 507).

you, the representatives of the commoners, why do you call yourself the only representatives of the Nation?'.[94] The starting point for this term of the nation, which excludes the aristocracy [and thereby expressing the state citizen equality] is the first chapter of Sieyès Tiers État: 'Such a class [the nobility] is absolutely unknown to the nation by its idleness'[95] since it does not work, does not create value or bears public functions. Even more precise is the abridge version of the Tiers État which is kept in the French National Archives and which Pasquino has managed to edit. There you can read the equalization of 3rd estate and nation in Sieyès original soundtrack: "*Le tiers n'est point le tiers, c' est la nation, et si l' on veut distinguer des non-privilégiés les deux classes privilégiées, il faut alors dire: le clergé, la noblesse, et la nation*."[96] The pathetic ending of this pamphlet concludes with the address to the French people as Spartanian Helotes.[97]

Similar, but more pointedly anti-monarchical is the second meaning of nation in 1789.

3.2.2 Anti-monarchical Meaning of National Sovereignty

The nation and the theory of national sovereignty are addressed against the twelve hundred years of French monarchy. The monarchy by divine right (*le droit divine*) is still the characteristic wording of the edits against the *Parlement de Paris* under the redaction of the chancellor Maupeou[98]: "*Nous ne tenons notre couronne que de Dieu: le droit de faire des lois par lesquelles nos sujets doivent être conduits et gouvernés nous appartient à nous seuls, sans dépendance et sans partage*;"[99] It is exactly this absolutistic claim to 'hold our crown … for the grace of God' and the claim for exclusive monarchical legislation 'the right to make laws by which our subjects will be governed is to us alone without any kind of dependence and without any kind of sharing'– which the second meaning of nation in 1789 aims at putting in the museum of history. There are many voices to question any monarchical legitimation. Pasquino quotes the '*Mémoires ou Tableau historique et politique de l'Assemblée constituante*' (1797) of Antoine de Rivarol on the first months of the

[94] "*Mais ils [le clergé et la noblesse] font partie de la Nation […] et vous, les deputés des communes, pourquoi vous appelleriez-vous les seuls représentants de la Nation?*" Second discours sur la constitution des communes en Assemblée nationale, cit. in: Orateurs de la Révolution française, édition Pléiade, vol. I, Paris 1989, p. 451.

[95] "*Une telle classe [la noblesse] est absolument étrangère à la nation par sa fainéantise*" Ed. by Zapperi, Robert, Genf 1970, p. 125.

[96] Archives Nationales Paris, 284 AP 4 doss. 8, ed. by *Pasquino*, (n. 69), p. 169.

[97] "*Je m'adresse à tous les bons citoyens, à tous ceux qui tremblent pour l'evénement et croient déjà voir deux cent mille aristocrates replonger dans les fers vingt-cinq millions d' ilotes*." (Archives Nationales Paris, 284 AP 4 doss. 8, ed. by Pasquino, (n. 69), p. 170).

[98] Cf. for the context of the prerevolutionary parliamentary opposition: *Müßig*, *Ulrike*, Justizhoheit (Judicial Sovereignty), ibid. (n. 2), p. 105.

[99] Edit de décembre 1770, in: *Jourdan/Décrusy/Isambert,* Tome XXII, p. 501, p. 506 et seq.

French revolution: "*La couronne n' est plus qu' une ombre vaine*" ('The crown is nothing more but a vaine shadow').[100]

Despite the monarchical position as head of the executive and integral part of the legislative, the September Constitution 1791 does no longer cause illusions due to the only suspensive royal veto (Tit. III, Chap. III, Sec. 3, Art. 1, 2).[101] Sieyès wants to eliminate the crown's integration into legislation. In his manuscript '*Représentation et Élections*' 1791, Sieyès argues against any monarchical participation in the legislation, denying even a suspensive veto of the king, otherwise the legislative decision-making process would be divided into two branches, in a national will and a hereditary monarchical will: "*Suivant le comité le corps législatif se divise en deux branches, l'Assemblée et le roi. Dans ce cas le pouvoir législatif est formé de deux volontés, la volonté nationale exercée par le système temporaire des élus et la volonté royale héréditaire*." And he closes this rarely known manuscript with the polemic, that 'the king is not a minister in the national interest next to the national assembly, therefore he is not a legislative representative.'[102] Such a theoretical position is congruent with those of the President of the Constituent National Assembly Jacques Guillaume Thouret[103] or the Jacobine Antoine Barnave.[104] And the highlight of this democratic-republican use of nation is the explanation of the national sovereignty in the 1793 constitution as popular sovereignty.

3.2.3 The National Sovereignty as Idea or Principle of an "ordre nouveau"

Sièyes' idea[105] of the nation is a principle that is incompatible with aristocratic privileges and legitimizes the civil war against the Ancien Régime as new "*droit commun*", as "*ordre nouveau*". This (modern) term of the nation which has been coined

[100] *Rivarol, Antoine de*, Mémoires ou Tableau historique et politique de l'Assemblée constituante, Paris Maret, Desenne, Cérieux 1797, p. 226. Antoine de Rivarol (1753–1801) was a French and Europe-wide known editor, from an originally Italian Bourgeois family.

[101] Willoweit/Seif (=Müßig), ibid. (n. 32), p. 326; *Müßig*, Die europäische Verfassungsdiskussion des 18. Jahrhunderts (The European Constitutional discourse of the 18th c.), Tübingen 2008, p. 49.

[102] *Le roi n'agit que comme ministre de l'intérêt national auprès de l'Assemblée, il n'est pas représentant législatif* 284 AP 4 doss. 12, cit. also in *Pasquino*, (n. 69), p. 173.

[103] 1746–1794.

[104] Together with Adrien Duport and Alexandre Lameth, Antoine Barnave was called the "Troika" in the constituante. He supported Sieyès, though in favour of the suspensive monarchic veto, and was, apart from Mirabeau, the rhetoric protagonist at the National Assembly. His passionate dispute with Mirabeau and Jacques Antione Marie de Vazalès on the question of whether the King had the right to decide on war or peace (May 16–23, 1791) is deemed one of the most notable scenes in the history of the National Assembly.

[105] Lafayette is to talk of the principle of the nation later on in his pre-draft on the declaration of human and citizen rights of July 11, 1789, cf. here No. 3 and AP, Vol. VIII, BN, Microfilm M-11174(4): AP, Vol. VIII, P. 222 [11 juillet 1789]. Malouet critisises in his Opinion sur l'acte

in the Fifth Chapter of the Tiers État is the expression of the state citizen equality and carries through with the Tennis Court Oath: 'The nation exists before all, it is the origin of everything. Its will is always legal and it is the law itself.'[106]

Now the Third Estate can declare itself the National Assembly, the exclusive representative of the nation construed as the sovereign: "*Une société politique, un peuple, une nation sont des termes synonymes*.", formulates Sieyès' manuscript '*Contre la Ré-Totale*' (1792).[107] If one opposes the absolutistic sovereignty attitude of the Leviathan according to which it is impossible to think the sovereign without the people,[108] the new legal conception (of the nation) becomes evident: the nation consists before all and is the origin of all. Thus, the nation can exist independent of the process of the representation and can be carrier of the *pouvoir constituant*.[109]

Thereby, for the first time, the (normal) legislative power can be distinguished from the constituent assembly. Sieyès is the person who first formulates the distinction between *pouvoirs constitués* and *pouvoir constituant* in his preliminaries of the French Constitution: 'A healthy and useful idea was established in 1788, that is the idea of the division between the pouvoir constituant and the pouvoirs constitués. It belongs to the discoveries that have found their way, it is due to the French' (his discours of 2 thermidor III).[110] Often, the *pouvoirs constitués* are called *pouvoirs commettants* by Sieyès, especially when they have been voted for.[111]

Constitution-creating sovereignty of the nation resolves the self-referring paradox of the sovereignty as an unfixed power of self-bindingness, which had been left in the open by social contract theories.[112] With the fiction that the will of the nation

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constitutionnel: "*Tel est donc le premier vice de votre Constitution, d'avoir placé la souveraineté en abstraction*," (cit. in: Orateurs de la Révolution française, vol. I, édition Pléiade, Paris 1989, p. 503.

[106] *La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi elle-même*. (*Sieyès*, Qu' est-ce que le tiers état?, edition by Zappieri, R., p. 180).

[107] 284 AP 5 doss. 1 (1), cit. also in *Pasquino*, (n. 69), p. 175.

[108] *Hobbes, Thomas*, Leviathan, Part II (of commonwealth), cap. XVII (Of the Causes, Generation, and Definition of a Commonwealth): 'And in him consisteth the essence of the Commonwealth; which, to define it, is: one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence. And he that carryeth this person is called sovereign, and said to have sovereign power; and every one besides, his subject.' (in: The English Works of Thomas Hobbes, Molesworth, William (ed), vol. III, London 1839, Reprint Aalen 1962, p. 172).

[109] *Pasquino*, (n. 69), p. 63.

[110] *«Une idée saine et utile fut établie en 1788, c'est la division du pouvoir constituant et des pouvoirs constitués. Elle comptera parmi les découvertes qui ont fait faire un pas à la science, elle est due aux Français» Discours sur le projet de constitution et sur la jurie constitutionnaire.—Moniteur* du 7 thermidor an III (25 juillet 1795) = Les discourses de Sièyes dans les débates constitutionnels de l'an III (2 et 18 thermidor), ed. and with introduction by Paul Bastid, Paris 1939, p. 20.

[111] *Sieyès*, Préliminaire de la constitution francaise, p. 35 et seq.; *idem*, Quelques idées de constitution applicables à la ville de Paris, p. 30 et seq. Realized by *Pasquino*, (n. 69), note 58 on page 65.

[112] *Müßig*, Konflikt und Verfassung, p. 5 and also *Pasquino*, (n. 69), p. 63.

itself is always lawful and that it is the law in itself – designed by Sieyès in the cited fifth chapter – the entire decisive process of the juridification of the sovereignty is initiated.[113] This is so, since the constitution is understood as decision (*acte impératif de la nation*) according to Émile Boutmy: 'a decision which creates the positive law and leads back to a conception of the constitution'.[114] Essential for the understanding of Sieyès sovereignty concept, articulated in his third estate-pamphlet, is the differentiation between *pouvoirs constitués* and *pouvoirs constituant*.[115] This is elaborated further in his not well-known abridged version of the pamphlet 'What is the third estate?': From the non-interchangeability of the *pouvoirs constitués* and the *pouvoir constituant* Sièyes concludes that the ordinary legislative body cannot touch the constitution.[116]

Even less well-known is Sieyès' manuscript '*Limites de la Souveraineté*' (limits of the sovereignty),[117] where he specifies the exclusion of any absolutistic political power by the sovereignty of nation and its immanent differentiation between constituant assemblies and ordinary legislative bodies. Thereby he seems to anticipate the liberal state theory of the Kantian Metaphysics of Morals[118] and points out that any kind of absolutistic omnipotence of the constituted powers (*pouvoirs constitués*) is excluded. The political power (*le pouvoir politique*) is limited by the political object of society (*l'objet politique de la société*).[119] The latter has the same meaning as Locke's extra-statutory natural law as an immanent limit of every exercise of power with the freedom guarantee of the common law before the prerogative.[120] Sieyès' pamphlet declares the protection of liberties and rights as a political object of any

[113] "*Das Verfassungsdenken wird von einem wachsenden Rechtspositivismus durchzogen.*" (*Schmale, Wolfgang,* Constitution, Constitutionnel, in: Reichardt, Rolf/Lüsebrink, Hans-Jürgen (ed.), Handbuch politsch-sozialer Grundbegriffe in Frankreich 1680–1820, Munich 1992, p. 37).

[114] *Boutmy, Émile,* Études de droit constitutionnel: France, Angleterre, États-Unis, Paris 1885 (3rd éd. 1909), p. 241: "*une décision qui crée le droit positif, et renvoie à une conception de la constitution*".

[115] *«Dans chaque partie, la constitution n'est pas l'ouvrage du pouvoir constitué, mais du pouvoir constituant.» Sieyès*, Qu'est-ce que le Tiers État? Edition critique avec une introduction et des notes par Roberto Zapperi, Genève 1970, p. 180–181.

[116] "*J'y vois que le pouvoir constitué et le pouvoir constituant ne peuvent point se confondre. Et qu'ainsi le corps des représentants ordinaires du peuple, c'est-à-dire ceux qui sont chargés de la législation ordinaire, ne peuvent sans contradiction et sans absurdité toucher à la constitution. Il est évident que tous les droits appartiennent toujours à la nation et que dans tous les différends qui regardent la constitution, c' est à la nation elle-même d'y mettre ordre, en confiant, à cet effet, un pouvoir spécial à des représentants ordinaires dont les forces ainsi que celles de la nation elle-même sont libres, et indépendantes, des formes constitutionnelles sur lesquelles ils ont à juger.*" (284 AP 4 doss. 8, cit. also by *Pasquino*, (n. 69), p. 168).

[117] 284 AP 5 doss. 1 (4), cit. also by *Pasquino*, (n. 69), p. 177 et seq.

[118] Cf. *Müßig*, Justizhoheit (Judicial Sovereignty), ibid. (n. 2), p. 279 et seq.

[119] *Il y a une grande différence entre un pouvoir absolu/total, complet, et le pouvoir politique. Celui-ci pris même dans son intégrité est déjà borné par l'objet* politique de la société ; 284 AP 5 doss. 1 (4), cit. also by *Pasquino*, (n. 69), p. 177.

[120] Cf. *Müßig*, Justizhoheit (Judicial Sovereignty), ibid. (n. 2), p. 210 et seq.

societal association. The majority's decision becomes law.[121] If the constitution doesn't exist before the majority's decision it falls within the nucleus of the association-contract conducted under the unanimous will of the people. Therefore the constituent sovereignty is under control by means of the personal veto of every dissenting individual. Even if the constitutional decisions have to be taken for practical reasons by the majority, the guarantee of the minority resides within the act of the association and therefore within the legal text of the constitution decided upon in the constituent national assembly. This immanent guarantee is the equivalent of the *bonum commune* by the political philosophers since ancient times and bars the sovereignty executed by the majority from unifying all of the political powers, from disorganising them and from reframing their constitutional organisation.[122] And for Sieyès this imminent guarantee is the safeguard for personal liberty by means of constitutions. Thereby despotism is excluded before the legal second in which the ordinary legislative body (deciding on statutory law by the majority) is established

[121] *[…] On s'associe pour être protégé et aidé dans l'exercice de sa liberté/ses droits par la puissance de toute l'association. Ainsi donc la* ***toute-puissance*** *n'appartient point au souverain, il est souverain de l'association et non maître des associés. Quant aux limites de ce* ***pouvoir politique*** *pris dans sa totalité, voyons : Un acte qui exige l'unanimité, c'est l'acte d'association. Puisque chaque individu y entre, il y reste librement, c'est sa volonté. Toute autre volonté commune concernant les intérêts de la société peut n'être pas unanime. Il faut néanmoins qu'elle fasse loi. L'acte d'association est donc une convention tacite ou formelle de reconnaître pour loi la volonté de la* ***majorité*** *des associés. […] (284 AP 5 doss. 1 (4), cit. also by Pasquino, (n. 69), p. 178) Bolding by UM.*

[122] *[…] C'est le passage de la première époque à la seconde, qui décide de la liberté d'un peuple. Si la constitution n'existe pas avant l'action de la majorité (la majorité ne peut décider pour la minorité qu'en la représentant, la représentation est libre de la part du représenté; il faut donc qu'il existe de la part de chacun un engagement préalable de reconnaître la majorité même contre son vœu individuel; cet engagement fait partie de l'acte social) ou si la majorité peut manquer aux lois constitutionnelles, l'aristocratie se montre à la place de la liberté.* ***On se trompe donc lorsqu'on parle de la souveraineté du peuple comme n'ayant point de bornes. 1. Ce ne peut jamais être la toute-puissance sur les associés, nous l'avons prouvé plus haut, la souveraineté est enfermée dans les limites d'un pouvoir politique. 2. Le peuple votant à l'unanimité ne peut pas exercer une souveraineté dangereuse, puisque chaque individu a dans cette supposition son veto personnel. Dès que le peuple votant ainsi a arrêté son acte d'association et ses lois constitutionnelles qui en sont la garantie*** *(puisqu'il ne peut plus, à moins d'être en demeure, continuer à vouloir à l'unanimité, car dans cette supposition, il n'y aurait jamais de lois, chacun aurait son veto et la société manquerait son but, elle s'anéantirait)* ***il est évident que la souveraineté lorsqu'il vote à la majorité n'embrasse pas le droit de réunir tous les pouvoirs politiques ni de les désorganiser, ni d'en exercer aucun en particulier autrement que suivant les lois de son organisation constitutionnelle. La liberté d'un peuple tient essentiellement à cette condition.*** *Sans elle, la majorité dévorerait la minorité, et s'il faut exécute [?] elle-même, elle continuerait à se dévorer jusqu'à l'anéantissement de la liberté.* ***La garantie de l'acte d'association, et de la minorité réside donc dans sa constitution.*** *Les philosophes et surtout ceux de l'Antiquité diront que cette garantie est dans les mœurs et dans la bonne volonté du peuple. Mais comme la bonne volonté est ambulatoire et ne peut trop aux ordres des passions, comme les mœurs se dépravent ou changent par le seul avancement des arts et la progression des richesses,* ***je dis que c'est à la constitution à nous garantir notre liberté****. […] Bolding and underlining by UM. (284 AP 5 doss. 1 (4), cit. also by Pasquino, (n. 69), p. 178 et seq).*

as *pouvoir constitué*.[123] Sieyès' conclusions from his differentiation between the decision on constitution and the passing of ordinary legislative acts in his '*Limites de la souveraineté*' are expressly against Rousseau: 'Respresentation can never be a direct act, and under the constitution it is always divided, never accumulated and always dependent on the constitutional laws.'[124]

With the introduction of the nation a second point of reference besides the monarchy comes into existence. The monarch is indeed disempowered, but not abolished. In my perception, this means a quite decisive process of juridification of sovereignty.[125]

This can be traced via the elaboration of Sieyès' concepts in Lafayette's draft of the Declaration of Human and Civil Rights July, 11 1789. The Declaration of Human and Civil Rights in the National Assembly on August 26 to November 3, 1789 relies indirectly on Lafayette's draft: "*Le principe de toute souveraineté réside dans la nation.*[126] *Nul corps, nul individu ne peut avoir une autorité qui n'en émane expressément*" ('The principle of the entire sovereignty is vested in the nation. Nobody, no individual can have an authority which is not derived therefrom').[127]

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[123] "*Le despotisme doit être rendu impossible avant qu'on se permette de faire une loi à la majorité.*" 284 AP 5 doss. 1 (4), cit. also by *Pasquino*, (n. 69), p. 179).

[124] "*Donc, la représentation et non l'action directe; dons la représentation divisée, sous la constitution, et non accumulée et rendue indépendante de ses lois constitutives.*" 284 AP 5 doss. 1 (4), cit. also by *Pasquino*, (n. 69), p. 179 et seq.).

[125] "*The constitutional thinking is permeated by a growing legal positivism.*" (*Schmale*, *Wolfgang,* "Constitution, Constitutionnel", in: Reichardt, Rolf/Lüsebrink, Hans-Jürgen (ed.), Handbuch politisch-sozialer Grundbegriffe in Frankreich (Handbook of social-political basics in France) 1680 – 1820, Munich 1992, 37).

[126] AP, Vol. VIII, BN, Microfilm M-11174(4): AP, Vol. VIII, p. 222 [11 juillet 1789]: M le marquis de Lafayette fait lecture du projet qui suit:

"La nature a fait les hommes libres et égaux; les distictions nécessaires à l'ordre social ne sont fondées que sur l'utilité générale.

Tout homme nait avec des droits inaliènables et imprescriptibles; telles sont la liberté de toutes ses opinions, le soin de son honneur et de sa vie; le droit de proprieté, la disposition entière de sa personne, de son industrie, des toutes ses facultés; la communication des ses pensées par tous les moyens possibles, la recherche du bien-être et la résistance à l'oppression.

L'exercice des droits naturels n'a de bornes que celles qui en assurent la jouissance aux autres membres de la société.

Nul homme ne peut être soumis qu'à des lois consenties par lui ou ses représentants, antérieurement promulguées et légalement appliquées." Then the quotation in the main text follows.

[127] The wording of Lafayette continues : "Tout gouvernement a pour unique but le bien commun. Cet intérêt exige que les pouvoirs législatif, exécutif et judiciaire, soient distincts et définis, et que leur organisation assure la représentation libre des citoyens, la responsabilité des agents et l'impartialité des juges.

Les lois doivent être claires, précises, uniformes pour tous les citoyens.

Les subsides doivent être librement consentis, et proportionellement répartis.

Et comme l'introduction des abus et le droit des générations qui sed succèdent nécessitent la révision de tout établissement humain, il doit être possible à la nation d'avoir, dans certains cas, une convocation extraordinaire de députés, dont le seul objet soit d'examineer et corriger, s' il est nécessaire, les vices de la constitution." Archives Parlementaires de 1787 a 1860, Recueil complet débats législatifs & politiques des chambres françaises, sous la diréction de M.J. Mavidal/MM. E. Laurent et E. Clavel, première série (1789 à 1799), Tome VIII du 5 Mai 1789 au 15 septembre 1789, Paris 1875.

'The origin of all sovereignty is intrinsic to the nation', it is formulated in the declaration of the human and civil rights of 1789. In the September constitution of 1791, Title III, Article 1 repeats: 'The sovereignty is unique, indivisible and non-susceptible to time-barring. It only belongs to the nation. No part of the people and no singular person can appropriate its exercise.'[128] Such an understanding corresponds with Sieyès' periphrasis of legal equality: 'I think of the law as being in the centre of an enormous sphere: all citizens without exception find themselves in the same distance on the surface, all depend equally from the law, all give their freedom and belongings under its protection. … All these individuals …, enter into obligations and trade, always under the same guarantee of the laws … By protecting the common rights of every citizen, the law protects every citizen in everything until the moment when that what he wants begins to be opposed to the common interest.' (translat. U.M.).[129]

The wording of the sovereignty of the nation in the French September Constitution 1791 does not only manage to integrate two sovereigns, but also joins the constitutional idea with national integration.[130] Symbolizing the revolutionary pathos for equality, the idea of a French nation was expanded from that of a few privileged to all of the citizens, with a corresponding census. Thus, the French Constitution of 1791 created a right of citizenship (Tit. II, Art. 2–6),[131] and announced civil equality (Tit. I),[132] even though three sevenths of French men (due to poverty) and French women altogether were excluded from the right to vote (Tit. III, Chap. I, Sec. II, Art. 2),[133] and the right to stand for election (Tit. III, Chap. I, Sec. III, Art. 3).[134] The demand for civil equality expresses itself also in the modern understanding of laws as abstract/general norms,[135] and in the postulate of a unitary, legally equal nation as

[128] Cit. by Willoweit/Seif (=Müßig), ibid. (n. 32), p. 299.

[129] *Sieyès*, *Emmanuel Joseph*, Qu'est-ce que le Tiers État? Edition critique avec une introduction et des notes par Roberto Zapperi, Genève 1970, p. 209, chap. VI (Chapitre VI) : « *Je me figure la loi au centre d'un globe immense ; tous les citoyens sans exception sont à la même distance sur la circonférence et n'y occupent que des places égales ; tous dépendent également de la loi, tous lui offrent leur liberté et leur propriété à protéger ; et c'est ce que j'appelle les droits communs de citoyens, par où ils se ressemblent tous. Tous ces individus correspondent entr'eux, ils négocient, ils s'engagent les uns envers les autres, toujours sous la garantie commune de la loi.* […] *La loi, en protégeant les droits communs de tout citoyen, protège chaque citoyen dans tout ce qu'il peut être, jusqu'à l'instant où ses tentatives blesseroient les droits d'autrui.*"

[130] Cf. for more details, *Müßig*, Giornale di Storia Costituzionale 27 (2014), 107 et seq., 109.

[131] Cited by Willoweit/Seif (=Müßig), ibid. (n. 32), p. 297 et seq.

[132] Cited by Willoweit/Seif (=Müßig), ibid. (n. 32), p. 294 et seq.

[133] Cited by Willoweit/Seif (=Müßig), ibid. (n. 32), p. 302.

[134] Cited by Willoweit/Seif (=Müßig), ibid. (n. 32), p. 305.

[135] *Sieyès,* tiers état, chap. 6: "*Je me figure la loi au centre d'un globe immense; tous les citoyens sans exception sont à la même distance sur la circonférence et n'y occupent que des places égales; tous dépendent également de la loi, tous lui offrent leur liberté et leur propriété à protéger; et c'est ce que j'appelle les droits communs de citoyens, par où ils se ressemblent tous. Tous ces individus correspondent entr'eux, ils négocient, ils s'engagent les uns vers les autres toujours sous la garantie commune de la loi.* […] *La loi, en protégeant les droits communs de tout citoyen, protège chaque citoyen dans tout ce qu'il peut être, jusqu'à ses tentatives blesseraient les droits d'autrui.*" (I imagine the law in the center of an enormous globe: all citizens without exception are equally

a rationally based unit, in which individuals may realise their pursuit of happiness. The antonym[136] of the happy constitution (*heureuse constitution*) and the pre-constitutional state (*agrégat inconstitué*) corresponds with the *bonum commune* of the antique political philosophy in the enlightened adaption.[137]

In relation to Sieyès' quoted explanation of legal equality, the King himself or members of the former privileged estates are also included. Therefore, the monarchical principle was held compatible with the sovereignty of the nation (Tit. III, Chap. II Sec. I, Art. 2).[138] It is the abstractness of national sovereignty that allows a monarchical reading of the September Constitution 1791. It is again Malouet, who opens our eyes for the monarchical impact within the process of juridification by constitution: "*Le Corps législatif est seul indépendant, dans le royaume, de toute personne et de toute autorité. Le Corps législatif, et le roi à la tête, voilá la représentation exacte de la souveraineté nationale; mais le monarque représente à lui seul la souveraineté de la loi. Ainsi, tout ce qui peut porter atteinte à sa dignité, à sa prérogative d'indépendance, à son autorité légitime, est aussi criminel en fait qu'absurde en principe, si l'on veut conserver la monarchie*."[139] Neither the implementation of Sieyès' ideas into the declaration of 1789 nor into the text of the September constitution 1791 were antimonarchical.

3.3 Openness of the Political Vocabulary of 1789 for the Rankly Oriented Use of Nation by the French parlements

Besides Sieyès' connotations of the nation, there is one other influence on the political vocabulary of 1789, which derives from the usage of the French *parlements* as origin of the estate resistance since 1760. From the registration right (*droit de*

spaced on the surface, all equally alike depend on the law, all their freedom and their property themselves under its protection. … All these individuals are facing each other in relationships with each other, enter into commitments, and do business, always under the joint guarantee of the law. …While the law protects the common rights of every citizen, it protects every citizen in all that he may be up to the moment when what he wants to be, begins to harm the common interest.) ed. Zapperi, p. 209.

[136] In the *Cahiers* an *agrégat inconstitué* describes the opposite of the happy constitution (*heureuse constitution*). Cf. Goubert, Pierre/Denis, Michel (ed.), Les Français ont la parole (The French have the word), p. 65 quotes the Cahiers de doléances des États généraux, Paris 1775: "*régnez comme Charlemagne; mais ajoutez à votre gloire ce qui a manqué à la sienne: forces vos successeurs à maintenir l'heureuse constitution que vous allez nous rendre*".

[137] Cf. definition by the *L'Encyclopédie methodique, Economie politique* of 1784, that when a nation wishes to form a political society, it must give itself the most suitable constitution, which will be exactly the one, which aims at its "*salut*…, *perfection*…, *bonheur*" (Démeunier, Jean Nicolas (ed.) Encyclopédie méthodique, Economie politique, vol. 1. Paris 1784, p. 642).

[138] Cited by Willoweit/Seif (=Müßig) ibid. (n. 32), p. 310.

[139] Sur la révolte de la minorité contre la majorité (Fev. 1791), cit. in: Orateurs de la Révolution française, édition Pléiade, vol. I, Paris 1989, p. 499.

remontrance avant l'enregistrement) the *parlements* derived their right to be the (estate) guardians of the right of the nation,[140] which had been eternalized by Montesquieu in his idealisation of the French monarchy (II, 4).[141] At the heart this is about the rest of the estate restrictions of the absolute monarchy. In my habilitation '*Recht und Justizhoheit*' ('Law and Judicial Sovereignty'), I elaborately took a stance concerning the pre-revolution of the *parlements,*[142] as defendant of the old constitution of the Kingdom and of the estate rights which are described as natural law; the *parlements* describe themselves as *cours souveraines*[143] in their remonstrances and notably the *Parlement de Paris* since 1788 as "*représentants de la nation*".[144] The King was well aware of the danger as his speech in the Parlement de Paris in 1766 on the occasion of a *lit de justice*, known under the name *Séance de la flagellation* made evident: "*Les droits et les intérêts de la nation, dont on ose faire un corps séparé du monarque, sont nécessairement unis avec les miens, et ne reposent qu'un mes mains*" ('The rights and the interests of the nation of which one dares to make a body separate from the Monarch are necessarily united with mine and extend only to my hands').[145] A very similar read is the dissertation by the court historian and apologist of the Ancien Régime Jacob Nicolas Moreau of 1789 by the title '*Défense de notre constitution monarchique francaise*': 'I have said it without reference to the nation'.[146] These ideas of the prerevolutionary parliamentary opposition against the French crown have been well known in the National Assembly since 1789. For contemporaries, they open up the interpretation of the nation as canon of old republican freedoms, that understanding which can easily be traced in the Polish May Constitution 1791.

[140] Esp. *Müßig*, Justizhoheit (Judicial Sovereignty), ibid. (n. 2), p. 121.

[141] *Müßig,* Justizhoheit, ibid. (n. 2), p. 122 et seq.

[142] *Müßig,* Justizhoheit, ibid. (n. 2), p. 130 et seq.

[143] *Müßig, Ulrike,* Höchstgerichte im frühneuzeitlichen Frankreich und England – Höchstgerichtsbarkeit als Motor des frühneuzeitlichen Staatsbildungsprozesses, Akten des 36. Deutschen Rechtshistorikertages in Halle an der Saale 2006, Lieberwirth, Rolf/Lück, Heiner (ed.), Baden-Baden 2008, p. 544–577, 544 with the quotation according to the French-Latin Dictionary, ed. in Paris 1569.

[144] *Müßig*, Justizhoheit (Judicial Sovereignty), ibid. (n. 2); *Bickart*, *Roger,* Les Parlements et la nation de souverainetés nationale au XVIIIe siècle, Paris 1932.

[145] *Flammermont/Tourneux*, Remonstrances, II, Paris 1895, p. 558.

[146] "*Je l'ai dit, sans le roi point de nation* […]" Exposition et défense de notre constitution monarchique française, précédé de l'Histoire de toutes nos Assemblées Nationales, dans deux mémoires où l'on établit qu'il n'est aucun changement utile dans notre administration, dont cette constitution même dont cette constitution même ne nous présente les moyens, vol. II, Paris 1789, p. 105.

3.4 The Nation in the Polish May-Constitution 1788

3.4.1 Old Republicanism as an Integral Part of the Juridification by Constitution

In the tradition of the pre-revolutionary estate-based ideas, the Polish constitution of May 1791, just after its preamble, includes a constitutional contract between the estates' assembly representing the nation on the one side and '*Stanisław August by the Grace of God through the will of the nation King of Poland*' (Introduction to the Polish May Constitution 1791)[147] on the other. The constituent nation in the sense of the preamble is not meant to be understood as the sovereign people of free and equal citizens, but – and this is in accordance with the old-estate understanding of the nobility as 'the furthermost pillar of liberty and the contemporary constitution'[148] – as the nation of the nobility.[149] The affirmation of the old-Republican *pacta conventa* in Art. 7 perfectly fits into the picture.[150] Even in the non-state period after the Polish partitions, the ancient Republican principles served as legitimations for the historic Polish Nation. Yet the *Grande Émigration* 1830 after the Warsaw upheaval relies on the 'legitimacies'[151] of the Polish Nation as Joachim Lelewel's manuscript

[147] This passage is a precision of *Müßig*, Reconsidering Constitutional Formation – The Polish May Constitution 1791 as a masterpiece of constitutional communication, CPH 67 (2015), 75- 93. It elaborates the first delineation in *Müßig*, Reconsidering Constitutional Formation – Research challenges of Comparative Constitutional History, Journal of Constitutional History/Giornale di Storia Costituzionale, 27 (2014), 107–131. The introduction is cited by Willoweit/Seif (=Müßig), ibid. (n. 32), p. 281.

[148] Art. 2 at the end, cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 283.

[149] In the introduction and Art. 2 of the May constitution, the meaning of nation is equivalent to nobility.

[150] Art. 7, cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 287.

[151] «*La nation polonaise avait aussi ses légitimités; on les a discutées, on les a sacrifiées avec les légitimités de tant d'autres peuples, pour statisfaire à l'avidité d'honorables brigands, déprédateurs couronnés. La dipolmatie envahissante en 1807 et en 1808, et spoliatrice en 1815, sanctionnant les partages anciens avec de nouveaus morcellemens, et évitant de donner une sincère satisfaction à la légitimité de la nation polonaise, renouvelait, par ce fait même, les violences qu'elle lui avait déjà fait subir, et donnait ainsi une preuve de l'existence de sa légitimité. Disons dons quelques mots sur la position et la nature de cette légitimité.*" (Polish Library Paris, *Lelewel, Joachim*, Légitimité de la Nation Polonaise, Rouen 1836. B.r. Imp. D. Brière. 8°, p. 12). In the paraphrasing English translation it reads: 'The Polish Nation also had its legitimacies; …, we have hailed them with the legitimacies of so many other peoples to satisfy the avarice of the honourable bandits, the crowned predators. The overgrown diplomacy in 1807 and in 1808, and the raiding in 1815 sanctioning the old habits with new fragmentations and avoiding to give a true satisfaction to the legitimacy of the Polish Nation renewed by the very same fact the violence that it had already caused it to suffer and thereby proved the existence of its legitimacy. Let us say a few words on the position of the nature of this legitimacy.' As long as no Polish state existed after the Polish partitions, the Polish Nation remained the point of reference of the legitimacy. The mastermind of this and an important French voice in the Grande Emigration after the Warsaw upheaval 1830 was Joachim Lelewel (1786–1861). He has not only published a manuscript "*Légitimité de la Nation Polonaise*", but also a comparative history of Spain and Poland and a comparative analysis of all Polish constitutions. He uses 'nation' as 'state' (p. 12).

'*Légitimité de la Nation Polonaise* (1836)'[152] indicates. For this mastermind accompanying Adam Jerzy Czartoryski,[153] Frédéric Chopin and Adam Mickiewicz, the language[154] and the political element are points of national legitimacy. The latter is explained explicitly: The social state (*l'état social*) is the main legitimation: 'In one word, if we want to depict in the history of Poland a true social element this is no different from the political element. The civil life only, purely political creates exclusively the principal themes of the Polish history.'[155] The political element is specified as 'political habit of the ancient Poland'.[156] National legitimation is synonymous with Republican legitimation: For Lelewel's ex post-perspective after the Warsaw upheavel, Poland was a Republic and as the great ancient Republics,[157] it has elected its head on its own for his lifetime. And every candidate had the same honour without differences as to the rank or his wealth since the 'brotherhood' (*braterstwo*), and the 'equality' (*równość*) was decisive for the Polish Republic. Thus, the sovereignty of the people manifested itself in all rulers: in the judiciary that is independent and representative, in the administration which executes the will of all.[158] Lelewel's explanations about the old Polish Republicanism refer to the slavistic linguistic speciality. In the Polish language, the word for slave did not exist, only for subject (*podany*). This foundation of the Polish Republicanism is an important condition for freedom from the point of view of the *Grande Émigration* 1830.[159]

Interestingly enough, around the Great Sejm 1788–1792 there were some inaccuracies, which mark the Polish term of the nation to be in between the sense of the old aristocratic Republic and the opening towards an understanding of a gen-

[152] *Lelewel*, ibid. (n. 151).

[153] On the advice of Eugène Delacroix he bought the hotel Lambert on the Île Saint-Louis, where the Polish Library is still situated.

[154] Polish Library Paris, *Lelewel*, ibid. (n. 151), p. 2.

[155] Polish Library Paris, *Lelewel*, ibid. (n. 151), p. 4, paraphrased and translated by UM.

[156] "*La vie civique seulmenet, vie purement politique, fournit exclusivement les sujets principaux d'histoire polonaise*" ("The civil life only, purely political creates exclusively the principal themes of the Polish history"); "*coutumes publiques de l'ancienne Pologne*" ("political habit of the ancient Poland") Polish Library Paris, *Lelewel*, ibid. (n. 151), p. 5.

[157] *Là est la légitimité de la Pologne; et si les Polonais combattent légitimement pour son existence et leur propre indépendance, c'est encore un devoir légitime pour eux que de rechercher ces mêmes principes républicains que leurs ancêtres leur ont laissés en heritage*." ('There is the legitimacy of Poland; and if the Polish legitimately fight for their existence and their own independence, then that is still a legitimate goal for them as it is to look for their own Republican principles that they inherited from their ancestors'). (ibid. p. 8). Cf. also page 12, where Lelewel closes his plea on by reference to the legitimation by means of the old Republican principles.

[158] Polish Library Paris, *Lelewel*, ibid. (n. 151), p. 8. Also at p. 9.

[159] Polish Library Paris, *Lelewel*, ibid. (n. 151), p. 10. His comparative analysis of the constitutions of 1791, 1814 et al. and a comparative constitutional history of Poland-Spain will be analysed in future publications.

eral political body. The law on 'Our free Royal Cities in the States of the *Rzeczpospolita*' of April 18, 1791'[160] was adopted unanimously and received the constitutional rank as a law in article III of the May Constitution, a law that gives the free Polish Aristocracy a new, true and powerful force for the safety of its freedoms and the inalienability of the common fatherland.[161] There seem to be two ideas behind this prudent and rather confusing formulation. The first one is that the law on the free royal cities in the states of the Republic of April 18, 1791 does not want to restrict the aristocrats' privileges in any way. The second one is that the foundation of the 'Republic' are both the Polish aristocracy and the citizenship. Lelewel made it very clear that the law of the free royal cities should not be seductive for the assumption of a unitarian urban area. He pointed out in his manuscript '*Légitimité de la Nation Polonaise*'[162] that Poland had never had a unified 'national law' since the cities functioned as small Republics, especially with their German town law.[163]

The inaccuracies with the usage of the term of the nation fit into this picture. In Article II of the May Constitution, the nation is the point of reference in the sense of an old aristocratic nation[164] while in Article IV[165] even the farmers seem to be included. And the union that was renewed on October 20, 1791 was named *Rzeczpospolita Obojga Narodów*, the Republic of two nations. The sovereignty of the nation is claimed to be the origin of all state authority (Art. 5), even though since the second and third division of Poland a nation in the sense of a politically mobil-

[160] The First English translation is accessible here in the Appendix. The German translation was done by *Inge Bily* with the help of *Danuta Janicka* (Torún) and *Zygfryd Rymaszwski* (Łódź). The Polish text can be found in the edition of Kawecki, J., "Miasta nasze królewskie wolne w Rzeczypospolitej", in: "Konstytucja 3 maja 1791" PWN, Warsaw 2014, p. 125–136.

[161] Therefore this volume includes in the Appendix the first English translation of the law of the free royal cities of the republic (edited by Kawecki, J., "Miasta nasze królewskie wolne w Rzeczypospolitej", in: "Konstytucja 3 maja 1791" PWN, Warsaw 2014, p. 125–136). The English translation was made by Max Bärnreuther and Ulrike Müßig. The free royal cities are not equivalent to the "free towns" under German law or to the royal cities, but are cities within a *res publica*. The new granted rights freed them from the feudal corset. The meaning of the new "freedom" is explained in Art. I Nr. 2 of the law ('We acknowledge the inhabitants of these cities as free men. Furthermore, we acknowledge their land property in the cities in which they live, their houses, villages and territoria which currently legally belong to these cities. All this is acknowledged by us as hereditary property of the inhabitants of these cities.').

[162] Ibid. (n. 151).

[163] Polish Library Paris, *Lelewel, Joachim*, Légitimité de la Nation Polonaise, Rouen. B.r. Imp. D. Brière. 8°, p. 6, esp. at n. 2.

[164] *Handelsman*, *Marceli,* Konstytucja Trzeciego Maja roku 1791 [Die Konstitution vom 3. Mai 1791; The Constitution of May 3, 1791], Warsaw 1907, p. 58 et seq.

[165] Wording of Article IV according to Willoweit/Seif (=Müßig), ibid. (n. 32), p. 283, in paraphrased translation: 'The land people under the hands of which flows the most fertile source of the belongings of the Empire that makes up the greatest part of the nation and consequently is the most powerful protection for the country – that we protect by the law both from the point of justice and Christianity as well as our own, well understood interest'.

ised people is lacking.[166] Hence, contrary to the French September document, the Polish May constitution does *not* establish a new basis of legitimation for modern statehood after a revolutionary break with inherited power structures.[167] Though it does not systematically fix the conditions of legitimacy as 'the basis and foundation of government' (in the wording of the Virginia Bill of Rights 1776[168]) or as "*le but de toute institution politique*" (in the wording of the declaration of human civil right as it is found in the September constitution 1791[169]), the Polish May Constitution fixes a core part of normativity and a positive uniform constitutional text due to the notion of constitutional supremacy. It is the only constitutional document of the revolutionary era which expressly states the precedence of the constitution: that 'all consecutive resolutions of the current sejm are to be consistent with the constitution in all respects' (ending of the Introduction, May Const. 1791).[170] It is the argumentation of the American revolutionaries, opposing the 'unconstitutional' taxation of the colonies by the Westminster Parliament against the constitutionally legitimate resistance of the colonies, which suited, from the Polish point of view, the legitimation of the Polish resistance against the Russian Tsarina, the Prussian King and the Habsburg Kaiser of the Holy Roman Empire.

With the modern concept of the constituent sovereignty, the 1791-text of the Great Sejm seems to combine the old idea of an aristocratic nation. The openness of the sovereignty of nation in the Polish May Constitution to continuities with the pre-revolutionary class-based state can be seen in different aspects, which I laid down in length at the Polish Legal History Conference in Cracow.[171] In regard to national sovereignty as juridification, we can concentrate on the May Constitution's procedural openness.

[166] Only the Polish nobility was inhibited by liberal reform ideas. Accordingly, the Polish Constitution of 1791 regulated no Polish civil rights.

[167] Therefore there was no declaration of rights, only religious and cultural freedom was mentioned in the context of the fixing of Catholicism as the state religion in Art. 1.

[168] Compare "*le but de toute institution politique*" in the diction of the preamble of the Declaration of human and civil rights 1789 (cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 250).

[169] Cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 251.

[170] Willoweit/Seif (=Müßig), ibid. (n. 32), p. 281.

[171] *Müßig*, *Ulrike,* Reconsidering Constitutional Formation – The Polish May Constitution 1791 as a masterpiece of constitutional communication, CPH 67 (2015), 75–93.

3.4.2 The Procedural Openness of May Constitution as Reflex onto the Juridification of National Sovereignty

The procedural openness of the May Constitution reflecting the juridification of national sovereignty finds its first expression in the partnership of legal and parliamentary ministerial responsibility. As 'father and head of the nation', the Monarch is not responsible. The ministers appointed by the King assume legal responsibility for the decrees issued by the king by means of countersignature. Moreover, in Art. 7, the May constitution fixes a parliamentary vote of no confidence, which resembles the American impeachment requiring a two thirds majority: 'In the case, by contrast, that both chambers united in the *Reichstag* demand the resignation of a minister from the state council or another position by means of a two thirds majority of secret votes, the King shall be held to most immediately appoint another to this position'.[172] The partnership of legal and parliamentary ministerial responsibility motivates my often articulated intervention[173] against the popular contrast between constitutionalism and parliamentarism.[174]

Another aspect is the elaboration of the executive in Art. 7 with the separation of the hereditary monarch[175] and the state council which was referred to as *straż praw* (guardian of the rights) in accordance to Montesquieu's *dépôt des lois*. The constitutional terminology of 'the King in his state council' is proven by individual inter-

[172] Art. 7, cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 289. About the appreciation as parliamentary vote of no confidence compare *Malec, Jerzy,* Rec. on Nationale und Internationale Aspekte der polnischen Verfassung vom 3. Mai 1791, in: Jaworski, Rudolf (ed.), Ius Commune 22 (1995), 431, 433; *Tenzer, Eva/Pleitner, Berit,* Polen, in: Brandt, Peter/Kirsch, Martin/Schlegelmilch, Arthur (ed.): Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert, Band 1: Around 1800, Bonn 2006, p. 546–600 (567). The contradictory opinion can be found in *von Beymes*, *Klaus,* Die parlamentarischen Regierungssysteme in Europa, 2nd ed., Munich 1973, p. 49 et seq.

[173] *Müßig*, *Ulrike,* Konflikt und Verfassung in: Müßig (ed.), *Konstitutionalismus und Verfassungskonflikt*, Tübingen 2006, p. 11 et seq.; *idem*, Die europäische Verfassungsdiskussion des 18. Jahrhunderts, Tübingen 2008, p. 127 et seq.; *Seif, Ulrike* (=*Müßig*), Introduction, in: Willoweit/Seif (=Müßig), ibid. (n. 32), p. XXXII.

[174] *Hintze, Otto,* Das monarchische Prinzip und die konstitutionelle Verfassung (1911), in: *idem*, Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte, published by Gerhard Oestreich, 2. Edition, Göttingen 1962, p. 359 et seq.; *Huber, Ernst Rudolf*, Deutsche Verfassungsgeschichte seit 1789, Vol. 3, 2nd ed., Stuttgart/Berlin/Köln 1978, p. 3 et seq.; *the same*, Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung, in: Handbuch des Staatsrechts, published by Josef Isensee/Paul Kirchhof, Vol. 1, 3rd ed., Heidelberg 2003, § 4 Rdnr. 52 et seq.; *Böckenförde*, *Ernst-Wolfgang,* Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert, in: Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert, published by Conze, Werner, Stuttgart 1967, p. 70 et seq.; also *Kühne*, *Jörg-Detlef,* Die Reichsverfassung der Paulskirche, Vorbild und Verwirklichung im späteren deutschen Rechtsleben, 2nd ed., Neuwied and others 1998. Concerning the state of the art *Fehrenbach*, *Elisabeth,* Verfassungsstaat und Nationenbildung 1815–1871, Munich 1992, p. 71–75 and 75–85.

[175] Successor to Stanisław August II. Poniatowski is supposed to be a hereditary monarch from the Wettiner. After their extinction, the right to vote a new monarch falls back to the nation.

preters with the association of the English wording of '*the king in council*'.[176] The state council, which is subordinate to the laws and supervises the authorities, consists of the archbishop of Gnesen as primas of Poland, five ministers[177] as well as two secretaries. It had no right to vote. The monarch as head of the state council was not responsible before it.

The elaboration of the two chamber legislative body, which was separated from the executive[178] and made up of the Messengers' Chamber and the Senators' Chamber also shows potential for evolutionary development. While the Messengers' Chamber was supposed to be 'the sanctuary of the legislature as the representative body and embodiment of national sovereignty',[179] the Senators' Chamber which was governed by magnates and headed by the King had a suspensive veto against the resolutions of the Messengers' Chamber. By contrast to the American constitution, the House of Representatives was dominating. If after the veto of the Senate, the same law was passed again by the House of Representatives, it was valid irrespective of the Senate's veto. The King possessed a single vote in the Senate; he did not have the right to veto by means of his chair. As was the case in the French September constitution, the King had a right of legislative initiative, the same applying to the messengers. Besides the 204 representatives of the nobility, 24 citizens were part of the Messengers' Chamber as commissioners of the royal cities. As representatives of the nation as a whole (Art. 6), the representatives from the (provincial) state parliaments were no longer dependent whereby the metamorphosis from an estate organ towards a modern representative institution can be observed. The estate-based perception of an imperative mandate turns into the conviction of the individual freedom of decision of the state citizen who is obliged to the general good. The majority principle was applied in both legislative bodies. *Liberum veto* and the confederate right were abolished.[180]

[176] *Libiszowska*, *Zofia,* ibid. (n. 35), p. 233 et seq.

[177] Police/Interior affairs; exterior affairs; defense; justice; finances.

[178] Art. 5 of the May constitution separates the executive power of the hereditary monarch and the one of the state council from the legislative power of the Reichstag as two chamber legislative body made up of the Messengers' Chamber and the Senators' Chamber and from the jurisdiction of the existing courts (cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 284). Compare Art. 7 and the explicit separation of the executive and legislative power: 'The executive power shall not pass any laws, no taxes whatsoever, no state derivatives, not change the state income, not declare any war, no freedom, no contract and no diplomatic acts' (cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 286).

[179] Art. 6, cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 284.

[180] Art. 6 at the end cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 286.

3.5 National Sovereignty in the Cádiz Constitution 1812

3.5.1 Sovereignty of the Spanish Nation (*nación española*)

Analyzing national sovereignty in the Spanish Cádiz Constitution 1812, one realizes at first sight, that the constitutional process in Spain is connected with the anti-Napoleonic resistance (*Guerra de Independencia*).[181] The reference to the sovereignty of the nation (*soberanía nacional*) in Tit. 1, Art. 3[182] is directed against the usurpation claims of the French imperial family Bonaparte,[183] in an intermediate situation of revolutionary potential.[184] Only thanks to its sovereignty, the nation was able to annul the declaration of abdication in favour of Napoleon in Bayonne as well as the statute of Bayonne and to 'fix the laws and conditions according to which their kings ascend the throne.'[185] Thus, only one day after the festive inauguration of

[181] In detail *Timmermann*, *Andreas,* Die "gemäßigte Monarchie" in der Verfassung von Cádiz und das frühe liberale Verfassungsdenken in Spanien (The "moderate monarchy" in the Constitution of Cádiz and the early liberal constitutional thinking in Spain), Münster 2007, p. 25 et seq.; *Masferrer*, *Aniceto,* La soberanía nacional en las Cortes gaditanas: su debate y aprobación, in: Escudero López, José Antonio (ed.), *Cortes y Constitución de Cádiz. 200 años*, vol. 2, Madrid 2011, p. 660.

[182] Cited in Willoweit/Seif (=Müßig), ibid. (n. 32), p. 430.

[183] The French claimed that the highest form of sovereignty was vested in the Spanish Crown, and due to the abdication of Karl IV and his son Ferdinand VII, was transferred to them in Bayonne in 1808. Compare *de Argüelles*, *Agustín,* Discurso preliminar a la Constitutión de 1812 (1811), First Part, Madrid 1989, p. 78; also related to this topic: *Sánchez Agesta*, *L.,* Introducción, in: de Argüelles, A., Discurso preliminar, p. 44; *Badia*, *J. Ferrando*, Vicisitudes e influencias de la Constitutión de 1812, in: Revista de Estudios Políticos 126 (1962), p. 187; *ibid*., Die spanische Verfassung von 1812 und Europa (The Spanish Constitution of 1812 and Europe), in: Der Staat 2 (1963), 153; in the same sense *Gmelin, Hans,* Studien zur spanischen Verfassungsgeschichte (Studies on the Spanish Constitutinal History), Berlin 1905, p. 20.

[184] Masferrer, ibid. (n. 181), p. 660. In regard to the Weberian differentiation between power and rule and the influences of the school of Salamanca onto the constitutional discourse my argumentation borrows from the statements and the sources of the seminarthesis of *Müller, Marius,* Der Souveränitätsbegriff im Konstitutionalisierungsprozess von Cádiz 1810–1812, supervised at my chair in Passau. It will be published under the title 'The notion of sovereignty in the constitutional process of Cádiz (1810–1812)'.

[185] Meeting of the Cortes of December 29, 1810, in: de Argüelles, Agustín. Discurso preliminar ibid. (n. 182), p. 82; further *Estrada*, *Alvaro Florez*, Representación hecha a S.M.C. el señor Don Fernando VII (1820), Madrid 1996, p. 15, 17 et seq.

the Cortes on the Isla of Léon[186] near Cádiz on September 24, 1810,[187] the order followed that the proper title of Charles IV and Ferdinand VII was 'Majesty' .[188]

It had been Napoleon's declared goal to renew the Spanish monarchy under French preponderance and dominance and to legitimate the Napoleonic usurpation of the Spanish throne. On May 23, 1808, after Bayonne, he convened an assembly of notables of the Spanish nation with only 91 representatives appearing when asked to do so. On June 20, 1808, they were presented a constitutional draft elaborated by Napoleon and Maret, which led to the constitutional octroi of July 6, 1808. In this draft, the hereditary monarchy and Catholicism as a state religion were fixed. The Cortes were intended as estate representation and divided up into a bench of the clergy, one belonging to the aristocracy and a bench of the people.[189] Napoleon's handwriting contained the following provisions: 'Spain and India shall be governed by virtue of a single civil code' (art. 96); 'The courts are independent' (art. 97); the judiciary is to be administered in the name of the King by the courts appointed by him (art. 98, 99); three-fold appellate stage (article 101); abolition of all landlord courts and the special judiciary (art. 98); guarantor of the freedom of press (article 45); the legislature is vested in the king and will be 'considered and drafted' by the state council (art. 57) and is presented to the Cortes for further deliberation and permission (art. 86). The legislature was not regulated in an independant chapter. Napoleon appointed his brother Joseph as king of the Spanish/Spain-America. This constitutional octroi of July 6, 1808 based on monarchical prerogatives of the intruder king (*rey intruso*) was widely rejected by the people as a sign of French foreign rule.

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[186] During the French occupation in the Spanish War of Independence (1808–1814), Cádiz was the only unoccupied territory in Spain and hosted the Junta Central on the Isla de León, in the midst of today's natural park Bahía de Cádiz. From February 6, 1810 to August 25, 1815, the French sieged and bombarded the city, though they did not succeed in their conquest of Cádiz, which was protected on its seaside by the British Royal Navy. (cf. also Archer, Christon (ed.), The Wars of Independence in Spanish America, Wilmington 2000, p. 23).

[187] Cortes generales y extraordinarias (ed.), Colección de los Decretos y Órdenes que han expedido las Cortes generales y extraordinarios desde su instalacion en 24 de setiembre de 1810 hasta igual fecha de 1811, Vol. 1, Madrid 1813, p. 1 et seq.; *Gallardo y de Font*, Apertura de las Cortes de Cádiz en 24 de Septiembre de 1810, Vol. 1, Segovia 1910, p. 30 et seq: "*(…) y declaran nula, de ningun valor ni efecto la cesión de la corona que se dice hecha en favor de Napoleon, no solo por la violencia que intervino en aquellos actos, injustos é ilegales, sino principalmente por falterle el consentimiento de la Nación*", almost literally reinforced in the decree of January 1, 1811: "*Declárense nullos todos los actos y convenios del Rey durante su opresión fuera ó dentro de España*", in: Cortes generales y extraordinarias, ibid., p. 41.

[188] Decree of September 25, 1810: "*Tratamiento que deben tener los tres poderes*", in: Cortes generales y extraordinarias, Colección de los Decretos y Órdenes, ibid. (n. 184), p. 3 et seq. After the dissolution of the Central Junta on 29 January 1810 it was the five-person Regency Council of Spain and the Indies which took over the responsibility for convening the Cortes.

[189] Article 61 of Joseph Napoleon's Constitution of July 6, 1808, in: Pölitz, Karl Heinrich Ludwig, Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit, Mit geschichtlichen Erläuterungen und Einleitungen (The European Constitutions from the Year of 1789 to the Modern Age, Including Historical Explanations and Introductions), Third Volume, Second, Restructured, Corrected and Revised Edition, Leipzig 1833, p. 15.

On May 22, 1809, the "*Junta Suprema Central y Gubernativa*"[190] as the provisional government in the name of Ferdinand VII agreed on the reinvigoration of the Cortes as the legally legitimate representation of the monarchy.[191] While fleeing from the French army, it moved to Cádiz, dissolved on January 29, 1810 and conferred government powers to a governing council, which decreed the convocation of the Cortes on June 18, 1810. Since 1809 the preparing commission (*Comisión de Cortes*) had begun to ask the estates and the cities about their reform expectations.[192]

By virtue of the recourse to national sovereignty, the general and extraordinary convention of Cádiz (*Cortes generales y extraordinarias*) claimed the constituent power (*el poder constituyente*) for itself since all authoritarian power supposedly had fallen back to the nation represented by the Cortes after the dismissal of the legitimate Spanish King.[193] The reference to national sovereignty in Tit. 1, Art. 3[194] is no rejection of monarchy, but the exclusive claim of the constituent power: "*La soberanía reside esencialmente en la Nación, y por lo mismo pertenece a esta exclusivamente el derecho de establecer sus leyes fundamentales*" ('Sovereignty is essentially vested in the nation, and therefore the nation has the exclusive right to decide on the fundamental laws).[195] In the 'political revolution' (*revolución política),*[196]

[190] The central administration (*Junta Suprema Central y Gubernativa*) in Aranjuez, Extremadura, Seville and later in Isla de León near Cádiz had the command over the Provincial administrations (*juntas provincials*) set up to organize the guerrilla war and to coordinate the British aid (*Brey Blanco, José Luis*, Liberalismo, nacíon y soberanía en la Constitución española de 1812, in: Álvarez Vélez, Isabel (ed.), Las Cortes de Cádiz y la Constitución de 1812: ¿la primera revolución liberal española?, Madrid 2011, p. 72; *Suárez, Federico*, Las Cortes de Cádiz, Madrid 1982, p. 16).

[191] *Konetzke, Richard* (with completion by *Kleinmann, Hans Otto),* Die iberischen Staaten von der Französischen Revolution bis 1874, in: Schieder, Theodor (ed.), Handbuch der Europäischen Geschichte, Band 5, Stuttgart 1981, p. 886–929, 897. *Ramos Santana, Alberto*, 1808–1810. La nación reasume la soberanía, in: Czeguhn, Ignacio/Puértolas, Francesco (ed.), Die spanische Verfassung von 1812. Der Beginn des europäischen Konstitutionalismus, Regenstauf 2014, p. 206.

[192] The Archivo de la Real Chancilleria de Granada keeps a bundle of documents with the preparatory questionaires.

[193] The Cortes did not see themselves as old estate representation in the sense of the *ancien régime* but as a popular representation and constitutive assembly. As Diaries of the Cortes debates the Diario de las discusiones y Actas de la Córtes, Cádiz en la Imprenta Real 1811 are digitalised in the Bavarian State library (cited here with the abbreviation D.D.A.C.). The *Prospecto del Periodico Intitulado* is said to be published under the "souverain authority and controll of the constituant National congress"/"*Diario de las Discusiones y actas de las Cortes, que se ha de publicar baxo de la soberana autoridad é inspeccion del Congreso Nacional*" And the Prospecto itself concedes that there is no mandate by electoral consensus: "*al pueblo deben du autoridad*" and "*vuestro cuerpo soberano os prepara la constitucion*".

[194] La soberanía reside esencialmente en la Nacion, y por lo mismo pertenece á esta exclusivamente el derecho de establecer sus leyes fundamentales. The sovereignty resides essentially within the nation.

[195] Willoweit/Seif (=Müßig), ibid. (n. 32), p. 430.

[196] For this contemporary denomination of the revolutionary movement, that was directed against the Spanish absolutism and the French occupation cf. *Martínez Marina, Francisco*, Teoría de las cortes ó grandes juntas nacionales de los reinos de Leon y Castilla: Monumentos de su constitucion

pillared by clerics and lawyers, the nation served as a topos to communicate on the Spanish independence without referring to the abdicated King and the suppressed people. Whilst sovereignty before and during the constitutional debates was often described in contemporary literature as a little elites' burlesque[197] or as an oligarchic 'stage spectacle',[198] it obtained the strength of a legal construct for supreme power not derived from anything before.

Miguel Artola Gallego[199] and Brey Blanco[200] seem to borrow from the Weberian differentiation between power (*Macht*) and ruling according to legal competences (*Herrschaft*),[201] when explaining the semantics of national sovereignty within the process of constitutionalisation of Cádiz. The juridification of constituent sovereignty (*soberanía constituyente*) by constitution generates the constituted powers *(poderes constituidos*). The sovereignty in terms of a constituted power was divided between King and Cortes (as normal legislative body, art. 15)[202] because the power of the nation was institutionalised (=juridificated) by constitution. The original sovereignty attributed to the nation (art. 1 and 3) is differentiated from the constituted sovereignty, divided between Cortes and Monarch (art. 15 and 16).[203] According to the *Diario de las Discusiones y Actas de las Cortes,* the constituted sovereignty or rather sovereignty *in actu* was divided between King and nation, and both made the laws in agreement with each other.[204]

The Monarch becomes the constituted power (*el poder constitucionalizado*): 'Don Ferdinand the Seventh, by the grace of God, and by the Constitution of the

política y de la soberanía del pueblo, Madrid Imprenta de Fermin Villalpando 1813, vol. 1, p. XL; *Artola Gallego, Miguel*, Los origenes de la España contemporánea, vol. 2, 2nd ed., Madrid 1975, p. 466.

[197] "*Como á todos los demas españoles, se les tapó la boca, se les hechó un candado á sus labios, por decir lo así, […]*" (quoted from: *Carnicero, José Clemente*, El liberalismo convencido por sus mismos escritos, ó examen crítico de la constitucion politica de la monarquia española publicada en Cádiz y de la obra de Don Francisco Marina "Teoría de las Cortes" y de otras que sostienen las mismas ideas acerca de la soberania de la nacion, Madrid Imprenta de D. Eusebio Aguado 1830, p. 23).

[198] "*epectáculo de gran escenografía*"; quoted from: *Agesta, Luis Sanchez*, Historia del Constitucionalismo Español, 2nd ed., Madrid 1964, p. 19.

[199] *Artola Gallego, Miguel*, Los origenes de la España contemporánea, vol. 2, 2nd ed., Madrid 1975, p. 467 ("*La denominación del poder es la soberanía*").

[200] *Blanco*, Liberalismo, ibid. (n. 190), p. 89.

[201] *Weber, Max*; Economy and society; Roth, Guenther/Wittich, Klaus (ed.); Berkeley et al., 1978, p. 53.

[202] Article 15 "La potestad de hacer las leyes reside en las Córtes con el Rey.", (quoted from: Willoweit/Seif (=Müßig), ibid. (n. 32), p. 432); the English translation "The legislative power belongs to the Cortes, together with the king." is cited according to Constitution of the Spanish Monarchy, printed by G. Palmer, Philadelphia 1814, p. 6.

[203] *Varela Suanzes-Carpegna, Joaquín*, La teoría del estado en los origines del constitucionalismo hispanico (Las Cortes de Cádiz), Madrid 1983, p. 65.

[204] "*Después de la invasión de los sarracenos se levanta la Monarquía de Asturias, y la soberanía está dividida entre rey y la nación, y ambos de conformidad hacen las leyes*.". D.D.A.C., ibid. (n. 193), vol. 8, p. 57.

Spanish Monarchy, King of Spain' the preamble of the Cádiz-Constitution of March 19, 1812 is worded.[205] In their address to the King on December 24, 1811 in the context of the '*Discorso preliminar*', the Cortes themselves speak of a new 'liberal Constitution' on the 'firm basis' of which is now based the throne.[206] The deduction of monarchical power from the national sovereignty represented by the Cortes[207] is experienced as revolutionary by contemporaries.[208] However, popular sovereignty in the sense of Rousseau's *volonté générale* or in the sense of the French national convent 1792–1795 did not come to the Cortes' mind: They did not act as proxy of their voters but as sovereign representatives of the nation.[209] The members of the Cortes represented the nation.[210] 'The representatives that compose this Congress

[205] Willoweit/Seif (=Müßig), ibid. (n. 32), p. 429.

[206] Hartmann, Carl Friedrich, Die spanische Constitution der Cortes und die provisorische Constitution der Vereinigten Provinzen von Südamerika; aus den Urkunden übersetzt mit historisch-statistischen Einleitungen, Leipzig 1820, p. 106. Concerning the denomination as "Magna Charta" of Spanish liberalism compare *Dippel*, *Horst,* La Significación de la Constitución Española de 1812 para los Nacientes Liberalismo y Constitucionalismo Alemanes, in: Iñurritegui Rodrígez, José María/Portillo Valdés, José María (ed.) Constitución en España: Orígenes y Destinos, Madrid 1998, p. 287–307; *Konetzke, Richard* (with completion by *Kleinmann, Hans Otto),* Die iberischen Staaten von der Französischen Revolution bis 1874, in: Schieder, Theodor (ed.), Handbuch der Europäischen Geschichte, Band 5, Stuttgart 1981, p. 886–929, p. 898.

[207] Compare already the formulations in: Article 5 Polnish May Constitution (Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 284) and in Article Title III, Article 1 French September Constitution 1791 (Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 299). The Spanish nation is defined as 'assembly (réunion) of all the Spanish of both hemisphere' in Title 1 Article 1 of the Cortes-constitution 1812 (Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 430). Compare *Arbós*, *Xavier,* La idea de nación en el primer constitucionalisme espanyol, Barcelona 1986, p. 110 et seq.

[208] The seminarthesis of *Müller, Marius* (ibid. Fn. 184, [2] n. 12) cites Don Franciso Marina and Karl Ludwig Haller. Cf. also among others: *Soldevilla*, Fernando, Las Cortes de Cádiz. Orígines de la Revolución española, Madrid 1910; *del Valle Iberlucea, E.,* Las Cortes de Cádiz. La Revolución de España y la Democracia de América, Buenos Aires 1912; *Novales*, *A. Gil*, La revolución burguesa en España, Madrid 1985, esp. *ders.*, Las contradicciones de la revolución burguesa española, ebda., Madrid 1985, p. 50 et seq.; *Artola Gallego, Miguel,* Antiguo Régimen y revolución liberal, Barcelona 1991, a.o. p. 161, 163; *Morán Orti, Miguel,* Revolución y reforma religiosa en las Cortes de Cádiz, Madrid 1994; *Portillo Valdés*, *J. M.,* Revolución de nación. Orígines de la cultura constitutional en España, 1780–1812, Madrid 2000. Compare *Müßig*, *Ulrike,* Die europäische Verfassungsdiskussion des 18. Jahrhunderts, Tübingen 2008, p. 81.

[209] Compare the voting order of the central junta of January 1, 1810 (Instrucción que deberá observarse para la elección de Diputados de Cortes vom 1.1.1810, cited by *Bernecker, Walther L./Brinkmann*, *Sören,* Spanien um 1800, in: Brandt, Peter/Kirsch, Martin/Schlegelmilch, Arthur (ed.), Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel, Volume 1: Around 1800, Bonn 2006, p. 601–639, p. 617. The order was divided up into four calls for election (convocatorias) to different addressees and may be understood as the first electoral law of Spain, *Ull Pont, E.,* Derecho electoral de las Cortes de Cádiz, Madrid 1972, p. 11; *Estrada Sánchez, M.*, El enfrentamiento entre doceañistas y moderados, in: Revista de Estudios Políticos 100 (1998), p. 244 et seq. Compare Title 3 1. Section Cádiz-constitution 1812, *Willoweit/Seif*, (=Müßig), ibid. (n. 32), p. 435.

[210] "*al pueblo deben du autoridad*" or rather "*vuestro cuerpo soberano os prepara la constitucion*" (Prospecto of D.D.A.C., ibid. n. 193, p. III, IV). Rather concerning the representative character Torres del Moral, Antonio, Constitucionalismo histórico español, 7th ed., Madrid 2012, p. 60.

and who represent the Spanish Nation, declare themselves legitimately constituted in general and extraordinary Cortes and that in them resides the national sovereignty.'[211]

The formulation of the preamble, according to which the King was to 'proclaim' the constitution of the Spanish monarchy that the Cortes had 'agreed upon' and 'enacted',[212] does not leave room for any doubts about the new ratio of powers between popular or national representation on the one side and the crown on the other. The people and the monarch belong to the nation. With that, monarchical sovereignty is not excluded, as the double legitimation of the new Spanish constitutional monarchy ('by the grace of God and by virtue of the constitution') illustrates in its preamble. It becomes obvious that such a constitutional legitimation opens up old estate dualistic understanding[213] and for the liberal understanding of the nation as a new point of reference. This openness takes into account the scholastic influences[214] onto liberal representatives, like Diego Muñoz Torrero, president of the University of Salamanca, and Antonio Oliveros,[215] whose understanding of the nation as *cuerpo moral* in the Suárezean tradition[216] incorporates the king as head of it (*illudque consequenter indiget uno capite*).[217] These traditional concepts[218] in the Cádiz constitutionalisation process document the distinctiveness of national sovereignty represented by the Cortes from the Rousseauian *volonté générale*.

[211] "*Los diputados que componen este Congreso, y que representan la Nación española, se declaran legítimamente constituidos en Cortes generales y extraordninarias, y que reside en ellas la soberanía nacional.*" (Colección de Decretos y Ordenes que han expedido las Cortes extraordinarias y Generales, Madrid 1820, vol. 1, p. 1).

[212] Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 429.

[213] Id est dualism between crown and estate representation.

[214] *Varela Suanzes-Carpegna*, *Joaquín,* Política y Constitución en España (1808–1978), Madrid 2007, p. 61; same, La teoría del estado, ibid. (n. 203), p. 39; *Timmermann*, ibid. (n. 181), p. 133.

[215] Both were clerics and alumni of the University of Salamanca.

[216] "*Primo solum ut est aggregatum quoddam sine ullo ordine vel unione physica vel morali; […] Alio modo ergo consideranda est hominum multitudo, quatenus speciali voluntate seu communi consensu in unum corpus politicum congregantur uno societatis vinculo et ut mutuo se iuvent ordine ad unum finem politicum, quomodo efficiunt unum corpus mysticum, quod moraliter dici potest per se unum […]*", (*Suárez, Francisco*, De legibus, vol. IV, Madrid 1973, p. 153) underlining by UM; concerning the notion *cuerpo moral*: *Maravall, José Antonio*; Estudios de Historia del Pensamiento Español, Madrid 1973, p. 190 ff.

[217] *Suárez*, De legibus, ibid. (n. 216), p. 153; *Varela*, La teoría del estado, ibid. (n. 203), p. 39.

[218] *Gallego*, ibid. (n. 199), p. 468.

3.5.2 Late Scholastic Concepts of the Transfer of Sovereignty (*translatio imperii*) or the Nation as Moral Entity (*cuerpo moral*) in the Cádiz Debates

The legal definition of the Spanish nation (*nación española*) as reunion of all the *Spaniards of both hemispheres* ("*reunión de todos los españoles de ambos hemisferios*")[219] by art. 1 cannot be read as to equate nation with people.[220] Art. 2 articulates not only the freedom and the independence of this nation, but also negates any claim for possession.[221] Art. 3 attributes sovereignty essentially (*esencialmente*) to the Nation.[222] Francisco Javier Borrull y Vilanova differentiates explicitly between the constitutional wording '*esencialmente'* and the social contract of the citizen of Geneva[223]. If the sovereignty resides 'essentially' in the nation, it has not to be conveyed on it by a social contract.

This is parallel to the *natural law* of Francisco Suárez and Fernando Vázquez de Menchaca, who attributed sovereignty to the political human nature, 'that before a determined form of government is elected this ability resides in the community or congregation of men'.[224] In allusions to Aristotle and his Christian adaption by Thomas Aquinas,[225] the natural origin of the nation's sovereignty depends on the

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[219] Constitution of the Spanish Monarchy, ibid. (n. 202), p. 4. For the debates cf. Diario de sesiones de las Cortes Generales y Extraordinarias: dieron principio el 24 de setiembre de 1810 y terminaron el 20 de setiembre de 1813*,* vol. 3, Sesion del dia 25 de agosto de 1811, Madrid 1870, p. 1684.

[220] Article 1 "*La Nación Española es la reunión de todos los españoles de ambos hemisferios*." (Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 430).

[221] "*La Nación española es libre é independiente, y no es, ni puede ser, patrimonio de ninguna familia ni persona.*"; cit. from: Diario de sesiones ibid. (n. 219)*,* vol. 3, Sesion del dia 28 de agosto de 1811, p. 1706; ["The Spanish nation is free and independent, and neither is nor can be the patrimony of any family or person whatever.", cited from: Constitution of the Spanish Monarchy, ibid. (n. 201), p. 4].

[222] "*La soberanía reside esencialmente en la nación, y por lo mismo le pertenece exclusivamente el derecho de establecer sus leyes fundamentales, y de adoptar la forma de gobierno que más la convenga.*" cit. from: Diario de sesiones ibid. (n. 219)*,* vol. 3, Sesion del dia 28 de agosto de 1811, p. 1707; ["*The sovereignty resides essentially in the nation; in consequence whereof it alone possesses the right of making its fundamental law*; cited from: Constitution of the Spanish Monarchy, ibid. (n. 202), p. 4].

[223] "*Se propone igualmente en ste artículo que la soberanía reside esencialmente en la nación. Yo reconozco la soberanía de ésta, y sólo me opongo a la palabra "esencialmente"; est es, a que resida esencialmente en la misma: lo cual parece convenir con el sistema de varios autores que creyendo poder descubir los sucesos más antiguos con el auxilio de conjeturas y presunciones tal vez demasiado vagas, atribuyen el origen de las sociedades a los diferentes pactos y convenios de los que se juntaban para formarlas. Pero yo, siguiendo un camino más seguro, encuentro el principo de las mismas en las familias de los antiguos patriarcas que usaban de una potestad suprema sobre sus hijos y descendientes, y no la habían adquirido en virtud de dichos pactos.*" cit. in D.D.A.C., ibid. n. 193), vol. 8, p. 57.

[224] *que antes de elegirse determinada forma de gobierno reside dicha facultad en la comunidad o congregación de hombres […],* quoted from: D.D.A.C., ibid. Fn. 193, vol. 8, p. 59.

[225] *Aristotle*, Politik, translated by Franz Schwarz, Stuttgart 1989, p. 78); *Thomas Aquinas,* Über die Herrschaft der Fürsten, Schreyvogel, Friedrich (ed.), Stuttgart 1975, p. 7.

existence of the human community itself.[226] In the School of Salamanca, which 'passed' natural law from theologians to jurists, monarchical sovereignty is not of divine but of human origin. The justification for this secularization[227] relies on the legal argument of the transition of sovereignty (*translatio imperii*); monarchical sovereignty comes from God by means of the community of the human beings, whose social nature includes their natural legislative power.[228] With reference to Domingo de Soto and his statement that 'the sovereign power derives from God to the kings by means of the people, where it is said to reside primarily and essentially',[229] a protest against the aforementioned Art. 3 was formulated in the Cortes.

It was the old dualism between monarch and estates that survived as a secularized model of the biblical covenant between God and his people. Irrespective of any French influences onto Cádiz-constitutionalism,[230] the prevailing discourse patterns with regard to national sovereignty rely on the mutual power of people and King.[231] The Spanish Nation as the people and the Monarch is reflected by Antonio Llaneras, who is not against the draft of national sovereignty in Art. 3, because 'the Spanish nation […] has a head, that is Ferdinand VII, whom [the cortes] had sworn solemnly as sovereign on the first day of their installation.'[232] Similar is the statement of José Ramón Becerra y Llamas: 'The Spanish people, who has deputed us to represent it in this general and extraordinary Cortes, and our beloved sovereign Ferdinand VII, who is its head, form a moral body, which I call the nation or the Spanish

[226] The Bishop of Clahorra even expressly referred to Thomas von Aquin: "*dicen […] Santo Tomás […] que en una comunidad perfecta era necesario un poder á quien perteneciese el Gobierno de ellla misma, porque el pueblo, segun la sentencia del Sábio […] quedaria destruido faltando quien gobernase.*" (quoted from: D.D.A.C., ibid. Fn. 193, vol. 8, p. 59).

[227] In relation to the change of religious covenant-concept see *Oestreich, Gerhard*, Die Idee des religiösen Bundes und die Lehre vom Staatsvertrag, in: Hoffmann 1967, p. 128; *Timmermann*, ibid. (n. 181), p. 140; the preamble implies this specific covenant in the meaning of an ability of Cortes to transfer government in accordance to divine will on the king: 'by the grace of God and the constitution of the Spanish monarchy' (quoted from: Constitution of the Spanish Monarchy, ibid. (n. 202), p. 4).

[228] Cf. *Reibstein, Ernst*, Johannes Althusius als Fortsetzer der Schule von Salamanca: Untersuchungen zur Ideengeschichte des Rechtsstaates und zur altprotestantischen Naturrechtslehre, Karlsruhe 1955, p. 94; *Castellote, Salvador*, Der Beitrag zur Spanischen Spätscholastik zur Geschichte Europas, in: Kremer, Markus/Reuter, Hans-Richard (ed.), Macht und Moral – politisches Denken im 17. und 18. Jahrhundert, p. 26 f. (Francisco de Vitoria).

[229] "*la potestad soberana es derivada de Dios a los reyes mediante el pueblo, en quien se dice residir primaria y esencialmente;*" (Quoted from: D.D.A.C., ibid. Fn. 193, vol. 8, p. 58).

[230] So *Agesta*, ibid. (n. 198), p. 59; *Timmermann*, Die Nationale Souveränität in der Verfassung von Cádiz (1812), Der Staat 39 (2000), p. 570–587, 572; *Masferrer*, ibid. (n. 184), p. 646. *Torres del Moral*, La soberanía nacional en la constitución de Cádiz, Revista de Derecho Político, 82 (2011), p. 55–117, 66.

[231] *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203); p. 179.

[232] "*la Nación española […] tiene cabeza que es Fernando VII, a quién V.M. en el primer día de su instalación juró solemnemente por soberano […]*" (Quoted from: D.D.A.C., ibid. Fn. 193, p. 21).

monarchy'.[233] The *cuerpo moral* of Llamas is distinct from the Rousseauian *corps moral* that receives its *moi commun* through the social contract.[234] Llamas' *cuerpo moral* is derived from the late scholastical notion of the *cuerpum mysticum (cuerpo místico),*[235] which can be traced back to the works of Francisco Suárez.[236] The Monarch is the head of the *cuerpo moral*, which consists of himself and the people,[237] and in Art. 3 it is the King as head of the nation who participates in the national sovereignty together with the Cortes.[238] Any idea of one homogeneous will embodied in the nation is to fail because it is not the egalitarian abstract idea of the human society born out of natural state, politically unified as nation, but the real conditions of the former global power[239] that are predominant in the cortes' debates. The metaphorical equivalence between the human organism and the political community in late scholasticism[240] leads to the understanding of the nation as an organic unity.[241] People (*pueblo)* describe the population in different territories or kingdoms of both hemispheres rather than an homogenous political entity. According to the scholastic doctrine of the seventeenth century, the Spanish nation consisted of the Castilian and Indian communities (*comunidades),* people *(pueblos),* republics *(repúblicas*) and the Monarch.[242] This matches the particular preconditions of nineteenth century hispanic-american constitutionalism.[243] It could not be ignored that the Spanish nation was a conglomerate of different people (*pueblos que forman una sola nación)*

[233] "*El pueblo español, que nos ha diputado para presentarlo en estas cortes generales y extraordinarias, y nuestro amado soberano el señor don Fernando VII, que es su cabeza, forman un cuerpo moral, al que yo llamo la nación o monarquía española, […]*" (Quoted from: D.D.A.C., ibid. Fn. 193, p. 15).

[234] "*A l'instant, au lieu de la personne particuliere de chaque contractant, cet acte d'association produit un corps moral et collectif […], lequel reçoit de ce même acte son unité, son moi commun, sa vie et sa volonté.*" (*Rousseau, Jean-Jacques*, Du contrat social ou Principes du droit politique, liv. I, chap. VI (Du pacte social), ed. Derathe, Robert (Pleïade), Paris 1964, p. 361).

[235] Details about the *Cuerpo Místico*: *Maravall*, ibid. (n. 216), p. 190 ff.

[236] "*Primo solum ut est aggregatum quoddam sine ullo ordine vel unione physica vel morali; […] Alio modo ergo consideranda est hominum multitudo, quatenus speciali voluntate seu communi consensu in unum corpus politicum congregantur uno societatis vinculo et ut mutuo se iuvent in ordine ad unum finem politicum, quomodo efficiunt unum corpus mysticum, quod moraliter dici potest per se unum […]*" (quoted from: *Suárez, Francisco*, Tractatus de legibus ac deo legislatore (1612), Vol. IV, Madrid (Inst. de Estudios Politícos) 1973, p. 153).

[237] With Suárez the *hominum multidudo* needs a head to be a moral cuerpo mysticum: "*illudque consequenter indiget uno capite.*" (quoted from: *Suárez*, ibid. (n. 236), p. 153).

[238] *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203), p. 212.

[239] *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203), p. 182.

[240] *Maravall* identifies the influence of humanism as condition for the perception of a political community (*Maravall*, ibid. (n. 216), p. 58).

[241] *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203), p. 211.

[242] *Maravall, José Antonio*, Teoría española del Estado en el siglo XVII, Madrid, 1944.

[243] Cf. inter alia Álvarez Cuartero, Izaskun/Sánchez Gómez, Julio (ed.), Visiones y revisiones de la independencia americana, Salamanca, 2007; *Annino, Antonio/Ternavasio, Marcela*, El laboratorio constitucional iberoamericano, Madrid et al., 2012; *Chust, Manuel/Serrano, José Manuel*, Debates sobre las independencias iberoamericanas, Madrid et al., 2007.

and that the representation of national sovereignty in the Cortes does not hinder the particular representation of the provinces.[244]

3.5.3 The Natural Origin of National Sovereignty as a Limitation for the Monarchical Sovereignty

The natural origin of national sovereignty according to the late scholastics in the sixteenth and seventeenth century[245] is used by the representatives Diego Muñoz Torrero and Antonio Oliveros[246] to explain the supralegal limitations of the monarchical position,[247] and to promote their concept of a moderate monarchy.[248] As monarchical sovereignty is derived from God by means of the community of human beings, whose natural legislative power is represented by the *pouvoir constituant* (*poder constituyente*) of the general and extraordinary convention of Cádiz (*Cortes generales y extraordinarias*), natural law is above divine law. The King's recognition of the sovereignty of the Cortes amounts to a supralegal limitation of royal government. This line of arguments guides Muñoz Torrero's counterplea against the conservative bishop of Calahorra.[249] Muñoz Torrero's rhetorical question, 'if sovereignty belongs exclusively to the king of Spain, what right do have the Cortes to put limits and restrictions on the exercise of royal authority?' is replied by himself, that it is the King's reward for the nation's sovereignty ("*reconocer la soberanía de la Nacion*")[250] that limits monarchical sovereignty by means of the natural law.[251] The supralegal natural limitation of monarchical sovereignty[252] is what Muñoz Torrero and Oliveros conclude from the debates of the preamble draft '*In the name of*

[244] Cites the Chilean representative Leyva during the debate on the 26th of September 1811 about article 91 of the Constituion of Cádiz: D.D.A.C., ibid. Fn. 193, vol. 8, p. 459; "[…] *I do not agree, that the representatives of the congress do not represent the pueblos, that elected them. That the congregation of representatives of the pueblos that form one single nation represent the national sovereignty does not destroy the character of particularly representation of their respective province.*". Cf. also "*Si las Cortes representan a la Nación, los cabildos representan un pueblo determinado.*"; cit. from: Diario de sesiones ibid. (Fn. 220), 10 de enero de 1812, p. 2590; [*engl.: "If the Cortes represent the nation, the councils represent a determined people.*"].

[245] *Varela Suanzes-Carpegna,* Política y Constitución en España, ibid. (n. 214), p. 61.

[246] Both these representatives were clerics and pupils of the University of Salamanca, first one furthermore its president; Muñoz Torrero quoted extensively from Pufendorf and Grotius. *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203), p. 39, 49.

[247] *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203), p. 123.

[248] Diego Muñoz Torrero: "*[…] reconocido y proclamado rey de España por toda la nacion.*" quoted from: D.D.A.C., p. 84). ["recognizing and proclaimed king of Spain for all the nation"].

[249] "*Dije tambien que el discurso del señor Obispo de Calahorra contine algunas* contradicciones […]" ["I also expressed that the bishop of Calahorra's discourse containes some contradictions […]"] ; (quoted from: D.D.A.C., ibid. (n. 193), 29. August 1811, p. 85).

[250] Quoted from: D.D.A.C., ibid. (n. 193), 29. August 1811, p. 86.

[251] Muñoz Torrero quoted extensively from Pufendorf and Grotius. (see *Varela Suanzes-Carpegna,* Política y Constitución en España, ibid. (n. 214), p. 49).

[252] Muñoz Torrero and Oliveros in D.D.A.C., ibid. (n. 193), p. 9,11.

Almighty God, Father, Son, and Holy Ghost, the author and supreme legislator of the universe.' [253]

Both the royalist conservatives *(realistas)* and the liberals refer to the *leges fundamentales* (*leyes fundamentales*). The historical continuity, highlighted by the *Discurso Prelimiar* of Agustín de Argüelles,[254] is cloud point of all the different views on the question of sovereignty in Cádiz.[255] The pro-monarchic *realistas* explain with the help of the fundamental laws that sovereignty of the Cortes is limited[256] and even that they cannot have the *pouvoir constituant* in the absence of the king. For the royalist conservatives *(realistas)*, the *leyes fundamentales* imply the pre-constitutional organizational framework of the Spanish monarchy,[257] confirming the monarch as head of the executive (Art. 16) and as part of the legislative (Art. 15). In consideration of the nation's long historical continuity,[258] it is therefore only a derived constituent power (*poder constituyente constituido*), which Juan de Lera y Cano attributes to the Cortes of Cádiz; According to him, both the general and extraordinary convention of Cádiz (*Cortes generales y extraordinarias*) were reinvigorated 'by entering to the execution of it [the sovereignty] to conserve it for its legitimate king and descendants'.[259] From the royalist point of view 'Conserving the sovereignty for the legitimate King and descendants' means, that the Cortes do not have the nation's *poder constituyente* during the Monarch's absence.

For liberal representatives, the *leyes fundamentales* express the transmission of sovereignty from the nation onto the King, and represent the conviction, borrowed from the School of Salamanca, that monarchical sovereignty is not of divine but of natural origin. As supra-legal limitations of the nation's constituent sovereignty,[260]

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[253] "*Dios Todopoderoso, Padre, Hijo y Espíritu Santo, autor y Supremo Legislador de la Sociedad.*". Quoted from: D.D.A.C., ibid. (n. 193), p. 7.

[254] See *Argüelles*, Discurso preliminar ibid. (n. 183), p. 1 ff.; "*Nada ofrece la Comisión en su proyecto que no se halle consignado del modo más auténtico y solemne en los diferentes cuerpos de la legislación española […]*"; ['Nothing offers the Commission in its project that would not be consternated in the most authentic and solemn mode in the different bodies of Spanish legislative.'].

[255] *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203), p. 121.

[256] In this way the Bishop of Calahorra: "*apropiándose a sí mismo de la soberanía que tenía cedida solemnemente con el contrato y pacto más relevante expresado en las leyes fundamentales*"; (quoted from D.D.A.C., ibid. (n. 193), vol. 8, p. 61); ['appropriating to herself the sovereignty that she had assigned solemnly with the contract and pact more relevantly expressed within the fundamental laws.'].

[257] Juan de Lera y Cano: "*una monarquía baxo las condiciones que forman las leyes fundamentales*" (quoted from D.D.A.C., ibid. (n. 193), p. 76).

[258] Cf. Llaneras: "*no para dar á la nacion española una nueva constitucion fundamental; sino para mejorar la que hay […]*"; (cited from D.D.A.C., ibid. Fn. 193, vol. 8, p. 21); ['not to give the Spanish nation a new fundamental constitution; but to improve the existing one.'].

[259] "*á entrar en el ejercicio de ella [soberanía], para conservarla á su legítimo Rey y descendientes*"; (quoted from D.D.A.C., ibid. (n. 193), vol. 8, p. 77). The Spanish language uses the feminine personal pronoun.

[260] Cf. the Spanish wording of *Article 3* "*[…] y por los mismo pertenece exclusivamente el derecho de establecer sus leyes fundamentales.*" (quoted from: Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 430).

the *leyes fundamentales* are used by liberals to argue for moderate, limited monarchy, as they are carried forward by positive-legal limitations.[261] In this context, the *leyes fundamentales* are the argumentative nucleus of the limitations on constituted sovereignty.[262] The *leyes fundamentales* serve as an argumentative link between constituent sovereignty and constituted sovereignty, due to the historical continuity established prominently in the *Discurso Prelimiar* of Agustín de Argüelles. The historical continuity is therefore not only a semantic keynote in the Cádiz debates, but it stands for the particuliarity of the Spanish discourse, which understands national sovereignty not as an abstract notion as in the French discourse, but as a historic one.[263]

3.5.4 Primacy of the Cortes in the Constitution of Cádiz

The legislative power of the *Cortes* is the centrepiece of the constitution of Cádiz,[264] as the 140 articles in its third title shows. Thus, the balance of powers is shifted far beyond the constitutional participation rights of its French role model of 1791[265] in favour of the *Cortes,*[266] and not only out of admiration of the constituent for English parliamentary sovereignty,[267] but rather above all because of the situational weakness

[261] *Varela Suanzes-Carpegna,* Política y Constitución en España, ibid. (n. 214), p. 121.

[262] *Varela Suanzes-Carpegna*, La teoría del estado, ibid. (n. 203), p. 121.

[263] *Müller*, ibid. (n. 184), p. 25 with reference to *Jellinek, Georg*, Allgemeine Staatslehre, 3. ed., 6th Reprint, Bad Homburg 1959, p. 487.

[264] *De Argüelles*, *Agustín*, Discurso preliminar a la Constitutión de 1812, ibid. (n. 183) p. 77. Accordingly, the third title *(*"*De las Cortes*") – alone comprising 140 articles – is also the most comprehensive of the whole text. Among other things, it comprises a complete electoral law. Cf. inter alia *González Trevijano, Pedro José*, El concepto de Nación el la Constitución de Cádiz, in: Escudero López, José Antonio, Cortes y Constitución de Cádiz. 200 años, vol. 2, Madrid 2011, p. 607.

[265] The executive power was vested in the King and his ministers (Titre III, Article 4). The legislative power was vested in the National Assembly as a single chamber legislature, which emphasised the unity of the nation and avoided a conservative upper house (Titre III, Article 3, Titre III, Chapter I). The right of legislative initiative was only accorded to the single chamber legislature (Titre III, Chapitre III, Section 1, Article 1, No. 1). The meeting of the legislative body was regulated in the constitution (Titre III, Section V, Article 1 & 5), and not dependent on being called by the monarch. The King could not dissolve the National Assembly (Titre III, Chapitre I, Article 5). The ministers were appointed and dismissed by the King (Titre III, Section IV, Article 1), and assumed by countersignature (Titre III, Section IV, Article 4) the legal responsibility for the legality of the acts of government of the King (Titre III, Section IV, Article 5). Only in two particularities was the strict division between the executive power of the king and his ministers from the single chamber legislature of the National Assembly modified: the king had a suspensive veto in the legislative procedure (Titre III, Chapitre III, Section 3, Article 1 & 2), and the legislature had a right of participating in foreign policy (Titre III, Chapitre III, Section 1, Art. 2).

[266] *Cortes*, Spanish: House of Representatives, Parliament of the Estates.

[267] The evaluation of the comprehensive correspondence of the *Cortes generales y extraordinarias* with London is one of the research tasks of the Advanced Grant ReConFort.

of the transitional government (*regencia*) during the War of Independence.[268] The primacy of the parliament has various manifestations in the constitution of Cádiz. The Cortes are, together with the monarch, entitled to legislation (Art. 15, 142). Every representative and every member of the government has the right of legislative initiative.[269] The monarch only has a suspensive right to veto, limited to two years (Art. 147). If he denies his approval to a statute, the bill can be put forward a second time in the following session (Art. 147). A second refusal has suspensive effect, until the Cortes can override the monarchical veto with a two-thirds majority in the third year (Art. 148, 149).[270] The exclusion of the executive from participation in parliamentary sessions also strengthens the superiority of the Cortes. Although the sessions were public, neither the King nor the minister were allowed to attend them (Art. 124 et seq.).[271] Furthermore, Art. 131, N° 26 stipulates a provisional presumption of the Cortes' competence in constitutional issues.[272] The primacy of the Cortes can also be seen in its relationship with the executive. The Monarch exercises the executive power (Art. 16, 170). But his competencies are enumeratively regulated in Article 171 and they are bound to detailed participation rights of the Cortes (Art. 172). Thus, the catalogue of Art. 172 encloses the prohibition to suspend the Cortes. The Monarch appoints the state ministers (Art. 171 N° 16). These were politically responsible to the Cortes (Art. 226). The recognition authority for the Prince of Asturias as successor to the throne (Art. 210), their right of proposal of appointment of the members of the privy-council (*Consejo de Estado*) according to Art. 235,[273] and the coronation oath before the plenum (Art. 173) document the derived monarchical power.[274]

3.5.5 The Legitimisation of the Cádiz Constitution by the Old Fundamental Laws of the Kingdom (*las antiguas leyes fundamentales de la Monarquía*)

In the Cortes' debates, one realizes the argumentative link between the constitutional drafts and the tradition and history of the old Spanish law in order to avoid the general suspicion that they were headed to revolutionary goals. This defensive strategy marked the formulation in the preamble of the Cortes-Constitution according to which the general assembly of the Cortes 'after the most careful investigation and

[268] *Sánchez Agesta, L.*, Introducción, in: De Argüelles, ibid. (n. 183), part one, p. 55.

[269] In practice, the usage of the legislative initiative by the monarch remained the exception. For instance, 92% of the adopted drafts during the so-called Trienio Liberal (1820–1823) were based on the *Cortes*' initiative, *Marcuello Benedicto, Juan Ignacio*, División de poderes y proceso legislativo en el sistema constitucional de 1812, in: Revista de Estudios Políticos 93 (1996), p. 225 et seq.

[270] Cited in accordance with Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 451.

[271] Cited in accordance with Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 445 et seq.

[272] Cited in accordance with Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 448.

[273] Cited in accordance with Willoweit/Seif, (=Müßig), ibid. (n. 32), ibid, p. 463.

[274] Cited in accordance with Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 461.

the most thorough contemplation' were convinced that the 'already established fundamental laws of the kingdom (*las antiguas leyes fundamentales de la Monarquía*) as well as the fixed and permanent securing of the execution of the adequate orders and the measure provisions advanced the great goal of furthering the well-being and prosperity of the whole nation …'.[275] Even if this declaration in the preamble marks the transition from the traditional constitutional semantics of the *Ancien Régime* towards a constitutional understanding of a sovereign nation,[276] in their 'addresses to the king'[277] of August 11, 1811, November 6, 1811 and November 24, 1811 contained in the three "*discorso preliminar*", the Cortes put their constitutional works in the historical context that was not vulnerable 'to the argument of revolutionary upheaval and dangerous novelty originating from the monarch'.[278] 'In its draft, the commission establishes nothing that is not yet to be found in the most authentic and celebratory manner in the different Spanish laws …'.[279] In the address of August 11, 1811, the constitutional commission rejects 'the draft of novelty'[280] and the suspi-

[275] Willoweit/Seif (=Müßig), ibid. (n. 32), p. 430; Concerning the "leyes fundamentales" as "fundamental laws" compare *Pölitz*, *Karl Heinrich Ludwig,* Die Constitutionen der europäischen Staaten seit den letzten 25 Jahren, Dritter Theil, Leipzig 1820, p. 36. Concerning the literal model of the edition elaborated by Hartmann, Karl Friedrich (anonymously published: *Hartmann*, *Karl Friedrich,* Die spanische Constitution der Cortes und die provisorische Constitution der Vereinigten Provinzen von Südamerika; aus den Urkunden übersetzt mit historisch-statistischen Einleitungen, Leipzig 1820) see *Mohnhaupt*, *Heinz,* Das Verhältnis der drei Gewalten in der Constitution der Cortes, in: Müßig (ed.), *Konstitutionalismus und Verfassungskonflikt*, Tübingen 2006, p. 79–99, 82, that also mentions the distorting translation mistake in the preamble (Compare the preamble of *Pölitz*, Constitutionen, Dritter Theil, p. 36, instead of: "daß die alten Grundgesetze … den großen Zweck … *nicht* erfüllen können" ("that the old fundamental laws … may *not* accomplish the great goal …"), it has to be positively: "… erfüllen können" ('can accomplish'). Cf. also von Grunenthal, Friedrich/Dengel, Karl Gustav (ed.), Spaniens Staats-Verfassung durch die Cortes, Berlin 1819, p. 3. Concerning the function and meaning of the "fundamental laws" compare also *Mohnhaupt*, *Heinz,* Von den "leges fundamentales" zur modernen Verfassung in Europa. Zum begriffs- und dogmengeschichtlichen Befund (16.-18. Jahrhundert), in: Ius Commune 25 (1998), p. 121–158.

[276] Compare *Mohnhaupt*, ibid. (n. 275), p. 121 et seq.; *idem*, Verfassung I, in: Mohnhaupt, Heinz/Grimm, Dieter, Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart, 2nd edition., Berlin 2002, p. 62–66, 78–83; *Coronas González, Santos Manuel*, Las Leyes Fundamentales del Antiguo Régimen (Notas sobre la Constitución histórica española), Anuario de Historia del Derecho Española, LXV (1995), p. 127–218; *Magin Ferrer, R. P. Fr.*, Las Leyes Fundamentales de la Monarchía Espaňola, segun Fueron antiguamente, y segun conviene que sean en la época actual, I-II, Barcelona 1845.

[277] All in all, the adresses allow for comprehensive conclusions about the intention of the constitutional commissions of the Cortes, printed by Hartmann in "*Discorso preliminar*" (*Hartmann*, Spanische Constitution (n. 275), p. 3–106). My analysis and assessment follows *Mohnhaupt*, Cortes (n. 275), in: Müßig (ed.), *Konstitutionalismus und Verfassungskonflikt*, Tübingen 2006, p. 79.

[278] *Mohnhaupt*, Cortes (n. 275), in: Müßig (ed.), *Konstitutionalismus und Verfassungskonflikt*, Tübingen 2006, p. 79–99, 89 et seq.

[279] Adresse of August 11, 1811, in: *Hartmann,* Spanische Constitution ibid. (n. 275), p. 4.

[280] Von Grunenthal/Dengel, ibid (n. 275), Berlin 1819, p. III).

cion of having neither 'borrowed something from foreign nations, nor of having been penetrated by reformative enthusiasm' since they did nothing but to adopt what 'had become unfashionable since several centuries' and 'what had been known and usual in Spain' in their 'present draft'.[281]

The sovereignty of the nation is derived from old traditions: 'In order to prove this thesis, the commission must do nothing but refer to the decrees of the *Fouero Zuzgo* [the Gothic code] about the laws of the nation, the king and the citizen, about the mutual obligations to uphold the laws, about the manner of delivering the same and to execute them. In the fundamental laws of this code, the sovereignty of the people is pronounced in the most authentic and celebratory manner that is conceivable.'[282] Even the old 'fundamental laws of Aragon, Navarra and Castile' as well as the older codes from "*Fuero Zuzgo*" to "*Nueva Recopilación*" are being used.[283] This should hush every critic: 'Who upon seeing such celebratory, such clear, such decisive decrees was still able to refuse to accept as an undeniable principle that the sovereignty originated from the nation and is inherent to it?'[284] In this sense, also Rotteck called the constitutional draft of the Cortes a creation 'born in the spirit of the new ages of reestablishment of the rights of the nation asserted by law against the monarch that it had been deprived of'.[285] The context of the old traditions is obvious, even more so since the catholic national religion confirms the Cortes' traditionalism.[286] With this lack of a separation of law and religion, the Cortes contradicted all cosmopolitan and religious principles of the Enlightenment,[287] even if the constitutional commission in its address of December 24, 1811

[281] In: *Hartmann*, Spanische Constitution ibid. (n. 275), p. 5.

[282] In: *Hartmann,* Spanische Constitution ibid. (n. 275), p. 8.

[283] Adresse to the King of August 11, 1811, in: *Hartmann*, Spanische Constitution ibid. (n. 275), p. 4, 17, 34; compare also von Grunenthal/Dengel, Spaniens Staats-Verfassung ibid. (n. 280), p. X et seq.

[284] In: *Hartmann,* Spanische Constitution (n. 275), p. 8. Compare Mohnhaupt, Cortes (n. 275), in: Müßig (ed.), Konstitutionalismus und Verfassungskonflikt, Tübingen 2006, p. 91 et seq.

[285] *Von Rotteck*, *Carl,* Cortes und Cortes-Verfassung in Spanien, in: Von Rotteck, Carl/Welcker, Karl Theodor (ed.), Carl, Staats-Lexikon oder Encyklopädie der Staatswissenschaften, Dritter Band, Altona 1836, p. 57.

[286] "The religion of the Spanish people is and remains for ever the one, true, roman-catholic and apostolic religion. The people protect it by means of wise and just laws and forbids the exercice of any other," article 12 Cortes-Constitution 1812. (Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 432).

[287] Concerning this conflict between political and religious freedom compare *Portillo, José María*, La Libertad entre Evangelio y Constitución. Notas para el Concepto de Libertad Política en la Cultura Española de 1812, in: Iñurritegui Rodrígez, José María/Portillo Valdés, José María (ed.), Constitución en España: Orígenes y Destinos, Madrid 1998, p. 139–177.

proclaimed political freedom of speech and the press (Art. 371)[288] as 'the true medium of the Enlightenment'.[289]

The normativity of the modern constitution, as a text of law, which fixes the political order as a legal order, flashes up in the reflection of the enlightened claim for codification.[290] For instance, the constitutional draft according to the constitutional commission is 'in its character national and ancient', in its 'order and method', however, 'new'[291]: '[New is the ...] method of how the matter is divided up, …, by depicting and classifying it like this, that they form a system of fundamental and constitutional laws wherein one finds the fundamental laws of Aragon, Navarra and Castile scattered amongst everything what unified the decrees that concern the liberty and independence of the nation, the rights and duties of the citizens, the dignity and authority of the king and the tribunals with one another.'[292] The generalising order of the legal matter and the fixation of the political order as a legal order serves the creation of the nation state by means of territorial unification and integration of all social groups. The unification in the first constitutional title (Concerning the Spanish nation and the Spanish) and of the second constitutional title (Concerning the territory of Spain, concerning its religion and government and concerning the Spanish people)[293] serves the creation of common economic conditions, as well as to 'further the national prosperity by means of everything possible without the reglementations and rules of the government having to interfere …'.[294]

'Revolutionary' state theories are consciously avoided, the name of Montesquieu not being named once in the 'addresses to the king' of the year of 1811.[295] The Cortes justified the 'separation of the sovereign authority of a nation' into three

[288] Article 371: "Todos los españoles tienen libertad de escribir, imprimir y publicar sus ideas políticas …"; text version in García, Antonio Fernández (ed.), La Constitución de Cádiz (1812) y Discurso Preliminar a la Constitución, Madrid 2002, p. 169; compare *Sarasola, Ignacio Fernànde,* Opinión pública y "libertades de expresión" en el constitucionalismo español (1726–1845), in: Giornale di Storia costituzionale 6/2 (2003), Macerata 2003, p. 195–215, 200–205.

[289] Adresse of the Cortes to the King of December 24, 2811, in: *Hartmann,* Spanische Constitution, ibid. (n. 275), p. 101.

[290] The declared goal of the constitutional commission was that "the constitution of the Spanish monarchy should be a complete and well-arranged system whose parts were fully connected and in harmony with each other. It must be made by the same hand". Adresse to the King of August 11, 1811, in: *Hartmann*, Spanische Constitution (n. 275), p. 18. Compare *Caroni, Pio,* Gesetz und Gesetzbuch. Beiträge zu einer Kodifikationsgeschichte, Basel/Genf/Munich 2003, p. 5–21.

[291] Adresse to the King of August 11, 1811, in: *Hartmann*, Spanische Constitution ibid. (n. 275), p. 18, paraphrased translation by UM.

[292] Adresse to the King of August 11, 1811, in: *Hartmann*, Spanische Constitution ibid. (n. 275), p. 4, paraphrased translation by UM.

[293] *Willoweit/Seif*, (=Müßig), ibid. (n. 32), p. 430 et seq. Art. 1–9 ("De la Nación española y de los Españoles") and in Art. 10 and 11 ("Del territorio de las Españas, su Religion y Gobierno, y de los Ciudadanos Españoles").

[294] Adresse der Cortes an den König vom 24. Dezember 1811, in: *Hartmann,* Spanische Constitution, ibid. (n. 275), p. 84 et seq.

[295] *De Secondat, Baron de la Brède et de Montesquieu*, *Charles-Louis,* De l'Esprit des Lois (1748), Livre I, Chapitre III ("Des lois positives").

branches with the human nature in which possibilities for conflict are immanent: 'The separation of the same is indispensable; but the dividing lines that one has to observe in particular between the legislative and executive branch in order to create a correct and stable balance are of such a degree of uncertainty that their delimitation has been the bone of contention amongst the important authors of governmental science and that the systems and dissertations concerning this matter have indefinitely multiplied.'[296] For instance, the Cortes-Commission is able to contemplate in its address to the king of November 6, 1811 whether 'it may be beneficial under very urgent circumstances to unite the legislative and executive power for a certain amount of time…'.[297] The dangers going hand in hand with the concentration of the three branches of power or the three Aristotelian state functions[298] for the 'political and civil liberty' as well as 'personal security' were nevertheless very well known to the Cortes. These dangers were seen as possible potential for conflict in the system of the constitution that was only perceived as avoidable by means of the separation of powers. In this sense, the separation of justice and administration allows the creation of 'the necessary balance between the government's authority … and inalienable liberties'.[299]

3.5.6 Struggle of the *realistas* for the Monarchical Principle

Therefore reactionary longings for the restoration of the absolutistic Bourbon monarchy had room. After the flight of the French King Joseph Napoleon and the return of the Spanish King Ferdinand VII in March 1814, the *realistas* – as the royalists were called – took the view in their renowned Persian manifest of April 12, 1814 that the Cortes Constitution of Cádiz which while not being directed against the monarchy was created without the monarch[300] and therefore could not possibly bind the king.[301] The latter called for absolute power as he had held before the displacement by Napoleon. Ferdinand VII consequently annulled the Cortes Constitution of 1812 and in the meantime proclaimed laws by the decree of May 4, 1814.[302]

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[296] Adresse of the Cortes to the King of August 11, 1811, in: *Hartmann*, Spanische Constitution (n. 275), p. 21 et seq. ; "*Su separación es indispensable* …", in: *de Argüelles*, ibid. (n. 183), p. 78.

[297] In: *Hartmann*, Spanische Constitution, ibid. (n. 275), p. 56.

[298] *Aristoteles*, Politica, 1297 b 35–1298 a 7.

[299] Adresse of the Cortes to the King of December 24, 1811, in: *Hartmann*, Spanische Constitution, ibid. (n. 275), p. 88. Compare *Sánchez Agesta*, Introducción, in: ibid. (n. 183), p. 52–59.

[300] *Badía*, *Juan Ferrando,* Die spanische Verfassung von 1812 und Europa, Der Staat 2 (1963), 153–180, p. 153; *Santana*, *Alberto Ramos,* La Constitución de 1812 en su Contexto Histórico, in: Ramos Santana, Alberto/Marchena Fernández, Juan (ed.), Constitución política, Vol. I, Estudios, Sevilla 2000, p. 9–67.

[301] Compare: *Konetzke, Richard* (with completion by *Kleinmann, Hans Otto),* Die iberischen Staaten von der Französischen Revolution bis 1874, in: Schieder, Theodor (ed.), Handbuch der Europäischen Geschichte, Band 5, Stuttgart 1981, p. 886–929, p. 899 et seq.

[302] Compare CD-ROM-1, Dok.-Nr. 8.2.8 (Königliches Dekret von Valencia über die Abschaffung der Verfassung v. 4.5.1814) concerning *Bernecker, Walther L./Brinkmann*, *Sören,* Spanien um

By doing so, the situation before the octroi of the French constitution of 1808 was supposed to be restored. Rotteck called the following phase of restoration a 'reactionary tyranny' by means of which the inquisition, 'the heaviest intellectual pressure' and 'all calamitous flaws of the old administration' had come back.[303] A cruel domestic struggle (1814–1820) was to follow. Not only liberal forces and farmers took part in the upheaval against the restoration of the Bourbon monarchy, but the reactionary agitation also seized the badly equipped and irregularly paid army. The officer corps had since long been a domain of the middle class strongly influenced by liberal ideas.[304] Attempts to instrumentalize the restored Bourbon Kingdom concerning the officer corps failed. Rather, since 1814, military revolts took place (*Pronunciamientos*) that aimed at the return to the Constitution of Cádiz. After a putsch of the military and a proclamation of the restoration of the Cortes Constitution of 1812, Ferdinand VII found himself having to finally accept the constitution of 1812 on March 7, 1820. The laws passed before 1814 were now reinvigorated. In the towns, the squares received again their original name "*Plaza de la Constitución*".[305] The often used battle cry 'Constitution or Death'[306] marks well the political radicalisation of the country after 1814 and makes clear that it was not a struggle within an agreed upon constitutional frame, but that it focused on the constitution itself, the power to make the final decision in the non-constitutional state and thus on sovereignty.[307]

3.5.7 Contemporary Ambigous Evaluation of the Cádiz Constitution

The ambiguous argumentation of the Cortes, their recourse to old liberties and the rejection of enlightened sanctuary of religious liberty is mirrored in the disputed assessment of the Cortes-constitution in the historiographical state of the art. It is partially described as the Magna Carta of Spanish liberalism,[308] and partially only named a revolution on paper.[309] The same is true for the contemporaries' evaluation.

1800, in: Peter Brandt/Martin Kirsch/Arthur Schlegelmilch (ed.), Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel, Volume 1: Around 1800, Bonn 2006, p. 601–639.

[303] *Von Rotteck*, Cortes ibid. (n. 285), p. 54.

[304] *Bernecker/Brinkmann*, ibid. (n. 209), p. 616.

[305] *Konetzke*, Die iberischen Staaten, (n. 301), p. 901.

[306] *Konetzke*, Die iberischen Staaten, (n. 301), p. 901.

[307] *Hofmann, Hasso*, "Souverän ist, wer über den Ausnahmezustand entscheidet" (Carl Schmitt), in: Müßig (ed.), *Verfassungskonflikt* (n. 278), p. 269–284, 272 et seq.

[308] Compare *Dippel*, *Horst,* La Significación de la Constitutión Española de 1812 para los Nacientes Liberalismo y Constitutionalismo Alemanes, in: Iñurritegui Rodrígez, José María/Portillo Valdés, José María (ed.) Constitutión en España: Orígenes y Destinos, Madrid 1998, p. 287–307; *Konetzke*, ibid. (n. 191), p. 898.

[309] Indeed, until nowadays scholars dispute whether the work of the Cortes of Cádiz may be understood as a "civil" revolution. With regard to the noble property and some clergy prerogatives, Josep Fontana emphasized the political modesty of the bourgoisie, its readiness to social compromise

Metternich reviled the Cortes-Constitution of 1820 as 'the work of arbitrariness or senseless blindness'.[310] The 'Holy Alliance'[311] and the representatives of the strict monarchical principle – as for instance Albrecht von Haller – demanded: 'Avoid the word constitution; it is poison in monarchies since it requires a democratic basis, organizes the inner warfare and creates two elements of life and death fighting each other. Who called for this constitution? It was the Jacobins themselves …. The people do not demand from you a constitution but protection and justice.' [312] The supportive voices were certainly not Jacobins. Its influence on the Constitution of the United Provinces of South America (December 3, 1817)[313] as well as its model character for Portugal, Piedmont and Naples-Sicily,[314] however, support Dominique Georges Frédéric de Pradt's assessment, which was given under the title '*De la révolution actuelle de l' Espagne et de ses suites*' (1820): 'The absolutistic Europe will not be able to escape the influence that these revolutions with their constitution of 1812 will exercise on it in the future to come.'[315] In Carl von Rotteck's words, the positive evaluation goes as follows: 'What friend of liberty and a popular constitution will not consider such a provision as desirable?'[316] In this sense, Pölitz declares

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with the traditional forces and the social-revolutionary character of the Cortes was disputed. Manuel Pérez Ledesma by contrast differs between the phase of the Cortes of Cádiz qualitatively from the actual beginning of the constitutional period (since 1834) and only acknowledges the judgement of Fontana for the latter, compare *Fontana*, *Josep,* La crisis de Antiguo régimen 1808–1833, Barcelona 1992, p. 17 et seq. and p. 48 et seq. ; *Ledesma*, *M. Pérez,* Las Cortes de Cádiz y la sociedad española, p. 167 et seq., in: Artola, M. (ed.), Las Cortes de Cádiz, Madrid 1991.

[310] Brandt, Hartwig (ed.), Restauration und Frühliberalismus 1814–1840 (Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert, Volume III), Darmstadt 1979, p. 229; compare also *Dippel*, *Horst,* Die Bedeutung der spanischen Verfassung von 1812 für den deutschen Frühliberalismus und Frühkonstitutionalismus, in: Kirsch, Martin/Schiera, Pierangelo (ed.), Denken und Umsetzung des Konstitutionalismus in Deutschland und anderen europäischen Ländern in der ersten Hälfte des 19. Jahrhunderts, Berlin 1999, p. 219–237, p. 222.

[311] Compare *Ferrando Badía*, *Juan,* Die spanische Verfassung von 1812 und Europa, in: Der Staat 2 (1963), p. 153–180 (174–180); *Von Görres*, *Joseph,* Die heilige Allianz und die Völker auf dem Congresse von Verona, Stuttgart 1822.

[312] *Von Haller*, *Carl Ludwig,* Ueber die Constitution der Spanischen Cortes, s.l. 1820, p. 72.

[313] Hartmann has illustrated the "Constitution der Vereinigten Provinzen von Südamerika vom 3. Dezember 1817" directly after the Cortes-constitution and thereby clarified the closer connection of the two constitutions. *Hartmann,* Spanische Constitution (n. 195), p. 177–222 (177): "Vorläufiges Verfassungsgesetz, gegeben (den 3. Dec. 1817) von dem souveränen Congreß der vereinigten Provinzen von Südamerika, für die Regierung und Verwaltung des Staats (L.S.) bis zur Zeit der öffentlichen Bekanntmachung der Constitution. Buenos Ayres, in der Druckerei der Unabhängigkeit. 1817." Concerning the influence of the Cortes-constitution of 1812 on the Southern American continent, compare: *Sánchez Agesta*, *Luis,* La Democracia en Hispanoamérica, Madrid 1987, p. 35 et seq.; *Bravo Lira*, *Bernardino,* El Estado Constitucional en Hispanoamérica 1811–1991, Mexico 1992, p. 10 et seq.

[314] More precisely *Badía*, Spanische Verfassung (n. 183), p. 153–180.

[315] *De Pradt*, *Dominique Georges Frédéric,* De la révolution actuelle de l'Espagne et de ses suites, Paris 1820, p. 143, here cited according to *Badía*, Spanische Verfassung (n. 183), p. 154 with Footnote 9.

[316] *Rotteck,* Cortes (n. 285), p. 64.

as well – even if doing so a little bit more tacitly: 'Thus, when considering it as a whole, one cannot refuse approval to this constitution.'[317]

3.6 The Constituent Sovereignty in the Norwegian Grunnloven

The Norwegian Fundamental Law (*Grunnloven*),[318] adopted on May 17, 1814, is particular not only for its 'survival' of the restoration after the Vienna Congress,[319] but for the unique combination of a strong parliament and a strong crown. Compared to its previously outlined European contemporaries, like the French September Constitution of 1791[320] and the Spanish Cortes Constitution of 1812, the Norwegian *Grunnloven* does not only rely on the strength of Parliament, but also allows for a strong monarchical position,[321] – much stronger than in the Swedish form of government of 1809.[322] The 'Eidsvoll-alliance' of a strong parliament and a strong crown allowed for an evolutionary transition from the constitutional to the parliamentary system, which was accompanied by a legal dispute over the King's veto

[317] *Pölitz*, Constitutionen III (n. 275), p. 28.

[318] Of May 17, 1814. Cited in: *Pölitz*, *Karl Heinrich Ludwig,* Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit, Mit geschichtlichen Erläuterungen und Einleitungen (The European Constitutions from the Year of 1789 to the Modern Age, Including Historical Explanations and Introductions), Third Volume, Second, Restructured, Corrected and Revised Edition, Leipzig 1833, p. 92 et seq.

[319] Therefore it is the oldest functioning constitution of Europe and only topped globally by the Constitution of the United States of 1787.

[320] Norway was for a long time the only European country with a constitutional monarchy influenced by the French role-model of 1791 with a royal suspensive veto and lacking monarchical right of dissolution. Up until the separation of Sweden and Norway in 1905, the King frequently made use of his veto when it came to simple laws. Besides the suspensive veto, the French Revolutionary Constitution was also the role model when it came to the rules for the indirect election of the Parliament and when it came to the allocation of the respective candidate to a residence in the constituency.

[321] The text of the constitution puts the regulations of the monarchical executive at the beginning. The provisions relating to the State Council, (Here: the government as in "the cabinet".) the competence of the monarch for foreign affairs, for the armed forces, the declaration of war and the conclusion of peace treaties illustrate this intention to establish a strong monarchical power.

[322] The Swedish form of government served as a role model for the regulation of the relationship between the King and the government, namely the ministerial responsibility and the ministerial counter signature of royal decrees. The role of the monarch in Norway, however, remained stronger in respect of the latter point. A synopsis of the sources on the Norwegian Fundamental Law can be found at *Höjer, Nils Jakob*, Norska Grundlagen och dess Källor, Stockholm 1882, p. 171–198; *Tønnesen, Kåre*, Menneskerettserklæringene i det attende århundre og den norske Grunnlov, in: E. Smith (ed.), Menneskerettihetene i den nasjonale rett i Frankrike og Norge, Oslo 1990, p. 20–38; Heivall, Geir, En introduksjon til Kants begrep om statforfatning, in: Michalsen, D. (ed.), Forfatningsteori møter 1814, Oslo 2008, p. 95–144. A potential influence of the Cádiz Constitution of 1812 on the Norwegian Constitution of 1814 is discussed by *Tamm, Ditlev*, Cádiz 1812 y Eidsvoll 1814, in: Historia Constitucional (revista electrónica), n. 7, 2006, p. 313–320, http://www.historiaconstitucional.com/index.php/historiaconstitucional /iisue/view/8/showToc [30.04.2016].

against constitutional alterations. As the evolutionary understanding of constitution in the context of ReConFort comprises the respective constitutional interpretation,[323] the Norwegian Constitutional Formation is to be included into my paper, even though Norway is not a ReConFort-targeted country. The statement of the Christiana Faculty of Law does not only refer to the constitutional nature of the King's veto, but also covers constituent sovereignty and the precedence of constitution by explaining why constitutional amendments cannot be left to an ordinary parliamentary assembly. Therefore, it is a document that is crucial for the understanding of the Norwegian implementation of the modern constitutional model.

3.6.1 *Eidsvoll* Debates and the Norwegian *Grunnloven* of May 17, 1814

Christian Frederik[324] summoned the leading men on February 16, 1814 in order to have himself declared the hereditary king by virtue of his hereditary right and vested in him as the Danish Prince. He saw himself confronted with the argument that – with the abdication of the Danish King Friedrich IV as the Norwegian King after the Peace of Kiel of January 14, 1814 – the state power was not handed down to the Prince, but to the Norwegian people. Despite the fact that the men surrounding Georg Sverdrup[325] and calling for a constitutional monarchy were only a small elite, Christian Frederik still had to satisfy their claims in order to make sure that he was able to continue his policy of independence of a Norwegian Kingdom. Due to the fact that the Norwegian actions appeared to be of a rebellious and revolutionary nature from the Swedish perspective, Christian Frederik was exposed to a dilemma: on the one hand, he wished to fight for the Norwegian independence and on the other hand, he wanted to assure the continuance of the Union with Denmark. The aversion against the *Ancien Régime* was not generally directed against crowned heads, as the crown was perceived as bulwark against revolutionary *terreur* and in the special Norwegian Case was received as a guarantee of independence.[326]

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[323] See here 'I. On ReConFort's research programm in general'. Of course one has to bear in mind that according to the Norwegian state of arts the faculty's statement was a kind of circumvention of stortinget as all lawyers were the King's lawyers formulating his position he could not get through Parliament as legal opinion of the capital's law faculty (Writing democracy. The Norwegian Constitution 1814–2014 edited by Gammelgaard, Karen/Holmøyvik, Eirik, New York/Oxford a.o. 2014).

[324] Cousin of the Danish King; After King Frederik VI of Denmark died in 1839, Christian Frederik ascended to the throne as King Christian VIII of Denmark.

[325] Georg Sverdrup (1770–1850) represented Christiania (Oslo) at the Imperial Assembly of Eidsvoll on May 17, 1814. He was the leading person of the Party of Independence. Sverdrup was a member of the Constitutional Committee and was furthermore President of the Imperial Assembly. He was a member of the Storting from 1818 to 1824 and from 1824 to 1826.

[326] 'A striking feature of the Constitutional Assembly at Eidsvoll in 1814 was that the assembly resolved of its own accord that it would not adopt positions on or consider issues relating to foreign policy. Such issues were to be reserved for the regent, Christian Frederik. When the resolution was put to the vote on 19 April 1814, there were 55 votes in favour and 55 against. The president of the assembly used his casting vote to support the Independence Party's view that the assembly should

In the proclamation of February 19, 1814, Prince Christian Frederik – in his position as the 'regent' – proclaimed the convocation of a Constitutional Imperial Assembly (*Riksforsamlingenat*)[327] that was to elaborate an Imperial Constitution and fix the electoral procedure comprising an obligatorily preceding oath for the civil servants, the voters and the candidates 'to defend Norway's independence and to risk life and blood for the beloved fatherland'.[328] The actual constitutional work was vested in the hands of the constitutional committee, which had the plenary assembly's agree to twelve fundamental principles (*grunnsetninger*) before deliberating on specific constitutional provisions. Among them were No. 2 'The people are to exercise the legislative power through representatives. (*Folket skal utøve den lovgivende makt gjennom sine representanter*)' and No. 3 'Only the people are to have the right to impose taxes through their representatives. (*Folket skal alene ha rett til å beskatte seg gjennom sine representanter*).'[329] The constitutional elaborations were conducted at an extreme speed of six weeks (convocation on April 10, 1814, finalisation of the elaborations on May 16, 1814) relying mostly on the draft of the Norwegian jurist Christian Magnus Falsen (1782–1830)[330] and of the Danish Crown Secretary Johan Gunder Adler (1784 –1852), both familiar with the French and the American constitutional discourse.

not consider matters relating to foreign policy.' Dag Michalsen and Ola Mestad refer to the transformation of international law and Norwegian Sovereignty in 1814 in their conference announcement "The International Influence of the Norwegian 1814 Constitution 1814–1920", Oslo 18–20 November 2015.

[327] Constituted on April 10, 1814.

[328] Cited according to *Brandt*, *Peter*, Norwegen, in: Daum, W. (ed.), together with Brandt, Peter/Kirsch, Martin/Schlegelmilch, Arthur (ed.), Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel, Volume 2: Around 1815–1847, Bonn 2006, p. 1174.

[329] (1) Norway was to become a moderate hereditary monarchy. It was to be a free, independent and inseparable Kingdom and the regent was to have the title "King". […] (4) The right to declare war and to make peace was to be the King's. (5) The King was to receive the right to pardon. (6) The judiciary was to be independent from the legislative and executive power. (7) There is to be the freedom of publication and printing; (8) The Evangelic-Lutheran religion is to be the religion of the state and the King. Religious cults are able to exercise their religion freely; but Jews are to be hindered from the entering of the Imperial territory altogether. (9) New restrictions of the trade are not to be allowed. (10) Privileges relating to persons or being of mixed character are not to be granted any more (11). The citizens of the state are to be obliged to contribute to the defense of the fatherland evenly, irrespective of their standing, birth or wealth (Norwegian version to be found at: https://www.stortinget.no/no/Stortinget-og-demokratiet/Grunnloven/Eidsvoll-og-grunnloven-1814/).

[330] Falsen led the Independent Party (*Selvstendighetspartiet*) that wanted complete independence and was prepared to resist Sweden militarily.

3.6.2 Moss Process into the Swedish Union: The Extraordinary *Storting* as Constituent Assembly and the Fundamental Law of the Norwegian Empire of November 4, 1814

The Swedish insisting on the compliance with the Peace of Kiel led to a new war ending with the Norwegian defeat in the Treaty of Moss of August 14, 1814. After the abdication of King Christian Frederik who – according to the wording of the ceasefire agreement 'gave his power into the hands of the nation', the moss-wording was argued upon with the commissioners of the Swedish Crown and guaranteed: "*Sa Majesté Le Roi de Suède promet d' accepter la constitution religée par des deputés de la diète d'Eidsvoll. Sa Majesté ne proposera d'autre (sic)n changements, que ceux necessaires à l'union des deux royaumes, et s'engage de n'en faire d'autres que de concert avec la diète*".[331]

The 'Extraordinary Storting' steadfastly refused to deliver the election of Carl XIII[332] of Sweden to become King of Norway (where he was Carl II) before the altered Fundamental Law had been adopted. Following the constitutional promise emanating from the Treaty of Moss, the 'Fundamental Law of the Norwegian Empire' (*Kongeriget Norges Grundlov*) of November 4, 1814 was negotiated between the commissions of the Swedish government and the newly elected Extraordinary Storting as a de facto second constitutional assembly.[333] On the same day, 48 of the 79 representatives "elected" Carl to the throne, 23 'elected and acknowledged' him and 8 'acknowledged' him. These formulations are based on the emphasis of a (fictitious) free Norwegian decision that is in accordance with the previously enacted constitution. The special vote of Brandt on the Faculty opinion of August 30, 1880 confirms the Crown as the *pouvoir constitué*.[334] Thereby, the personal union under a King with two independent states[335] with a respectively own

[331] Cited according to the legal opinion, p. 88.

[332] And the French revolutionary Bernadotte through the Swedish Prince Karl Johan (formerly Jean-Baptiste Bernadotte).

[333] Hence, the principle of national sovereignty and the separation of powers amongst the Storting (legislation and budget), the government (executive power) with the King and the judiciary were retained in Norway. On October 20, 1814, under the impression of 15.000 occupying soldiers and 600 Norwegian soldiers in Swedish imprisonment decided with only five opposing voices "that Norway shall be an independent Empire united with Sweden under a King but under the adherence to the constitution with the alterations that have been necessary for the well-being of the Empire due to the unification with Sweden". (*Berg, Roald*, Storting og Unionen med Sverige 1814–1905. Dokumenter fra Stortingets arkiver, Oslo 2005, p. 12).

[334] 'I obviously deem the Fundamental Law not to be a contract between the King and the people, but as an order established by the people themselves by virtue of their own sovereignty wherein all state power finds it legitimacy. I do not attach any importance to King Karl Johan's so-called "adoption" of November 10, 1814 as far as the validity of the Fundamental Law is concerned […]' but I deem this "as an adoption or – at the most – a ratification of the deliberations with the Swedish commissioners". Legal Opinion, p. 84.

[335] There was no automatism between the Crowns: the Swedish King had to be specifically crowned at Trondheim in order to become the King of Norway. The King also had to reside on Norwegian territory for a certain number of days.

government[336] for internal affairs was fixed.[337] In 1815, a treaty was signed between the Storting and the Swedish estates in the form of an 'Imperial Act determining the constitutional relations resulting from the Union between Norway and Sweden'.[338] This international treaty between the Norwegian Parliament (*Stortinget*) and the Swedish Estates (*Stænder*) concerned the royal power and the provisions in the case of the vacant throne. It had constitutional rank in Norway and amounted to a simple law in Sweden.[339]

3.6.3 Relationship Between Monarch and Parliament in the Norwegian *Grunnloven*

According to § 3 *Grunnloven*, the executive power was solely vested in the King who appointed and dismissed his ministry, which was referred to as 'State Council' at his liking.[340] The responsibility for the government action was located therein. The ministerial duty of countersignature for 'all orders issued by the King himself' (§ 31) corresponded to the 'holiness' of the person of the ruler in the understanding

[336] The Swedish King did not directly govern the neighbouring country but rather appointed a governor who looked after the Swedish interests in Norway.

[337] Norway's independence results from the formulations of the November Constitution: the provisions "Norway is a free, independent, inseparable and unattached Empire" was complemented by the phrase "united with Sweden under a King".

[338] The Act of Union (*Riksacten*) regulating the constitutional personal union between Sweden and Norway, was passed by the Norwegian Storting on July 31 and by the Swedish Riksdag on August 6, 1815] (http://www.verfassungen.eu/n/norwegen14-1.htm); see also Allgemeine Zeitung München [General newspaper of Munich] of January 18, 1816, Beilage [insert], p. 25 et seq.

[339] *Berg*, *Roald,* Storting og Unionen med Sverige 1814–1905. Dokumenter fra Stortingets arkiver. [Oslo] 2005, p. 15.

[340] A proposal of 18 representatives of the Imperial Assembly of early 1814 from Western Norway and the territory of Trondheim had as a content not only the restriction of the suspensive veto but also the comprehensive revision of the constitution towards a parliamentarisation of the government (election of the State Councils by the (*Storting*). *Seip, Jens Arup*, Utsikt over Norges historie, 2 Vol., Oslo 1974–1981, Vol. 1, p. 39–41, plausibly distinguishes between two main types of governmental drafts: first, those of a Western European constitutional theoretical kind that is based on the separation of powers and a strong position of the Parliament elected by means of a restricted suffrage, completely being formulated by civil servants and the bourgeoisie and second a strong monarchy with a rather counselling position of the Parliament and drafts emanating from farmers and partially citizen bourgeoisie. In both groups, radical democratic and Republican tendencies may be depicted. On the tradition of the existent drafts CD-ROM-2, Doc.-Nr. 14.2.2 (Eidsvold Constitution of May 17, 1814). Both versions of the Fundamental Law of 1814 – the draft (Adler/Falsen) forming the basis for the parliamentary deliberations as well as further drafts and respective documents in the Kongeriget Norges Grundlov og øvrige Forfatningsdokumenter which has been published by the Storting in Kristiania in 1903; and Riksforsamlingens forhandlinger, utgit efter offentlig foranstaltning, 5 Vol. Christiania 1914–1918; now also in: Th. Riis a. o. (ed.), Forfatningsdokumenter fra Danmark, Norge og Sverige 1809–1849/Constitutional Documents of Denmark, Norway and Sweden 1809–1849 (= Dippel, Horst (ed.), Constitutions of the World from the late 18th Century to the Middle of the 19th Century. Sources on the Rise of Modern Constitutionalism, Europe, Vol. 6), Munich 2008.

of the time (§ 5); at the same time, the State Councils were obliged to dissuade in a written form if they considered the royal decisions to be unconstitutional or unlawful or harmful for the wellbeing of the state. They were forbidden from resigning out of protest. It is only in the case of them not dissuading that they could be indicted before the Imperial Court (§ 30). The King had the supreme command over the armed forces, declared war and made peace, appointed and dismissed civil servants within the legal provisions (which protected civil servants from arbitrary dismissals) 'after having heard his State Council' (§ 21). According to § 4 of the Fundamental Law, his person was holy and hence could not be held accountable or sued. The responsibility was vested in his council, the government. Decisions of the King required the countersignature of the respective minister. The latter was under the obligation to oppose illegal decisions in a written form and – if that did not help – only had the possibility of resigning from office in order to deny responsibility for the decision. In the case of unconstitutional decrees, the ministers were obliged to lodge counter presentations or to resign. Otherwise, they could be impeached before the Imperial Court (impeachment). The Norwegian government had to affirm the legislative drafts of the *Storting*. It was an organ of the royal government.

The strong Kingdom was opposed by a strong Parliament. It was incompatible to be a member of the latter while holding a government position. The *Storting* consisted of two departments, the *Lagting* and the *Odelsting* (§ 49)[341] and convened every three years. A true two-chamber system did not find a majority, since it was not the goal to create a specific representation of the nobility. According to § 76, the *Odelsting* that had the right of the legislative initiative had to present bills in the *Lagting*. In the case of the refusal by the *Lagting*, the bill had to be dealt with once more in the *Odelsting*. In the case of three refusals, the *Odelsting* could either drop the draft or present it to the plenum of the *Storting*, which required a two thirds majority. The division of the *Storting* in two, procedurally defined departments was a structure taken from the Batavian Republic of 1798, the institution of the Imperial Court from the Constitution of the USA, namely of Massachusetts and from the tradition of the British constitutional law, the French constitution of 1795, the Spanish Constitution of Cádiz (1812) as well as the Polish Constitution of 1791 and even the Danish-absolutistic *Lex Regia* of 1665. The research depicts a certain similarity with the Constitution of Batavia of 1789, which also possessed a two-part parliament.[342]

The '*Storting*' by means of which 'the people' exercised the legislative power (§ 49), the right of budget as well as the decision on taxes, custom duties and levies (§ 75); it was the legislating and controlling power. According to an unusually extended right to vote, the Norwegians elected the *Storting* every three years, which after its constituting session elected one fourth of its 75 to 100 members to the '*Lagting*'; the

[341] The separation into *Lagting* and *Odelsting* was abolished with the parliamentary term beginning in 2009.

[342] *Holmøyvik*, *Eirik,* Maktfordeling og 1814, Bergen 2012, p. 436.

rest was referred to as '*Odelsting*'.[343] The latter, first of all voted on statutes that were then submitted to the *Lagting*. If the *Lagting* had rejected a draft twice, the whole of the Storting plenum had to vote in favour of it with a two-thirds majority (§ 76). The members of the royal government did not have access to the meetings of the *Storting*.

The legislative initiative was seizable both by the King or the State Council mandated by him as well as every member of the *Odelsting* (but not the Parliament as a whole, one of its departments or one of its commissions), even by every Norwegian citizen by making use of an Odelsting-man ("private" legislative initiatives). Furthermore, the *Storting* had the right to summon every citizen, even State Councils and to look into the bills on state revenues and expenditure, state protocols and contracts (§ 75). The King had the right to make use of his veto twice against statutes passed by Parliament. If the resolution had been confirmed thrice, he had to sanction it (§§ 78, 79).

A democratic constitution was never on the agenda of the Eidsvoll Assembly and the extraordinary November-Storting. They wanted a constitutional monarchy with the separation of powers between King, Parliament und justice. Democratic elements can be traced in the active and passive right to vote.[344] The decision for an indirect election[345] and for the non-exclusion of civil servants[346] was motivated by the skepticism against unknowledged and unacquainted farmers as deputies. Only civil servants and members of the state council, who were in duty of the state council or the court, were not eligible due to the separation of powers.

[343] On the term of the "Odels" compare *Frängsmyr, Tore,* Svensk idéhistoria. Bildning och vetenskap under tusen år, Del 2: 1809–2000, Stockholm 2002, p. 10–100; in this context, the following oeuvres have to be referred to: *Andersson, Ingvar,* Sveriges historia, Stockholm 7th edition 1961, p. 338 et seq.; *Carlsson, Sten,* Svensk historia, Vol. 2, edited by Carlsson, V. S. u. J. Rosén, J., Stockholm, Second edition 1961, p. 356 et seq., p. 383–389.

[344] Following the information by the *Handbuch* (1184) every man older than 25, who was a civil servant or owner of a land with a value of at least 300 *Rigsbankdaler* in silver, who has been living for at least three years on the land. This corresponds to 45 % of the male population. Excluded from the right to vote have been women (although this has not been mentioned explicitly in the constitution) and persons without land, namely Samen and Roma ("travelers").

[345] Again relying on the *Handbuch*: Persons entitled to vote elected electors, which gave their vote on the members of the *Storting*. Later on, this procedure led to a real monopoly of power of the estate of the civil servants who have ruled the country earlier in the name of the King, then in the name of the nation. The passive electoral right was attached to an age at least 30 years and a residence in Norway for at least 10 years.

[346] In contrast to many similar constitutions, the proposal to exclude all the civil servants, who could be dismissed by the King without justification or judgment was not accepted.

3.6.4 Monarchical Right to Veto on Constitutional Amendments and the Smooth Transition to the Parliamentary System

Under the special circumstance that the *Storting* only met every three years, the separation between the legislature and the executive power could not consequently be assured. Since certain problems could not wait long for a solution, the King received the power to adopt preliminary regulations that were only to endure until the next session of the *Storting*, but which de facto developed to a legislation of the King (§ 17). Furthermore, the legislation was to be restricted in order to assure the balance between the powers. Therefore, a suspensive veto of the King was introduced. The King could refuse the adoption of a bill in two consecutive legislative sessions, but not after the third. Thus, the *Storting* could only prevail over the King after the expiration of six years.

In 1821, King Carl Johan tried to enforce an absolute veto on legislative procedures of the *Storting*. Furthermore, he wanted to establish a new nobility in Norway after the *Storting* had abolished the former nobility in 1821. He wanted to determine the President of the *Storting* and he wished to be able to dismiss civil servants at his liking. Moreover, he desired to be able to enact provisions by means of decrees between the parliamentary sessions[347] of the *Storting* and to weaken the Imperial Court. As court for impeachment, the Imperial Court was an effective means of the Storting to require the King to adhere to the constitution through the medium of ministerial responsibility by requiring ministers to refuse their participation concerning unconstitutional matters. The *Storting* rejected all demands of the King. The same happened in 1824. After that, Carl Johan put his plans concerning the absolute right of veto on ice. He repeated his demands until his death and the *Storting* rejected them every time.

§ 110 of the Constitution of November provided that the amendment decision had to be published and could only come into effect, if it has been passed in two successive sessions of the *Storting* between which an election had taken place. Nothing was said about the right to veto constitutional amendments. This question concerned the foundation of the state theory. The relationship between King and *Storting* was interpreted as a contract about the exercise of state authority, which could not be modified one-sidedly.[348] Despite the fact that the statutory term appears not to have been fully clear in the constitutional deliberations of early 1814, the ranking of the Fundamental Law as *lex superior* which bound both the King and the people's representation was explicitly provided for in the constitution. It stated that potential future alterations may only take the form of modifications not altering the 'spirit' of the law. According to the November Fundamental Law (§ 112), resolutions on constitutional changes had to be consented twice by a two-thirds majority of the *Storting*. A new election had to take place in the meantime. For a long time,

[347] The Storting is said to be convened only every three years.

[348] *Holmøyvik*, *Eirik,* Maktfordeling og 1814, Bergen 2012, p. 499.

it was unclear[349] if a royal veto in the case of alterations to the Fundamental Law corresponded with the 'spirit' of the constitution.

The discussion about a royal veto on constitutional modifications arose from the controversial participation of the state councillors (ministers) on the sessions of the *Storting*. On March 17, 1880, the *Storting* accepted the proposal of the members of the *Storting* from the year 1877 concerning the constitutional regulation 'about the participation of the state councillors (ministers) on the sessions of the *Storting*' with 33 to 20 votes. The same proposal had already been accepted by the parliament four times, but was never sanctioned by the king, "because the resolution did not comply with the spirit of the constitution [§ 112]". Since the sanction had been repeatedly refused, this was not about the original topic of the participation of the state councillors anymore, but about the royal right to sanction. On June 9, 1880, the *Storting* decided that no royal veto on constitutional modifications was to exist. That is the reason why on August 30, 1880 a royal resolution was made "to ask for a remark of the highest academic authority in the country on the field of jurisprudence, namely the faculty of law".[350]

All in all, the faculty commission consisting of Fredrik Peter Brandt[351]/Torkel Halvorsen Aschehong[352]/Ludvig Maribo Benjamin Aubert[353]/Marcus Pløen

[349] Legal opinion, p. XVIII: "The Norwegian Fundamental Law does not contain a paragraph that explicitly states that the King has a veto when it comes to alterations". The legal opinion of the Faculty of Law of Christiania on the right of sanction of the King during alterations of the Fundamental Law, emitted due to the royal resolution of August 30, 1880, dated March 23, 1881, translated [into German] and edited by Jonas, Emil, Leipzig/Oberhausen 1881, in the following refered to as legal opinion, page number.

[350] Legal opinion, ibid. (n. 349), p. V.

[351] *Brandt*, *Fredrik Peter,* (1825–1891) Norwegian Professor of Law and Legal History at the Kongelige Frederiks Universitet of Kristiania (Oslo). He was the prominent author of the dissenting opinion 1880, cf. *Maurer*, *Konrad*, Der Verfassungskampf in Norwegen, München, 1882, p. 8; *Stang, Fredrik*, Art. 'Aubert, Fredrik', in: Bull, Edv./Krogvig, Anders/Gran, Gerhard (ed.), Norsk Biografisk Leksikon, vol. II, Kristiania, 1925, Forlagt AV H. Aschehoug & Co. (W. Nygaard), p. 138–140; (*E.H.*) *Abs. T.*, Art. 'Brandt, Frederik Peter', in: Anden Udgave (ed.), Salmonsens konversationsleksikon, vol. III, Kopenhagen, 1915, p. 854.

[352] *Aschehoug*, *Torkel Halvorsen,* (1822–1909) Norwegian legal counse, historian and politician. cf. *Worm-Müller, Jac S.*, Art. 'Aschehoug, Torkel', in: Bull, Edv./Krogvig, Anders/Gran, Ferhard (ed.), Norsk Biografisk Leksikon, Vol. I, Kristiania (=Oslo) 1923, p. 275–287.

[353] *Aubert*, *Ludvig Maribo Benjamin,* (1838–1896) Norwegian lawyer, law professor and politician. He is deemed to be the main author of the faculty's assessment cf. Fredrik Stang, Art. 'Aubert, Ludvig', in: Krogvig, Edv. Bull-Anders/Gran, Gerhard (ed.), Norsk Biografisk Leksikon, vol. I, Kristiania (=Oslo) 1923, p. 314–316.

Ingstad[354]/Bernhard Getz[355]/Ebbe Carsten Hornemann Hertzberg[356] agreed on the result 'that according to the Constitution, the King has the right of an absolute veto concerning modifications of the constitution',[357] and more detailed in the summary at the end of the report: 'that this constitutional rule of law has its complete entitlement in the principle of the Constitution, that the sovereignty of the state powers shall be equitably shared, as well as the nature of the things does not allow one state power to expand its own constitutional power (*Botmäßigkeit*) or limit the other one; that this rule has been the basis while elaborating our current constitution; – and that this constitutional practice has gained a recognition which avoids every doubt'.[358]

Frederik Peter Brand derives the precedence of constitution from § 112 of the Norwegian Constitution: 'That the constitution cannot be subject to the common rule of the state powers. […] Because neither the *Storting*, nor the King or both together hold the full sovereignty, they hold it just to the extent that the constitution provides them with it alone or together'.[359] His other line of argumentation in the dissenting vote is the qualitative difference between constitutional modifications and amendments in simple laws.[360]

The differentiation between constituent sovereignty and representation of the people during the legislative procedure also dominates the argumentation of the majority vote, which outlines the basically absolute character of the royal veto and the exceptional suspensive nature in relation to §§ 76–79: 'The principle of the sov-

[354] *Ingstad*, *Marcus Pløen* (1837–1918) Norwegian law professor at the Kongelige Frederiks Universitet von Kristiania (Oslo) after studies in Roman Law at Leipzig and Zurich. cf. Lindvik, Adolf, Art. 'Ingstad', in: Jansen, Einar (ed.), Norsk Biografisk Leksikon, vol. VI, Oslo 1934, p. 525.

[355] *Getz*, *Bernhard*, (1850–1901) influental Norwegian lawyer, former mayor of Oslo and legal reformer ("lavreformator"). Cf. *Augdahl, Per*, Art. 'Getz, Bernhard', in: Bull, Edv./Jansen, Einar (ed.), Norsk Biografisk Leksikon, vol. IV, Kristiania (=Oslo) 1924, p. 430–437; (*E.H.*) *Abs. T.*, Art. Getz, Bernhard', in: Anden, Udgave (ed.), Salmonsens konversationsleksikon, vol. IX, Kopenhagen 1919, p. 652–654.

[356] *Hertzberg*, *Ebbe Carsten Hornemann,* (1847–1912) Norwegian legal historian, professor of statistics and state economy, cf.: *Koht, Halvdan,* Art. 'Hertzberg, Ebbe', in: Jansen, Einar (ed.), Norsk Biografisk Leksikon; vol. VI, Oslo 1934, p. 55–60.

[357] Paraphrased transl. of the German version ed. by Emil Jonas, Leipzig/Oberhausen 1882, p. 1. Translations are done by Ulrike Müßig.

[358] Paraphrased transl., ibid. (n. 357), p. 81. The majority vote (the royal veto is absolute, and has just a suspensive effect on decisions, which are in harmony with §§ 76–79 of the constitution) deviates in its justification from the minority vote of Professor Brand (p. 84). Brand assumes a suspensive nature of the royal veto in the Norwegian constitution and only considers the veto to be absolute on modifications of the constitution".

[359] And the quotation continues: "The Storthing is empowered by the constitution to modify it if the experiences have made it necessary and if "it does not contradict the principles, but only modifies individual regulations that do not change the spirit" – and the constitution does not mention a royal right to sanction such decisions of the Storthing […]" Legal opinion, ibid. (n. 349), p. 84.

[360] "For Frederik Peter Brand, modifications of the constitution itself are, due to a legal concept, an issue of the constitution itself, separated from the legislative or the regular executive power" and form "a group of constitutional functions of their own" and are to be treated "due to its own nature and spirit, which can be found in the entire constitution" Legal opinion, ibid. (n. 349), p. 85.

ereignty of the people has been adhered to by giving "the people" the power to modify the constitution. In this case, the sovereignty is performed in the name of the people either by an original meeting of the voters in association with an elected revision council (like in the Dutch constitution of 1758, as in the draft of Adler-Falke), or in a special, therefore elected constitutional assembly with previous decisions of the national representation, hence a revision council and a specifically therefore elected constitutional assembly. […][361] Nothing would have been more unfamiliar for the constitutional law at that time than giving the right to the general national representation to modify, even by just one single resolution, the constitution finitely and to widen its power towards the people or another state power; such a right would contradict the theories, which were based on the principle of the distribution of power which has paid homage at the time and mistrusted the tendency of the single state powers to widen their competences'.[362]

What is important for the faculty report is the justification of the royal right of sanction concerning constitutional modifications with the principle of the constituent sovereignty: 'Our constitution is one of those which exists because of the principle of sovereignty of the people. It has been given by the people on behalf of representatives at a time when the people have completely obtained the state power and had the right to define the constitution".[363] The principle of sovereignty of the people has only been expressed in the constitution by the existence of the constitution, it has not reserved the right for the people to exercise their sovereignty at constitutional modifications in the future, as it has been regulated in other constitutions from that time. Even though the constitution has limited the authority of the common state power concerning the constitution – where the principles count – the power to make modifications has not been given to the people. The relationship of the constitution to the principle of sovereignty had as result that for any exercise of the whole state power – like modifications of the constitution […] – an interaction of both powers which only hold the sovereignty together is necessary. This power to modify the constitution has been in some older constitutions, as already mentioned,

[361] The missing quotation in the main text body complements: "Then following the French Constitution of 1791 and the subsequent constitutions of 1793 and 1795; comparing the North American constitution or a series of resolutions of the national representation which have been passed by a qualified majority and need to be provided with special powers, to determine the modification (especially the Spanish one of 1812). All the constitutions of this time, even if they do not request the sanction of the King, like the Swedish Constitution of 1809 or the Dutch Constitution of 1815 contain other guarantees against rushed modifications of the constitution than our constitution would contain, if the sanction of the King was not necessary." Legal opinion, ibid. (n. 349), p. 28 et seq.

[362] Legal opinion, ibid. (n. 349), p. 28 et seq. On the difference between constitutional revision and legislation also compare legal opinion, p. 35: "Fundamental Law provisions often relate to the general laws as the more important to the less important". Again legal opinion, p. 37: "The power to create new provisions of the fundamental law is different from the legislative power. The fundamental law itself strictly differs between the Fundamental Law (state form) and the law. Where it aims at making a provision that is applicable to both, the Fundamental Law regularly names both side by side; see §§ 9, 17, 30 and 44".

[363] Legal opinion, ibid. (n. 349), p. 43 et seq.

originally reserved to the sovereignty of the people, namely by a representation which differs from the common representation. Our constitution does not do this. It is fully corresponding to the ideas of the time when the full sovereignty has been transferred to the common state powers, which have to comply with the modifications.'.[364]

In the Court of Impeachment decision of 1884,[365] it was held – against the analyzed Faculty's report – that the King's right to suspensively veto ordinary legislation (thereby postponing them §§ 78, 79) did not include the right to veto constitutional amendments. The background of the impeachment procedure was the constitutional amendment proposal calling for a constitutional obligation for government ministers to appear before the *Storting*. The King's veto against the precursors of parliamentarism was rejected by the Court of Impeachment in 1884, cancelling any executive veto against constitutional amendments. This led to the appointment of a new government, headed by the majority party's leader, Johan Sverdrup, as prime minister. According to Inger-Johanna Sand and her substantive contribution 'The Norwegian Constitution and Its Multiple Codes', the monarch gradually embraced the majority parties' impact on the appointment of the prime minister and the government, thus reflecting the Stortinghet's political formation. The decision was still, for some years, the King's, though his surroundings and the King himself got ready to accept "closer operational relations between the executive and the legislative branches, the government and Stortinghet, respectively."[366] However, besides the formal constitutional changes, an informal change of the political system was also taking place by means of which the Norwegian Constitution of May 17, 1814 was de facto altered. These informal alterations enabled a smooth transition from the separation of powers of the nineteenth century to today's parliamentary system in which the King no longer plays a political role.[367]

The parliamentary system was introduced in Norway in 1884 without an alteration of the constitution as a consequence of a highly disputed verdict in a trial on the removal from office. Article 12 of the Constitution provides that the King is to appoint a government to his liking. However, since the 1880s, the King has never appointed a government that has not been supported by the parliamentary majority.

[364] Legal opinion, ibid. (n. 349), p. 45 et seq.

[365] *Sand, Inger-Johanne,* The Norwegian Constitution and its multiple codes: Expressions of historical and political change, in: Writing democracy, ibid. (n. 323), p. 141.

[366] *Sand*, ibid. (n. 365), p. 142.

[367] Another key element of the Norwegian constitutional law, judicial review, is not provided for in the constitution. Yet, already since the 1820s, the Høyesterett, the highest Norwegian court, has suspended the application of statutes violating the constitution. The Norwegian system of judicial review is thus presumably the oldest in Europe, it is only the United States (where judicial review is also not fixed in the constitution) that are able to look back to an even longer tradition.

3.7 *The Lack of the Notion Sovereignty in the* French Charte Constitutionnelle *1814*

In contrast to the particular model of the Norwegian *Grunnloven*, the French *Charte Constitutionelle* (1814) illustrated the successful continental model for the link of constitutional binding between monarchical sovereignty and divine reign in early European constitutionalism. The monarch by the Grace of God[368] Louis XVIII [369] appears as constituent sovereign.[370] The king one-sidedly imposed the *Charte Constitutionnelle*, and its label as a charter (*charte*) tried to create the impression that it was a royal privilege. The *Charte* avoids the term sovereignty; the reference to authority (*l'autorité tout entière*) [371] in the preamble permits the subsumption of prerevolutionary positions of power of the doctrine of divine right.[372] Due to his absolute power,[373] the monarch is the sole bearer of executive power (Art. 13), of the exclusive right of legislative initiative (Art. 45, 46),[374] and of jurisdiction (Art. 57).[375] Nevertheless, the restoration of the French monarchy in 1814 was,

[368] The opening words of the preamble of the Charte Constitutionnelle: *Louis, par la grâce de Dieu, roi de France et de Navarre, à tous ceux qui ces présentes verront, salut*. (cited in: Hélie, Faustin-Adolphe, Les Constitutions de la France, ouvrage contenant outre les constitutions, les principales lois relatives au culte, à la magistrature, aux élections, à la liberté de la presse, de réunion et d'association, à l'organisation des départements et des communes, avec un commentaire, 3. fascicule : Le premier empire et la restauration, Paris 1878, p. 885).

[369] Governing 1814–1824.

[370] Preamble of the *Charte Constitutionnelle:* "*En même temps que nous reconnaissions qu'une constitution libre et monarchique devait remplir l'attente de l'Europe éclairée, nous avons dû nous souvenir aussi que notre premier devoir envers nos peuples était de conserver, pour leur propre intérêt, les droits et les prérogatives de notre couronne … qu'ainsi, lorsque la sagesse des rois s'accorde librement avec le voeu des peuples, une charte constitutionelle peut être de longue durée*" (cited in: Hélire, ibid. (n. 368), p. 885).

[371] Preamble: "*Nous avons considéré que, bien que l'autorité tout entière résidât en France dans la personne du Roi, nos prédécesseurs n'avaient point hésité à en modifier l'exercice, suivant la différence des temps*". (cited accordingly to Constitutions qui ont régi la France depuis 1789 jusqu'à l'élection de M. Grévy comme Président de la République, conférées entre elles et annotées par Louis Tripier deuxième édition augmentée d'un supplément, Paris 1879, p. 232).

[372] For detailed references compare *Seif*, *Ulrike,* Einleitung (Introduction), in: Willoweit/Seif, (=Müßig), ibid. (n. 32), p. XXVI.

[373] Preamble of the *Charte Constitutionnelle*: Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 481, "*Nous avons considéré que, bien que l'autorité tout entière résidât en France dans la personne du* Roi, [...]" (cited in: Hélie, ibid. (n. 368), p. 885).

[374] *"La personne du roi est inviolable et sacrée. Ses ministres sont responsables. Au roi seul appartient la puissance exécutive."* (cited in: Hélie, ibid. (n. 368), p. 887).

[375] Art. 45: La Chambre se partage en bureaux pour discuter les projets qui lui ont été présentés de la part du Roi. Art. 46: Aucun amendement ne peut être fait à une loi, s'il n'a été proposé ou consenti par le Roi, et s'il n'a été renvoyé et discuté dans les bureaux (cited in: Hélie, ibid. (n. 368), p. 888).

despite the objectives of the *Charte* to 'preserve the rights and amenities of our crown in its entire purity',[376] not able to whisk off the outcomes of the revolution. Above all, the renewed monarchy held on to the Napoleonic administrative system with the appointment of all office bearers by the centre. Furthermore, the *Charte* seeks the support of the previous political elite. The new (Napoleonic) nobility is assured of the renunciation of the sale of the national property, of the guarantee of national debt and retention of its titles (Art. 9, 70, 71). Legislation and sovereignty in budgetary matters rested with a bicameral legislative after English models with a chamber of pairs and a chamber of deputies. The *charte constitutionnelle* 1814 was imitated numerously until 1830, including its intrinsic systematic incompatibilities (between the monarchical principle and parliament's legislative and budgetary rights).[377]

4 The Undecisiveness Between Popular and Monarchical Sovereignty in the Constitutional Movement After the French July Revolution 1830

4.1 The Constitutional Movement After the French July Revolution 1830

The revision plans of the chambers of representatives and Pairs for the Charte of 1814 were out-dated by the revolutionary protest against the July ordonnances of Charles X (1757–1836). Among the substantial changes under the French July revolution 1830 were the right of legislative initiative of both chambers (Art. 15), the reorganisation of the chamber of Pairs as assembly of notables (Art. 23), the primacy of law for regulations (Art. 13) and the deletion of the ordinances 'for national security' (Art. 14 in the end of the 1814 Charte).[378] The strong monarchical executive of 1814 persisted in 1830 (Art. 12). The ministers were appointed and dismissed by the monarch and took over legal responsibility for the lawfulness of monarchical acts of government by contrasignature (Art. 12). This legal responsibility was sanctioned by ministerial impeachment. A political responsibility of the ministers was not envisaged.

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[376] Cited in accordance to Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 483.

[377] *Müßig, Ulrike,* Konflikt und Verfassung, in: *idem* (ed.), Konstitutionalismus und Verfassungskonflikt, Tübingen 2006.

[378] "*et fait les règlements et ordonnances nécessaires pour l'exécution des lois et la sûreté de l'État*" cited in accordance to *Willoweit/Seif*, (=Müßig), ibid. (n. 32), p. 486.

The *Charte Constitutionelle* 1830 was not imposed, but rather agreed upon between the *chambres assemblées* and the monarch.[379] The appointment of Louis-Philippe as 'King of the French',[380] who took an oath on the *Charte* on August 9, 1830 in front of the *chambres assemblées*,[381] communicated the monarchy as *pouvoir constitué.* The July revolutionaries, coming from the middle and lower classes were kept away from the chambers by the relatively high electoral census, saving the status quo of the propertied bourgeoisie and the property-owning nobility (*juste milieu*).

In the February revolution of 1848 the civil-liberal modified constitutional monarchy was replaced with a radical-democratic (second) republic, though a shift of power in favour of the parliament did not happen, because there was no firmly structured party system.[382] The *députés fonctionnaires* were under the influence of Louis-Philippe and middle and lower classes followers of republican groups did not cope with the high electoral census.[383] In the interaction between Monarch and the representation of the people, consensus was the prevailing aim of the constitutions after 1830. Instead of the old dualism of Monarch and the assembly of the estates, it rather mattered that the monarch acted in accordance with the people's representations. This principle of concensus was specified by the necessary approval of the monarch to the laws, passed by the people's representation, or by the monarchical right to veto against legal proposals, be it definite or just dilatory.

Hence, an acting of the Monarch in accordance with the majority of the people's representation could result in the constitutional practice, particularly since the establishment of a trusting relationship was politically smart due to the budgetary right of the people's representations. The necessity of balancing the monarchical government and the other constitutional powers was formulated by François Pierre Guillaume Guizot, Prime Minister of the July monarchy 1840–1848: *"Le devoir de cette personne royale … c'est de ne gouverner que d'accord avec les autres grands pouvoirs publics…"*.[384] Consequently, an ongoing need for negotiation about the limitations of monarchical competencies about the responsibility of the ministers and about the treatment of the chambers in order to obtain the majority, originates

[379] The proposal made by a representative to submit the amended constitution to a referendum was declined by the other representatives.

[380] Instead of King of France (*Bastid*, *Paul,* Les institutions politiques de la monarchie parlamentaire française (1814–1848), Paris 1954, p. 114 et seq., p. 118 et seq.; *Collingham*, *Hugh A.C.*, The July Monarchy. A Political History of France 1830–1848, London etc. 1988, p. 26 et seq.).

[381] The coronation oath was not taken in the coronation cathedrals of Reims or Notre Dame de Paris on the Bible, but before the chambers on the Constitution.

[382] There were only the two big movements of the liberal conservative "*résistance*" (*Centre droit* and *Doctrinaires*) and the reform-liberal "*mouvement*" (*Centre gauche* and *Gauche dynastique*).

[383] *Chevallier, Jean-Jacques/Conac, Gérard,* Histoire des institutions et des régimes politiques de la France de 1789 à nos jours, 8. éd., Paris 1991, p. 177 et seq.; *Jardin, André/Tudesq*, *André-Jean,* La France des notables, Vol. 1: L'èvolution générale 1815–1848 (Nouvelle histoire de la France contemporaine 6), Paris 1973, p. 140 et seq., 146 et seq.; *Ponteil*, *Félix,* Les institutions de la France de 1814 à 1870, Paris 1966, p. 151 et seq.

[384] Cited *Ponteil*, *Félix*, Les institutions de la France de 1814 à 1870, Paris 1966, p. 151.

according to Guizot's argumentation: *"Quelque limitées que soient les attributions de la royauté, quelque complète que soit la responsabilité de ses ministres, ils auront toujours a discuter et à traiter avec la personne royale pour lui faire accepter leurs idées et leurs résolutions, comme ils ont à discuter et à traiter avec les chambres pour y obtenir la majorité.*".[385] Thus, a fluent passage from the constitutional to the parliamentary system can be observed. Evident for this is the understanding of the constitutional practice after 1830/1831 as shaped in French research as *'parlementarisme à double confiance'*[386]: the government of the monarch is admittedly formally not bound to the parliamentary majorities, however, their consideration is political normality. The fluent passage from the constitutional to the parliamentary system could be accelerated, curbed or stopped.

This *Charte* 1830 led to a Europe-wide constitutional movement, and due to the connection of the constitutional movement with national struggles for freedom, the people and its representation were invigorated as constitutional factors. Like in France, a parliament took over the task of drafting a constitution in Belgium after the Revolution of 1830: The constituent assembly, dominated by the liberal-catholic union, is *pouvoir constituant*, the newly-to-be-appointed King is just taking on the role as '*pouvoir constitué*'. Contrary to the French model, the Belgian Constitution is not negotiated with the monarch, but freely proclaimed by a national congress in its own right.[387]

[385] Cited *Ponteil*, ibid. (n. 384), p. 151.

[386] Duverger refers to a "*parlamentarisme orléaniste*", marked by parliamentarism "*à double confiance*", which he saw realized not only in France in the time of 1830–1848, but also in the Great Britain of the eighteenth century until 1834 (*Duverger*, *Maurice,* Le système politique français. Droit constitutionnel et systèmes politiques. 19. éd., Paris 1986, p. 24 et seq., p. 85).

[387] "In the name of the Belgian people," the National Congress concludes the beginning of the Belgian Constitution (Gosewinkel, Dieter/Masing, Johannes (ed.), Die Verfassungen in Europa 1789–1949 (The Constitutions in Europe 1789–1949), Munich 2006, p. 1307).

4.2 Belgian Constitution of 1831

The Belgian national congress, elected by a mixed capital and educational census,[388] passed the new constitution on February 7, 1831,[389] largely based on the draft constitution, revised by Nothomb and Devaux.[390] Though the national congress could decide on the constitutional question as *pouvoir constituant*, it had to take numerous diplomatic questions into account when looking for a suitable candidate to the throne.[391] The election of Prince Leopold von Saxony-Coburg-Gotha[392] as 'Leopold I, King of the Belgians'[393] guaranteed London's support for the Belgian independence.

National sovereignty (Art. 25) [394] was compatible with the constituted monarchy (Art. 78: 'The King has no other power, but the one, which the constitution and other laws made in accordance with the constitution formally attribute').[395] The King had the executive power at his disposal 'according to the regulations of the constitution' (Art. 29). With regard to the monarchical power of legal ordinances, the hierarchy of law and regulation, as established in the French July-Charte, was inserted word by word into the Belgian constitution (Art. 67).[396] This added the non-applicability of non-legal ordinances and regulations reserved by Courts (Art. 107).[397] The legislative power was mutually due to the King and the two Chambers, the House of Representatives and the Senate as an elected regional representation of

[388] Only 46.000 of about 4 Mio. Belgians had the right to vote, within which the liberal-catholic union with aristocrat big landowners, educated bourgeoisie, and clergy had a strong majority.

[389] *Gilissen*, *John,* Die belgische Verfassung von 1831 – ihr Ursprung und ihr Einfluß (The Belgian Constitution of 1831 – its origin and influence), in: Conze, Werner (ed.), Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert (Articles concerning the German and Belgian constitutional history of the nineteenth century), Stuttgart 1967, p. 42 et seq. *Witte, Els/ Craeybeckx, Jan*, La Belgique politique de 1830 à nos jours : les tensions d'une démocratie bourgeoise, traduit du néerlandais par Serge Govaert, Brussels 1987, p. 9 et seq.; about the importance of the French revolution at the discussions of the national congress: *Thielemanns*, *Marie-Rose,* Image de la Révolution française dans les discussions pour l'adaption de la constitution belge du 7 février 1831, in : Vovelle, Michel (ed.), L'image de la Revolution française 2, Paris etc. 1990, p. 1015 et seq.

[390] 108 of the 131 articles of the constitution were adopted literally – while the newly integrated provisions did not address the fundamental structure of the governmental structure leaving aside the mode of appointment of the senate and the relationship between church and state.

[391] The decision for Louis-Philippe's son failed on London's veto, whose support for the Belgian Independence depended on the ensuring of balance of power.

[392] Related to the British royal house by marriage and uncle of the later Queen Victoria.

[393] In the publication formula of Belgian laws, the monarchic title is still called "King of the Belgians".

[394] All powers are coming from the nation. They are exercised as stipulated in the constitution. Cit. in: Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 513.

[395] Cit. in: Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 522.

[396] Cit. in: Willoweit/Seif, (=Müßig), ibid. (n. 32), p. 520.

[397] Addressing Art. 107 of the Belgian constitution in depth: *Errera*, *Paul,* Das Staatsrecht des Königreichs Belgien (The state law of the Belgian Kingdom), Tübingen 1909, p. 137 et seq.

notables. Each of them had the right of legislative initiative (Art. 27 S. 1). The judiciary was exercised by independent courts. A detailed catalogue of fundamental rights, inspired by the French role model of 1830 amended the equality of the Belgians before the law. The rights of the Belgians (Second Title of the Constitution) particularly entailed the freedom of assembly and of association (Art. 19, 20).

The monarch dismissed 'his ministers' just like in the French July monarchy (Art. 65). According to the role model of Art. 12 of the 1830 French Charte, the responsibility of the ministers remained undefined in the text of the constitution (Art. 65 at the end). The ministerial responsibility by countersignature (Art. 64) was normatively just regulated as judicial responsibility, which could lead to ministerial impeachment (Art. 90). Neither the ministerial responsibility nor the parliamentary exertion of influence on the formation of government was envisaged in the text of the Belgian constitution, but they developed on this basis in constitutional practice. Even though the Belgian constitutional system is often termed parliamentary monarchy in the literature since its early days,[398] it has to be differentiated. There were phases of the stronger and weaker influence of the monarch on the formation of government. In the early years after the revolution, Leopold I held a comprehensive right of political participation also regarding the formation of government, so that the ministers needed 'double trust' in the sense of the French connotation of *parlementarisme à double confiance*. The King also had great influence regarding the organisation of governmental policy. The period of Unionism[399] with loose party structures and uncertain majorities left ample space for the king, especially as he was the central figure to secure the Belgian independence because of his personal contacts with England, Germany, and France. Thus, the Belgian King projected national independence. Leopold made sure that the ministers had a majority in the Chambers, but then also needed his trust. The new King naturally led the cabinet himself, and the governmental programme, which had to be realised, had to be discussed with him and possibly changed in his view. He had the "*cabinet du roi*" at his disposal for his personal policy planning, an own brain trust, independent of the parliament and not envisaged in the constitution.[400]

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[398] *Mirkine-Guetzévitch*, *Boris,* 1830 dans l'évolution constitutionelle de l'Europe, in: Revue d'histoire moderne 6, 1931, p. 248 et seq.; *Fusilier*, *Raymond*, Les monarchies parlementaires. Études sur les systèmes de gouvernement (Suède, Norvège, Danemark, Belgique, Pays-Bas, Luxembourg), Paris 1960, p. 360 et seq.; *Stengers*, *Jean,* L'action du Roi en Belgique depuis 1831, Pouvoir et influence. Essai de typologie des modes d'action du Roi, Paris inter alia 1992, p. 28 et seq., 34 et seq.

[399] The Union of Liberals and Catholics, already formed in the opposition against the Dutch, also persisted in the new parliament after 1831.

[400] *Witte, Els/Craeybeckx, Jan,* La Belgique politique de 1830 à nos jours: les tensions d'une démocratie bourgeoise, traduit du néerlandais par Serge Govaert, Brussels 1987, p. 24 et seq., p. 44 et seq.; *Stengers*, ibid. (n. 398), p. 47 et seq.; *idem*, Evolution historique de la royauté en Belgique: modèle ou imitation de l'évolution européene, in: Res publica 1991, p. 88 et seq.; *Noiret*, *Serge,* Political Parties and the Political System in Belgium before Federalism, 1830–1980, in: EHQ 24 (1994), p. 87 et seq.

The government did not obtain a more independent position until the end of Unionism in 1846/57 permitting the formation of homogenous cabinets, born by one political belief. But even at this time, a great independent scope of action regarding foreign policy remained with the King. His son Leopold II, who succeded him to the throne in 1865, led the cabinet in fundamental questions himself, and he managed to dismiss a cabinet, entrusted with parliamentary confidence, thrice, even though the parliamentary system was firmly structured, and thereby enforced his own beliefs. In the year of 1871, the King tried at first to edge individual ministers out of the government, and when he was not successful, he dismissed the whole moderately-clerical cabinet of Anethan. A few years later, he brought down the strictly clerical government of Malou, which had altered the radically liberal school law of 1876 after the narrow election victory of 1884. Even though the King sanctioned the auditing law, he achieved the resignation of the government, which was superseded by the moderately-clerical cabinet of Beernaert, so that the aspired moderation was finally achieved by the King. In the year of 1907, a whole government had to step down because of a conflict with the monarch, when the cabinet of Smet de Naeyer was not any longer able to prevail against the stubborn old monarch in the conflict on the drafting of the annexation treaty of Congo by the Belgian state. The revocations under Leopold II indicate, that the dualistic character partially continued and was regarded as a fundamental principle in the field of foreign policy and the military.

4.3 Parliamentarism in England

Under the impression of the French and Belgian revolutions, a storm of petitions burst forth in favour of the extension of the right to vote in England. In accordance with the English fondness for the historical legitimation of the Common Law, the revolutionary ideals of 1789 were disparaged to be 'without any taste for reality or for any image or representation of virtue'.[401] The Parliament of Westminster claimed the representation of the nation. The population however was not represented (*real representation*), but only the spheres of interest of the high nobility (*virtual representation*), landowning aristocracy and bourgeois merchants of the autonomous *City of London*. Corruptive exertion of influence was a common occurrence. George III. (reg. 1760–1820) based his government upon the representatives, who were loyal to the royal interests, the so-called *King's Friends*. On the other hand, the economic centres of the industrial revolution in Manchester, Birmingham, Sheffield, with their explosively growing population, were not represented.

As early as 1780, claims for a reform of Parliament arose, also due to the loss of reputation of the crown after the defeat in North America and the empowerment of the cabinet government of the younger Pitt (reg. 1783–1802; 1804–1806) due to the

[401] *Burke*, *Edmund,* Reflections on the Revolution in France, ed. with an introduction and notes by Leslie George Mitchell, Oxford 1999, p. 117.

broad Tory-majority in Parliament. The worker's movement, taking hold since the end of the eighteenth century, claimed to pursue these reform movements. By doing that, it met the aligned interests of the ascending middle class. At the same time, the royal succession of George IV (rul. 1820–1830) to William IV (rul. 1830–1837) opened the way for new elections, which brought a majority of liberal-minded Whigs into the House of Commons, who were ready for reforms. After several oppositions of the House of Lords in the years of 1831 and 1832, the *Representation of the People Act* 1832[402] obtained the Lord's approval. This franchise reform, perceived as revolutionary by contemporaries, reorganised the constituencies and broadened the right to vote. Considering the high census, the moderate amplification did not amount to democratisation,[403] all the more so as this was far beyond the highly aristocratic mindscape of the Whiggist reformers. However, the slight changes to the constituencies and the right to vote sufficed to aggravate manipulations of the electoral and parliamentary votes. Neither the electoral nor the parliamentary voting results were any longer foreseeable. The parliamentary majorities were thus withdrawn from the defaults of the Crown and its related high nobility.

Additionally, the successful enforcement of the reform proposal against Crown and House of Lords strengthened the political weight of the House of Commons substantially. The self-consciousness of the House of Commons grew at that, due to which it challenged the Crown's prerogative regarding the formation of government. Wilhelm IV fell out with the government of Melbourne over the question of the right religious policy of the Anglican Church in Ireland, and dismissed the cabinet, which had the genuine support of the parliamentary majority, just because it had lost his trust. The successive government of Peel was, despite the dissolution of parliament and new elections, not able to obtain a stable majority in the Lower House. After several defeats in vote, Robert Peel resigned in 1835. The King now saw himself forced to appoint Melbourne again, even though he did not have his trust, but solely the trust of the parliament.

Thus, the principle of the parliamentary responsibility of the government was established. This practical case was raised to be a constitutional principle by the Lower Chamber in 1841: The motion of no-confidence, which was called for by Peel as leader of the opposition against the minority cabinet of Melbourne, installed by Queen Victoria, included the statement, that the resumption of an office without the necessary trust of the Lower Chamber is against the spirit of the constitution: 'That her Majesty's Ministers do not sufficiently possess the Confidence of the House of Commons, to enable them to carry through the House measures which they deem of essential importance to the public welfare: and that their continuance in office, under such circumstances, is at variance with the spirit of the Constitution.'[404]

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[402] 2 & 3 Will. IV, c. 45.

[403] In relation to 14 million inhabitants, about 7 % of the adult male population was eligible to vote. Only the well-off middle classes profited from the reform while smaller craftsmen and naturally also wageworkers were still denied the right to vote.

[404] Confidence in the Ministry-Sir Robert Peel's motion, that the Ministry have lost the confidence of the House of Commons-Debate, in: Hansards Parliamentary Debates, third series (commencing

Even though this motion of no-confidence passed only with the majority of one vote,[405] Victoria felt compelled, after the dissolution of parliament and new elections, to entrust Robert Peel with the formation of a government, who did not have her trust, but rather only the trust of the Lower Chamber.[406]

Even though the Crown's national power to integrate reinvigorated as a political factor of power in the quarrel of the parties on the grain tariff from 1846 onwards,[407] the loss of the royal right of prerogative to form a certain government, was irreversible. When the second great electoral reform of 1867[408] favoured a stronger structuring of the political organisations, and thus allowed for a stable majority situation in the *House of Commons*, the only remaining option for the crown was to appoint the head of the majority party of the Lower Chamber as Prime Minister.

5 Octroi of the Statuto Albertino 1848

5.1 The Octroi of the Piedmontese Statuto Albertino *and the Lack of an Italian Parliamentary Assembly*

Although the sensational news of the Neapolitan constitution of February 10, 1848 quickly found their way to Turin, Carlo Alberto (1831 to 1849 King of Sardinia and Duke of Savoy) himself did not go beyond the already conceded reforms at the beginning of February 1848, he rather considered abdicating on February 2. It was the note of his minister that the abdication would lead to a political destabilization and thereby may provoke an Austrian military intervention in Piedmont that caused the King to reconsider the Statuto – as was the constitutional name in the Savoy tradition. Driven by the upheavals in Genoa on February 2, which demanded a constitution comparable to the Neapolitan example of February 10, 1848 and driven by the City Council of Turin that was dominated by liberal noblemen and which demanded from the King the introduction of a representative system and the creation of a citizens' militia, the constitutional promise of February 8, 1848 (*Proclama dell'8 febbraio*) was issued. It fixed as foundations of the statuto the collective exercise of the legislative power, the mutual legislative initiative or the sole executive

with the Accession of William IV. 4° Victoriae, 1841), Vol LVIII, London 1841, p. 802. Compare also http://www.hansard-archive.parliament.uk.

[405] 312 yes und 311 no-votes.

[406] *Kleinhenz*, *Roland*, Königtum und parlamentarische Vertrauensfrage in England 1689–1841 (Kingdom and the parliamentary vote of confidence), Berlin 1991, p. 19 et seq., p. 79 et seq., p. 90 et seq., p. 148 et seq.; *Cox*, *Gary W.,* The Development of Collective Responsibility in the United Kingdom, Parliamentary History 13 (1994), p. 32 et seq., p. 46 et seq.

[407] The Queen therefore found herself in the role of the mediator between the parties and she succeeded in keeping certain personalities from obtaining ministerial posts.

[408] Increase of the number of those eligible to vote from about 9 % to about 16 % of the adult population.

power of the King as well as the reduction of the price for salt in order to calm down the explosive political-social situation, "*a benefizio principalmente delle classi più povere*".[409]

The Piedmontese Statuto Albertino of March 4, 1848 is not an oeuvre of a parliamentary assembly.[410] The octroi of the constitutional text by Carlo Alberto rather points to the similarities with the development conditions of the French Charte of 1814, the constitutions of Bavaria and Baden 1818 or the Prussian Constitution 1848/50 – 'in order … to protect the sovereigny dignity, royal authority and peace throughout the land.'[411] The Savoy ruler granted it as holder of the sole *pouvoir constituant* and did not even have to adhere to an already existing constitutional draft of a Parliament. In anxiety of 'French constitutional imports'[412] the Piedmontese King made every effort to impose the constitution since – as Duke Giacinto Borelli (1783–1860),[413] author of the Statuto, puts it – "*il faut la donner, non se laisser imposer*".[414] With his strict monarchical-conservative attitude, Borelli called for the introduction of a constitution inspired by the French Charte 1814 in order to preserve his beloved Savoy royal house. In the light of the feared triple danger of the young constitutional monarchy – a Republican revolutionary export of France in combination with the supporters of Mazzini at home and the military intervention of the Metternich Austria – the moderate-liberal movement in the Savoy Kingdom was ready to accept the constitution and not to demand further reform despite its not very progressive character.

The act of granting the fundamental law (*statuto fondamentale* in the wording of the constitutional promise) was communicated to maintain the *plenitudo potestatis* of the absolute monarchy, to rationalize the old royal sacredness.[415] Therefore the preamble declares the participation of the Council (*Consiglio di conferenza*) as a

[409] Art. 14, constitutional promise of February 8, 1848 cit. according to Dippel, Horst (ed.) Constitutions of the World from the late 18th Century to the Middle of the 19th Century, Vol. 10, Berlin/New York 2010, p. 246.

[410] As it was the case in revolutionary France, in Spain, or in Belgium.

[411] English paraphrase by *Mecca, Giuseppe* (his essay in this volume, note 29) on the minutes, cit. according to *Ciaurro Luigi*, Lo Statuto albertino illustrato dai lavori preparatori, Rome 1996, p. 118.

[412] Like the September Parliament 1791 having used its *pouvoir constituant* for the normative fixation of the political pre-eminence of itself.

[413] For Borelli's sympathies with the effectiveness of the napoleonic adminstration cf. *Giuseppe Locorotondo*, Art. Borelli, Giacinto, in: Dizionario biografico degli Italiani. Vol. 12, Rome 1970 p. 536 ff: Borelli is seen as a "*uomo fermo e severo*" and to him are attributed "*simpatie per il governo forte ed autorevole e nostalgie per la 'regolare amministrazione Napoleonica*", p. 537.

[414] Cit. According to *Locorotondo,* ibid. (n. 413), p. 539. Cit. According to *Emilio Crosa*, La statuto del 1848 e l'opera del ministro Borelli, Nueva Antologia, June 1915, p. 540 f. Cf. Borelli at the Consiglia di conferenza from 3rd Feb. 1848: cit. according Archivio di Stato Torino, Miscillanea Quirinale, Consiglia di conferenza 1848, m. 6, n. 3, Bl. 62.

[415] *Lacchè*, *Luigi,* Le carte ottriate, La teoria dell'octroi e le esperienze costituzionali nell'Europa post-rivoluzionaria, Giornale di storia costituzionale 18 (2009), 229 et seq.; *Mecca, Giuseppe*, here, note 31.

simple gathering of an opinion. According to art. 2, the state is based on the 'monarchical constitutional foundation', the legislative power is 'exercised' (art. 3) both by the King and the two chambers.[416] 'The person of the King is holy and inviolable' (art. 4). The oath of the Senators and Representatives contained first the loyalty towards the King and then towards the constitution and the laws (art. 49). Compared to the French discourse before 1791 (see above III., 1.-3.), the Italian coincidence of the monarchical sovereignty in its absoluteness with the granting of the Albertine Statute[417] was meant to avoid any scope for the differentiation between *pouvoir constituant* and *pouvoir constitué*.

5.2 *Italian costituzione flessibile Under the* Statuto Albertino

Even though the Statuto Albertino, 1848 decreed for Piedmont-Sardinia, is not a product of a constitutional assembly but of royal counselors (*Consiglio di conferenza*), its extension 1860 to the kingdom of Italy can be evaluated under the tertium comparationis 'Juridification by Constitution': The parliament act 1861, complementing the monarchical legitimacy by God's grace with the nation's consent,[418] is a remarkable example for constitutionalisation by constitutional practice: *costituzione flessible*. Despite its octroyed start, the monarchical-constitutional Statuto Albertino made the development of a dominating Parliament possible.[419]

The first prerequisite for the evolution of a dominating Parliament was the loss of the head start by the Savoy leaders in the wars of 1848/49. After the outburst of a revolution in the Kingdom of (Austrian) Lombardy-Venetia Carlo Alberto declared war on Austria on March 23, 1848, on the advice of Camillo Benso of Cavour (1810–1861). After initial successes (Battle of Goito, May 30, 1848), the Piedmontese monarch suffered a defeat in the battle at Custozza near Lake Garda against Feldmarshall Josef Radetzky and concluded a ceasefire agreement on August 9, 1848. Venetia proclaimed the Republic. After an upheaval in the Toscana, another war took place in which Charles Albert at Novara was beaten by Radetzky on March 23, 1849. He thereupon decided to abdicate in favour of his son Victor Emmanuel II (1849–1878). The latter concluded the peace of Milan in August 1849. Venetia capitulated and Austria kept Lombardy-Venetia and thereby the hegemony in North-Western Italy.

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[416] For the unsolved incompatibilites of the monarchical constitutionalism cf. *Müßig, Ulrike*, Konflikt und Verfassung, in: idem (ed.), *Konstitutionalismus und Verfassungskonflikt*, Tübingen 2006, p. 9 et seq.

[417] Cf. *Mecca, Giuseppe*, here, at p. 159.

[418] *Ghisalberti, Carlo,* Storia costituzionale d'Italia 1848–1948, 8th ed., Roma *et al.* 2012 ; *Riall, Lucy,* The Italian Risorgimento. State, society, and national unification, London *et al.* 1994; *idem*, The History of Italy from Napoleon to Nation-State, Basingstoke/New York 2009.

[419] The evolution of a dominating Parliament in the constitutional practice under a monarchical-constitutional text regime is exactly what ReConFort is interested in.

The military weakness of the monarchic executive resulted in his dependency on the Piedmontese-Sardinian parliament. In 1852, Cavour then Prime Minister of Sardinia-Piedmont,[420] began his liberal reconstruction of the Albertine monarchy by his free trade policy, judicial reform and church legislation (free church in a free state). His program for national unification under the leadership of Sardinia-Piedmont comprised the renouncement of a revolutionary upheaval and a self-liberation in the sense of Mazzini, the reduction of absolutism by means of liberal evolution and the freeing of Italy with foreign help.[421] With the foundation of the national association (*societa nazionale italiana*) in 1857, he wanted to unite all patriots against Austria while drawing attention to the Italian question by participating in the Crimean war in 1855/56. By making use of the assassination attempt against Napoleon III by the nationalist Felice Orsini, Cavour received the French commitment to military support against Austria for the creation of an Italian state federation chaired by the Pope. After victories of the allies against Austria in Magenta and Solferino, the Peace of Zurich passed over Italian interest in 1859,[422] making Cavour resign in protest (January 1860). In the Treaty of Turin of 1860, France won Nizza and Savoy against Lombardy. In Southern Italy, the Mazzini supporters organized upheavals by the democratic Action Party (Crispi 1819–1901) and – after the failure of the insurgency of Palermo in 1860 – received the support of the Red Shirts under Giuseppe Garibaldo (1807–1882), which were to land in Marsala. The March of the Thousand (*mille*, May-September 1860) through Sicily and Calabria was to lead to the capitulation of the Papal troops in Ancona (September 1860) and the fall of the Bourbons (1861 capitulation of Gaeta). With plebiscites in Umbria, Marche and Sicily in favour of the affiliation to Sardinia, the unification process ended.

5.3 On the Extension of the Statuto Albertino 1848 to Italy 1860: From the Octroi to the Referenda

During this development towards an Italian national unification, the question of the *pouvoir constituant* was asked anew. A new *octroi* by the Piedmont King was inconceivable given the strong position that parliament had acquired in constitutional practice. The agreement with a constituant assembly, too, was not discussed in Italy. The fears of the moderate-liberal politicians surrounding Cavour against the dynamics of the supporters of Mazzini[423] and Garibaldi in a constituant assembly were far too big.

[420] Victor Emmanuel had to appoint Cavout due to the parliamentary majority of his *destra storica*.

[421] He is one of the editor of the naming journal "*Il Risorgimento* (1847)".

[422] Contrary to French promises Venetia remained Austrian and the Lombardy came to France.

[423] Cf. Mazzini's claim for a constituant assembly at Giuseppe Mecca's paper, p. 202, note 155.

The plebiscites were instruments to confirm monarchical choices through the 'will of the nation'. Though less than 2 % of the population had the right to vote for the first pan-italian parliament,[424] the plebiscites served as 'a posteriori legitimisation'.[425] The Piedmontese liberal architects of the Italian unification instrumentalized the general consent of the people with regard to the unification process as a source of legitimation for the ruling class in Parliament ("*doppio livello di legittimazione*"[426]; "*dual level of legitimation*"[427]). This was only possible by the re-interpretation of representative government (*monarchia rappresentativa*) in the light of the omnipotence of Parliament as Giuseppe Mecca has pointed out in this volume.[428] The extension of the Statuto Albertino to Italy 1860 under the 'absolute, unlimited, undefined [authority of the Parliament]'[429] saved the Savoy Monarchy from being converted into a *pouvoir constitué*: Vittorio Emanuele II was proclaimed by the first Parliament of Italy, opened at Turin on 18th February 1861, to be the 'King of Italy' by the grace of God and the will of the nation (*per grazia di Dio, per volontà della nazione*).[430] Adhering strictly to the Savoy state tradition, however, it preserved the previous name and did not change it in favor of the new Kingdom.

The overall Italian *parlamento subalpino* also declared Rome the capital in 1861, but it was still to take until 1871 when Rome became the capital by pushing back the Papal supremacy. In the Peace of Vienna of 1866, Italy received Venetia, while Southern Tyrol (Trentino) and Istria became the core territory of the *Irredenta*. With the September-Convention between Piedmont and France in 1864, the French troops were withdrawn for the protection of the Church State.

[424] *Ghisalberti*, *Carlo,* Storia costituzionale d'Italia 1848–1948, 4th ed. Rome a.o. 1992, vol. I, p. 438 et seq.; *Riall*, *Lucy*, The Italian Risorgimento. State, society, and national unification. London a.o. 1994, p. 70 et seq.; *Ballini, Pier Luigi*; Le elezioni nella storia d'Italia dall'Unità al fascismo. Profilo storico-statistico, Bologna 1988 p. 43 ff.

[425] *Mecca*, ibid. (n. 417), p. 196.

[426] *Lacchè*, *Luigi,* L' opinione pubblica nazionale e l' appello al popolo: figure e campi di tensione, in: Burocracia, poder político y justicia, Libro-homenaje de amigos del profesor José María García Marín, Madrid 2015, p. 467.

[427] *Mecca*, ibid. (n. 417), p. 196.

[428] *Mecca*, ibid. (n. 417), p. 206 et seq.

[429] *Broglio*, *Emilio*, Delle forme parlamentari, Brescia 1865, p. 103: "l'autorità del Parlamento è assoluta, illimitata, indefinita; non riconosce altro confine als suo potere che le leggi fisiche e morali di natura."

[430] Cit. according to *Ghisalberti*, ibid. (n. 418), p. 101.

6 Improvised Parliamentarism in the Frankfurt National Assembly

The ideologisation of a western kind of constitutional monarchy[431] in Friedrich Julius Stahl's work "*Das monarchische Prinzip*" (The Monarchical Principle, 1845)[432] seems to be still manifest in the cemented state-of-the-art[433] perceiving the Frankfurt draft constitution as a specifically German form of constitutionalism, whose dualism between monarch and popular representation is said to have precluded a parliamentary governmental practice. Such an ex post-explanation of the St. Paul's church constitution (*Paulskirchenverfassung*) 1848/49 separates the constitutional text from societal context, political practice and constitutional interpretation and tends to misunderstand German constitutionalism after 1849 as an irreversible one-way road via the Prussian constitutional conflict to the exaggeration of the executive after 1933. Having in mind both 'improvised parliamentarism' in the National Assembly, as well as the debates about ministerial accountability in June 1848, such a static opposition between constitutionalism and parliamentarism is not plausible, especially when considering the fundamental politicisation of the March Revolution.

The constitutional text carefully regulated the relationship between government and parliament through several provisions: The imperial right to convene and postpone the *Reichstag* (§§ 79, 104, 106, 109) is precisely fixed. It is only the *Volkshaus*

[431] *Bluntschli, Johann Caspar* in his "Allgemeines Staatsrecht" (General Constitutional Law) (Vol. I, 3. Aufl., Munich 1863, Chap. 21) calls the constitutional monarchy a Westeuropean type of constitution. Paul Laband's "Staatsrecht des Kaiserreichs" then intensifies the polarisation between constitutional and parliamentary constitutions (Vol. 2, 2. Aufl., Leipzig 1913, 6. Chapter § 54). In 1911, the historian Otto Hintze (Das monarchische Prinzip und die konstitutionelle Verfassung, in: Staat und Verfassung: Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte, 3rd edition, Göttingen 1970, p. 359) hails the constitutional monarchy to be "*das eigenartige preußisch-deutsche System*" ("the curious Prussian-German system").

[432] Das monarchische Prinzip, eine staatsrechtlich-politische Abhandlung (The monarchical principle, a constitutional-political dissertation), Heidelberg 1845, p. IV, Reprint Berlin 1926, p. 5.

[433] *Huber*, *Böckenförde* and *Kühne* conceive a specific German type of constitutionalism in the draft of the Paulskirchen assembly which rendered impossible parliamentary government politics due to its dualism of monarchy and popular representation (*Huber*, *Ernst Rudolf,* Deutsche Verfassungsgeschichte seit 1789 (German Constitutional History since 1789), Vol. 3, 2. ed., Stuttgart/Berlin/Köln 1978, p. 3 et seq.; *idem*, Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung (The Empire as era of constitutional development), in: Josef Isensee/Paul Kirchhof (ed.), Handbuch des Staatsrechts, Volume 1, 3rd edition, Heidelberg 2003, § 4 Rdnr. 52 et seq.; *Böckenförde*, *Ernst-Wolfgang,* Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert (The German type of constitutional monarchy), in: Conze, Werner (ed.), Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert, Stuttgart 1967, p. 70 et seq. *Kühne*, *Jörg-Detlef,* Die Reichsverfassung der Paulskirche, Vorbild und Verwirklichung im späteren deutschen Rechtsleben (The Paulskirchen Constitution of the Reich, role model and realisation in the German legal life to come) 2nd edition, Neuwied and others more 1998). Concerning the present state of research compare *Fehrenbach*, *Elisabeth,* Verfassungsstaat und Nationsbildung 1815–1871 (Constitutional State and nation building 1815–1871), Munich 1992, p. 71–75 and 75–85.

(§§ 79, 106) that could be dissolved. The Emperor's veto concerning ordinary laws (§ 101 Abs. 2) and those altering the constitution (§ 196 Abs. 3) was only suspensive in nature and could be overcome by the *Reichstag*. Interior matters (Executive Commitee, Membership, Standing Orders) could be regulated by the first and second chamber without any need for the participation of the executive (§§ 110–116). Beyond this, the text of the constitution left open many questions, in particular the question of the political-parliamentary accountability of the imperial government. The analysis of the public debate provides profound arguments that the consensus between the monarchical government and the parliamentary majority dominated political thinking in the National Assembly.[434] This can even be confirmed by the constitutional deliberations on ministerial accountability in June 1848. They reveal a consensus between left, 'old' and constitutional liberals about a political ministerial accountability, even if the text of the constitution framed it merely judicially. So, for the representative Friedrich, of the Casino faction, an accountable Ministry could 'not govern one day long without the majority of the National Assembly'.[435] Accountability to parliament was thought of not as a problem to be clearly regulated by law, but as a question of political style. So in the explanatory statement of the draft for the law 'Concerning the Accountability of the Imperial Ministers', the expectation was expressed, that a minister 'against whom a vote of no confidence is pronounced, or whose behaviour becomes the object of constant complaint from sides of the house, will as a man of honour, resign'.[436] The political practice in the National Assembly corresponded to this. As long as the parliament was capable of functioning, the composition of the Imperial Ministry would be adapted to fit the changing majorities in the Frankfurt Parliament. The establishment of a minority cabinet in June 1849 provoked protest. The political linking of the government to the parliamentary majority was ultimately fostered by the compatibility between a mandate from the representative house and the assumption of ministerial office (§ 123).[437] Together with the role modelling of the Belgian constitution in the Frankfurt consultations, the mentioned topics of the German debate indicate the readiness for a parliamentary governmental practice on the basis of the Imperial Constitution,[438] had it come into force.

The possibility for a de facto parliamentary system of government on the basis of a 'constitutionalist' constitution corresponds with the openness of the 'Sovereignty of the Nation',[439] which Heinrich von Gagern's addressed to inaugurate the

[434] *Grimm, Dieter,* Gewaltengefüge, Konfliktpotential und Reichsgericht, in: Müßig (ed.), Konstitutionalismus und Verfassungskonflikt, p. 257–267 (261).

[435] *Wigard*, Stenographischer Bericht I [1848], p. 370 et seq.

[436] *Hassler*, Verhandlungen der Reichsversammlung II: Berichte [1848, ND 1984], p. 145.

[437] Such a combination was excluded by the *Reichsverfassung* 1871 from the very beginning.

[438] *Botzenhart*, *Manfred*, Die Parlamentarismusmodelle der deutschen Parteien 1848/49, in: Ritter, G.A. (ed.), Gesellschaft, Parlament und Regierung, 1974, p. 121 et seq.; *Langewiesche, Dieter,* Die Anfänge der deutschen Parteien – Partei, Fraktion und Verein in der Revolution 1848/49, 1983, p. 17 et seq.

[439] *Wigard*, Stenographischer Bericht I [1848], p. 17.

Paulskirchen-assembly. Such a formula implies the unique and unlimited *pouvoir constituant* of the National Assembly and the claim of the nation to self-government.[440] This avowal to the singular and unlimited *pouvoir constituant* of a not existing German nation does not make sense as a programmatic claim to self-government, but reflects the indecisiveness of the post-kantian liberalism between monarchical and popular sovereignty. It avoided the open commitment to popular sovereignty and thus the conflict with the monarchy, enabling a consensual framework between imperial government and parliamentary majority.

7 Summary and Outlook

Juridification by Constitution seems to be a suitable *tertium comparationis* for the comparative research of ReConFort on national sovereignty, and also adequate for the next key passage: the precedence of constitution.[441] The research on this next topos for ReConFort (Vol. II) leads back to the origins of the constitutional semantics at the end of the eighteenth century. The terms *Verfassung*, *Konstitution* and constitution were already in use, denoting the political condition of a state. Originally, as shaped by historical development and natural features; later, in its formation through basic laws and sovereign treaties. Besides this political terminology, medieval jurisprudence coined the maxim in the commentary to Isodore's "*lex est constitutio scripta*", which linked *constitutio* with positive law. The American federal constitution of 1787 and the French revolutionary constitution of 1791 tied together the threads of the political and legal argumentation: the revolutionary caesuras in relation with the British motherland and the *Ancien Régime* necessitated a new legal fixture of the political order. A constitution as such became the legal text to fix the political order as a legal order. As a consequence, *juridification* = *normativity* marked

[440] The concept of national sovereignty was discussed in German newspapers and political writings in the wake of the Paulskirchen-assembly, i. e. in the Neue Berliner Zeitung, No. 62, Aug 30, 1848, p. 925, l. 17 et seq: "*Zuvörderst ist ein […] Volk noch nicht von selbst ein Staat, sondern es muss die Kraft haben, ihn zu schaffen […], wie es keine Volkssouverainetät giebt, wo das Volk nicht wirklich mit dem Bewußtsein derselben Willen und Tat verbindet*." (First, a […] people does not constitute a state by itself, but it must have the strength to build it […], just like there is no national sovereignty where the people do not think and act on it.). Compare also Der Freund der Wahrheit und des deutschen Volkes, No. 73, Nov 7, 1848, p. 300, l. 15 et seq. "*Das Volk ist und bleibt souverän, sein Selbstbestimmungsrecht ist unveräußerlich […]*" (The people is and remains sovereign, its right of self-determination is inalienable […]) and *von Hermann*, *Friedrich,* Die Reichsverfassung und die Grundrechte, Zur Orientierung bei der Eröffnung des bayerischen Landtags im September 1849, p. 3 et seq.: "Sie [die Nationalversammlung] ruhte nicht auf der rohen Auffassung der Volks-Souveränität, […] sondern sie ist hervorgegangen aus dem Zusammenwirken aller Organe der Staatsgewalt und der Gesetzgebung […] oder dem Willen der Nation" (It [the national assembly] was not based on the coarse concept of sovereignty of the people […], but it resulted from the cooperation of all bodies of state authority and legislation […] or the will of the nation.) Here, national sovereignty is distinguished from the sovereignty of the people, which is seen in a negative way.

[441] Cf. the outline of the whole ReConFort programme above.

the new constitutional semantics. The heart of the modern normative constitutional concept is the positivity of the constitutional law as one unified law, to be the measure for the legality of all other law. As foundation for all law and legislation, the constitution is the primary norm. This conceptual differentiation of constitution and other kinds of law is not only of interest for lawyers, but also for legal historians. Its appearance is documented by the American protagonists using the antagonism 'unconstitutional – constitutional' to justify their legal right of resistance against an illegally-acting Westminster Parliament and to articulate their claim of being more true to the constitution than the British themselves.[442] These intentions of the American protagonists exemplify the communicative power of constitution-formation.

And last but not least, ReConFort's historical approach to the mutual constitution-forming impact of communication may have an actual impact. It is congruent with the political postulates on EU-level following the disaster of the failed referenda on the 'Treaty establishing a Constitution for Europe' in 2005. On request of the European Council,[443] the Commission developed "Plan D for Democracy, Dialogue and Discussion" in 2005.[444] In its first White Paper on a European Communication Policy (2006), the Commission gave voice to the problem that the "public sphere" in Europe is largely a national sphere.[445] In the Joint Declaration "Communicating Europe in Partnership" (2008), the European Parliament, the European Council and the Commission identify the interplay between constitutional process and public debate as a crucial prerequisite for democratic participation in the Union.[446] According to the programme "Europe for Citizens to promote active European citizenship" (2007–2013), European democracy presupposes a European citizenry in the sense of a European society.[447] The current refugees' movement towards Europe and the British challenge to the European Integration make it more necessary than ever before to elaborate the historically coined constitutional values Europe stands for.

[442] *Stourzh*, *Gerald*, Constitution: Changing Meanings of the Term from the Early Seventeenth to the late Eighteenth Century, in: Ball, Terence/Pocock, John G.A. (ed.), Conceptual Change and the Constitution, Lawrance 1988, p. 35–54, p. 35, 45 et seq.

[443] Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty establishing a Constitution for Europe (European Council, June 16 and 17, 2005), D/05/3, 18th June 2005, Section 4.

[444] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'The Commission's contribution to the period of reflection and beyond: Plan D for Democracy, Dialogue and Debate', COM (2005) 494, 13/10/2005.

[445] White Paper on a European Communication Policy, COM (2006) 35, 01/02/2006.

[446] Joint declaration of the European Parliament, the Council and the Commission 'Communicating Europe in Partnership' signed on October 22, 2008, OJ 2009/C 13/02 20.1.2009, p. 3.

[447] Decision No 1904/2006/EC of the European Parliament and of the Council on December 12, 2006 (recitals 4 and 9).

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National Sovereignty in the Belgian Constitution of 1831. On the Meaning(s) of Article 25

Brecht Deseure

Abstract Article 25 of the Belgian Constitution of 1831 specifies that all powers emanate from the nation, but fails to define who or what the nation is. This chapter aims at reconstructing the underdetermined meaning of national sovereignty by looking into a wide array of sources concerning the genesis and reception of the Belgian Constitution. It argues, firstly, that 'nation' and 'King' were conceptually differentiated notions, revealing a concern on the part of the Belgian National Congress to substitute the popular principle for the monarchical one. By vesting the origin of sovereignty exclusively in the nation, it relegated the monarch to the position of a constituted power. Secondly, it refutes the widely accepted definition of national sovereignty as the counterpart of popular sovereignty. The debates of the constituent assembly prove that the antithesis between the concepts 'nation' and 'people', supposedly originating in two rivalling political-theoretical traditions, is a false one. Not only were both terms used as synonyms, the Congress delegates themselves plainly proclaimed the sovereignty of the people. However, this did not imply the establishment of universal suffrage, since political participation was limited to the propertied classes. The revolutionary press generally endorsed the popular principle, too, without necessarily agreeing to the form it was given in practice. The legitimacy of the National Congress's claim to speak in the name of the people was challenged both by the conservative press, which rejected the sovereignty of the people, and by the radical newspapers, which considered popular sovereignty invalidated by the instatement of census suffrage.

Keywords Belgian Constitution • Belgian Revolution • Belgian National Congress • National sovereignty • Popular sovereignty • King • Nation

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B. Deseure (✉)
University of Passau and Vrije Universiteit Brussel, Passau, Germany
e-mail: brecht.deseure@uni-passau.de; brecht.deseure@vub.ac.be

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1 Introduction

On 27 October 1830 the Constitutional Commission, instated by the Belgian Provisional Government, finished its activities.[1] The creation of the Commission had been announced on 6 October, 2 days after the Provisional Government officially proclaimed Belgian independence.[2] The Commission's main task was to draw up a draft Constitution for the new country, which would then be discussed by the National Congress, Belgium's constituent assembly.[3] The publication of the draft Constitution immediately sparked up public discussions about the basic features of the new state.[4] F. Grenier, an otherwise unknown author, was only one of many Belgian citizens who took to the press to express his views on the draft Constitution. In his *Examen du projet de constitution de la Belgique et idées sur une nouvelle forme de gouvernement* ("Examination of the draft Constitution for Belgium and ideas for a new form of government"), Grenier staged a passionate defence for the sovereignty of the nation:

> Je conçois la possibilité de rendre permanente, dans notre patrie, l'action de la souveraineté nationale, de manière à ne plus revoir les effroyables désordres des bouleversemens politiques. Nous savons maintenant que toute monarchie tempérée est un conflit presque continuel des deux éléments de puissance souveraine. L'institution du Congrès et le simple raisonnement font comprendre que la souveraineté est déplacée quand elle est ailleurs que dans la nation, et que toute division quelconque dans la souveraineté est la source des commotions sociales, toujours si dangereuses.[5]

The battle cry of the Belgian revolutionaries was 'liberty for everyone in everything'.[6] According to Grenier, this implied the victory of the democratic principle over the monarchical one. The nation no longer wished to share sovereignty with a monarchial power, he contended, because the perpetual combat between the two elements undermined the order of the state. Therefore, only the delegates of the sovereign nation, united in the Chamber of Representatives, were to make laws under the new Constitution. Grenier criticised the draft Constitution for being

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[1] Van den Steene, *De Belgische grondwetscommissie (oktober–november 1830): tekst van haar notulen en ontstaan van de Belgische grondwet*, 40.

[2] *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 5, p. 13, 10/10/1830.

[3] Huyttens, *Discussions,* vol. 4, p. 43–49.

[4] Magits, *De Volksraad en de opstelling van de Belgische grondwet,* 352; Nothomb, *Essai historique et politique sur la révolution belge*, 98.

[5] "I can imagine a possibility to render the operation of national sovereignty in our fatherland permanent, in such a way as to avoid the terrible disorders of political upheaval. We now know that every tempered monarchy is an almost continuous conflict between the two elements of supreme power. The institution of the Congress as well as simple reasoning learn that sovereignty is out of place when it is anywhere else than in the nation, and that every division of sovereignty is the source of dangerous social commotion". Grenier, *Examen du projet de constitution de la Belgique et idées sur une nouvelle forme de gouvernement.*

[6] Hymans, *Le Congrès national de 1830 et la Constitution de 1831*; Nothomb, *Essai*. Demoulin attributes this motto to De Lamennais. Demoulin, Le courant libéral à l'époque de royaume des Pays-Bas et dans la Révolution de 1830, 32.

ambiguous on this point, and for including a Senate which, being composed of hereditary members, would infringe on the free exercise of power by the sovereign nation. He especially warned against the vague definition of 'nation' in the draft Constitution, which allowed for diverging readings:

> L'art. 4 du projet déclare que tous les pouvoirs (ceux politiques sans doute), émanent de la nation. Prenant pour accordé que les pouvoirs ne sont rien que par elle; c'est à elle qu'il appartient de les instituer. La souveraineté nationale doit rester au-dessus de tout pouvoir ordinaire; mais il faut que la constitution définisse ce que c'est que la nation. Il importe de savoir quels sont les individus qui forment la nation. Les termes qui n'ont pas de valeur convenue obscurcissent les idées, enfantent les aberrations. L'art. 8o dit que les députés représentent la nation, ce qui autorise de croire que le sénat ne la représente pas. L'art. 79 dit que les députés sont élus directement par les citoyens; le projet ne dit pas ce que c'est qu'un citoyen.[7]

As it turned out, Grenier cried in the wilderness. Article 4 of the draft Constitution was literally copied in the final Belgian Constitution of 1831. Up to this day, article 25 of the Constitution reads: "Tous les pouvoirs émanent de la nation. Ils sont exercés de la manière établie par la Constitution" ("All the powers emanate from the nation. They are exercised in the manner established by the Constitution"). Grenier was right about the ambiguousness of the formulation. It is therefore all the more striking that the National Congress adopted the article virtually unanimously and without debate, on 3 January 1831. One single dissenting voice was heard, as the priest Vander Linden pleaded the cause of divine sovereignty as the only legitimate source of law.[8] He received no support from the benches, not even from the side of the ultramontane Catholic delegates. The formulation of article 25 apparently suited the needs of all parties in the great compromise that was being forged between Catholic and liberal elites over the new Constitution.

As the Constitution was not preceded by a preamble specifying its great underlying principles, the concept of national sovereignty remained as vague as Grenier had feared. The underdetermined meaning of national sovereignty in the Belgian Constitution of 1831 is the subject of this contribution. The meaning(s) of the term will be reconstructed by looking into a variety of sources that shed light on the context of the constitutional formation process as well as on its reception. Central to this investigation are the debates of the National Congress, which allow to gauge the ideas and intentions of the members of the Belgian constituent assembly. On the reception side, evidence is provided by pamphlet literature, newspapers and constitutional manuals. The first section of this chapter goes into the meaning of national sovereignty from the point of view of the balance of power between King and

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[7] "Article 4 of the draft declares that all the powers (the political ones, that probably is) emanate from the nation. Taking for granted that the powers are nothing without her, it is she who is entitled to instate them. National sovereignty must remain superior to ordinary power; but the Constitution must define what the nation is. It is important to know which individuals make up the nation. Terms without a fixed meaning obscure the ideas and produce aberrations. Article 80 states that the delegates represent the nation, suggesting that the Senate does not. Article 79 states that the delegates are directly elected by the citizens; the draft does not specify what a citizen is".

[8] Huyttens, *Discussions,* vol. 2, p. 14, 03/01/1831. See also: Magits, *De Volksraad,* 8.

Parliament. In the second section, the implications of article 25 for the distinction between national and popular sovereignty will be examined. Finally, the findings of the first two sections will be tested against the evidence provided by the debates in contemporary society as reflected by the press. The focus will be on the understanding of national sovereignty at the time of the Constitution's genesis, i.e. on the intended meaning of the term. Its application in practice by successive generations of Belgian politicians falls outside of this chapter's scope.

2 Parliament Versus King

2.1 Parliament as the Sole Representative of the Nation

Like most of the articles of the Belgian Constitution, article 25 was not newly invented.[9] Article 3 of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789, which served as preamble to the French Constitution of 1791, reads: "Le principe de toute souveraineté réside essentiellement dans la nation".[10] Similar formulations figure in the Cádiz Constitution of 1812, the Portuguese Constitution of 1822 and the declaration of the First Chamber of the French Parliament of 1830.[11] In their haste to confection of a draft Constitution for the new country, the members of the Constitutional Commission did not care for originality.[12] The Commission's president, Etienne de Gerlache, commented:

> On a choisi dans les constitutions existantes, et particulièrement dans la charte française actuelle, les dispositions qui ont paru s'approprier le mieux à notre pays; et on y en a ajouté beaucoup d'autres qui sont désirées par les meilleurs publicistes européens. (…) Il ne renferme rien ou presque rien de nouveau; et c'est ce qui en fait, selon moi, le mérite. Il ne faut rien donner à l'aventure quand il s'agit des institutions d'un pays. Et personne de nous n'a été assez osé pour improviser des nouveautés.[13]

Indeed, 90 % of the articles of the Belgian Constitution of 1831, which closely followed the Commission's draft, were textually copied from older examples.[14] The articles of the draft Constitution mainly derived from the French Constitution of

[9] Descamps, *La mosaïque constitutionnelle. Essai sur les sources du texte de la Constitution belge.*

[10] "The principle of all sovereignty resides essentially in the people".

[11] Harris, European Liberalism in the Nineteenth Century, 506.

[12] Descamps, *La mosaïque constitutionnelle*, 51; Van den Steene, *De grondwetscommissie*, 60.

[13] "From the existing constitutions, and particularly from the present French *Charte*, we have selected those dispositions that seemed best suited to our country; and we have added many others that are desired by the best publicists in Europe. (…) It contains nothing or almost nothing new; and that I consider its merit. When the institutions of a country are concerned, adventures are out of place. And none of us have been daring enough to improvise novelties". Huyttens, *Discussions*, vol. 1, p. 324, 25/11/1830. For De Gerlache, see: Demoulin, Gerlache (Etienne-Constantin, baron de) ; Van den Steene, *De Belgische grondwetscommissie*, 14–16.

[14] Gilissen, Die belgische Verfassung von 1831. Ihr Ursprung und ihr Einfluss, 60.

1791, the *Charte* of 1814/1830 and the Dutch Fundamental Law of 1815. All except one of the Commission members were jurists, who had either been trained at French institutions or at the universities of the Kingdom of the Netherlands, which heavily relied on the French legal tradition.[15] Nonetheless, in its totality, the Belgian Constitution of 1831 offered something new, as contemporaries were quick to realise.[16]

As David Harris remarks, the dropping of the qualification 'essentially' is significant in this respect.[17] The sovereignty of nation acquired a more radical quality, which has often been described as a turn towards a definite break with the monarchical principle.[18] Article 32 of the Constitution, specifying the modalities of the exercise of the sovereign power, points in the same direction: "Les membres des deux Chambres représentent la Nation, et non uniquement la province ou la subdivision de province qui les a nommés".[19] Equally derived from the French Constitution of 1791 (and later copied in its successors of the year III and 1848), this provision had originally been conceived as a turn away from the imperative mandate of the Old Regime Estates General, which was deemed incompatible with the unitary concept of nation consecrated by the French Revolution.[20] Its inclusion in the Belgian Constitution was partly inspired by a desire to stave off a repetition of the fate of the United Belgian Provinces.[21] This short-lived Belgian republic, born from the Brabant Revolt against the rule of the Austrian Emperor Joseph II in 1789-'90, had partly failed due to its excessively regionalist inner structure.[22]

More important to our present goal, the first section of the article unambiguously designated the members of Parliament as the exclusive representatives of the sovereign nation. In another move away from tradition, the Congress discarded both

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[15] Idem, 59; Van den Steene, *De Belgische grondwetscommissie*.

[16] De Smaele, Eclectisch en toch nieuw. De uitvinding van het Belgisch parlement; Descamps, *La mosaïque*, 90; Van den Steene, *De Belgische grondwetscommissie*, 62.

[17] Harris, European Liberalism in the Nineteenth Century, 506.

[18] L'article 25 de la constitution proclame que la souveraineté réside dans la nation elle-même. La nation ne délègue que l'exercice des pouvoirs: de là résulte qu'elle peut révoquer tout mandat donné et que les mandataires ne peuvent gouverner que d'après sa volonté. Une semblable disposition n'est que la négation théorique du principe des théocraties, des monarchies et des aristocraties". Tempels, Droit constitutionnel, 440. Other authors consider it rather as an expression of the compromise, in the sense of their cohabitation, between royal sovereignty of Old Regime origin and popular sovereignty born from the Revolution: Müβig, L'ouverture du mouvement constitutionnel après 1830: à la recherche d'un équilibre entre la souveraineté monarchique et la souveraineté populaire. Pierre Wigny rejects this thesis on the ground of the Nation's initial consent to the monarch's mandate, which can at any time be retracted: Wigny, *Droit constitutionnel. Principe et droit positif*, 222.

[19] "The members of the two chambers represent the Nation, and not only the province or the subdivision of a province which has elected them".

[20] Lefebvre, *The Belgian Constitution of 1831: the Citizen Burgher*, 90; Roels, *Le concept de représentation politique au dix-huitième siècle français*, 122.

[21] Alen, *Treatise on Belgian Constitutional Law*, 12.

[22] Defoort, Particularisme en eenheidsstreven. De Verenigde Nederlandse Staten. For the Brabant Revolt, see: Polasky, *Revolution in Brussels*.

heredity and monarchical prerogative for the appointment of the senators.[23] The members of both chambers were designated via direct election and by the same electorate (art. 47, 53). In this light it cannot be maintained that the conception of sovereignty in the Belgian Constitution bore the marks of the monarchical principle. A constitutional manual published immediately after the proclamation of the Constitution indeed attributed article 32 to 'the triumph of popular sovereignty'.[24]

The structure of the constitutional document mirrors this interpretation. The powers were discussed in the third title, after the territory and the personal liberties. Within this title, the chambers were discussed first, then the King and his ministers and then the judiciary.[25] This order of precedence is especially revealing when compared to the Dutch Fundamental Law of 1815, the first chapter of which was entitled "On the sovereign monarch". A lengthy catalogue of royal prerogatives preceded the chapter on the Estates General, thus exemplifying the underlying monarchical principle.[26] A comparison of the preambles of both documents is just as revealing. The absence of a proper preamble in the Belgian Constitution is remarkable in itself. Nonetheless, the preceding formula in the act of proclamation, which came closest to a preamble, was programmatic: "Au nom du people belge, le Congrès national décrète" ("In the name of the Belgian people, the National Congress decrees"). It could not contrast more with the opening lines of the preamble of the Fundamental Law: "We, William, by the grace of God". Despite not technically being a *charte octroyée,* the Fundamental Law was a typical product of Restoration constitutionalism.[27] The Belgian Constitution of 1831 may rightly be read as a counter-reaction against the political order under William I enshrined by it, or, in Niek van Sas' words, as its "programmatical indictment".[28]

As a result of the frustration of the Belgian opposition with William I's autocratic style of government, the new Constitution expressed the distrust of royal power

[23] De Smaele, Eclectisch en toch nieuw; Stevens, Een belangrijke faze in de wordingsgeschiedenis van de Belgische grondwet: de optie voor een tweekamerstelsel.

[24] N.N., *Manuel constitutionnel de la Belgique contenant le portrait, la vie et la nomination de M. le régent, la Constitution et la loi électorale de la Belgique, expliquées et conférées avec l'ancienne loi fondamentale*, p. 46: "La crainte du despotisme et l'esprit de parti, le triomphe de la souveraineté du peuple, a porté la majorité du Congrès national à cette disposition. En France (Charte, art. 23), la nomination des sénateurs ou des pairs appartient au Roi; leur nombre est illimité; il peut en varier les dignités, les nommes à vie ou les rendre héréditaires, selon sa volonté. Les Belges usent d'une initiative qui peut devenir dangereuse".

[25] Koll, Belgien, 495. The structure of the Belgian Constitution closely followed the French Constitution of 1791: Descamps, *La mosaïque*.

[26] De Gerlache, *Histoire du Royaume des Pays-Bas depuis 1814 jusqu'en 1830*, 316; Koch, Le Roi décide seul/de Koning alleen besluit. Het 'systeem Willem I'; Marteel, *Inventing the Belgian Revolution. Politics and Political Thought in the United Kingdom of the Netherlands (1814-1830)*, 31.

[27] Mirkine-Guetzévitch, L'histoire constitutionnelle comparée, 93.

[28] Marteel, *Inventing the Belgian Revolution*, 411; Van Sas, Het politiek bestel onder koning Willem I, 434.

which prevailed both in the Congress and in public opinion.[29] The keystone of the system of national sovereignty instated in 1831 was article 78: "Le Roi n'a d'autres pouvoirs que ceux que lui attribuent formellement la Constitution et les lois particulières portées en vertu de la Constitution même".[30] Here too, the sovereignty arrangement of the Fundamental Law was reversed so as to become its exact opposite. Under the Fundamental Law, the Estates General had only possessed attributed powers, whereas all residual powers fell to the King. The Belgian Constitution of 1831 created the opposite constellation.[31] A very precise list of royal prerogatives was followed by the formal limitation of royal power by article 78.[32] This highly original prescription marked the end of the monarchical principle.[33] All residual powers were henceforward legally assumed by the representatives of the nation united in Parliament.

The articles 25, 32 and 78 combined in an arrangement where sovereignty no longer worked top down but bottom up. The origin of sovereign power was exclusively popular. Parliament moreover disposed of effective means to control and, if necessary, to blow the whistle over the executive, by the yearly vote over the budget (art. 115).[34] Although sovereignty emanated from the nation, it was constitutionally made sure that the latter did not exercise it in its entirety. Parliamentary despotism was precluded by a clear separation of powers. Or rather, in André Alen's words, a division of powers.[35] The English system of checks and balances, as it had been interpreted by Montesquieu and, above all, by Benjamin Constant, was the great example followed by the members of the Belgian constituent assembly.[36] The three powers were thus organised to influence and counterbalance each other. Therefore, the legislative power was shared between both chambers and the King, who also headed the executive.[37]

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[29] Senelle, Le monarque constitutionnel en Belgique; Van den Steene, *De Belgische grondwetscommissie*, 53.

[30] "The King has no other powers than those formally attributed to him by the Constitutions and by the ordinary laws established under the Constitution".

[31] Lefebvre, *The Belgian Constitution*, 25. Errera stresses the omnipotence of Parliament within the boundaries of the Constitution, providing it with a dominant position vis-à-vis the other powers: "il [le parlement] est virtuellement omnipotent dans les limites constitutionnelles; il occupe une place prépondérante à l'égard des autres pouvoirs de l'Etat. Ainsi en est-il en Belgique. Seule la Constitution restreint sa compétence, par l'établissement des autres pouvoirs et par la garantie des libertés individuelles". Errera, *Traité du droit public belge*, 121.

[32] Errera, *Traité du droit public belge*, 19.

[33] Alen, *Treatise on Belgian Constitutional Law*, 4.

[34] Senelle, Le monarque constitutionnel en Belgique, 55.

[35] Alen, *Treatise on Belgian Constitutional Law*, 9.

[36] De Smaele, Eclectisch en toch nieuw, 410; Lefebvre, *The Belgian Constitution of 1831*; Marteel, *Polemieken over natievorming in het Verenigd Koninkrijk der Nederlanden. Een blik op de intellectuele wortels van het Belgisch nationalisme*, 2012; Van den Steene, *De Belgische grondwetscommissie*, 63.

[37] Vile, *Constitutionalism and the Separation of Powers*, 72.

2.2 Congress as the Sole Constituting Power

Given the genesis of the Belgian Constitution of 1831, anything less than a popular origin of sovereignty would have come as a surprise. Contrary to the Fundamental Law of 1815 and the French Charters of 1814 and 1830, the Belgian Constitution was not the result of a negotiation between a national representation and a monarch. At the time of the National Congress, royal authority had come to an end due to the Belgian Revolution. The executive power was exercised by a collective Provisional Government, whereas the legislative and constituent powers were entirely in the hands of the National Congress. The Congress acted as the sole representative of the Belgian people. It was thus the only and omnipotent *pouvoir constituant*. The formula 'omnipotence of Congress' was literally used in the debates.[38]

The Congress members were designated through direct elections on 3 November 1830.[39] The electorate consisted of about 30,000 male citizens,[40] representing around 0.7 % of the population.[41] Census franchise was combined with capacity franchise, giving the vote to all holders of university degrees (as well as certain intellectual professions) and clerics.[42] Capacity suffrage and direct elections (as opposed to the complicated indirect system under the Kingdom of the Netherlands) were innovations introduced so as to fulfil the Provisional Government's intention to create "the most popular election method possible".[43] Jean-Baptiste Nothomb, secretary to the Constitutional Commission (which was also responsible for the electoral regulations) commented: "Jamais assemblée nationale n'a dérivé plus directement de la masse de la nation".[44]

The Congress members were fully aware of their quality of representatives of the people, in whose name they spoke and acted. President Jean-François Gendebien

[38] Huyttens, *Discussions*, vol. 2, p. 502, 11/02/1831.

[39] *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 12, p. 14, 25/10/1830.

[40] Of the 46,099 citizens who had the right to vote, 28,766 participated in the elections for the Congress: Magits, *De Volksraad,* 408.

[41] Gilissen, *Le régime représentatif en Belgique depuis 1790*, 84; Magits, *De Volksraad*, 408.

[42] Van den Steene, *De Belgische grondwetscommissie*, 30; Magits, *De Volksraad*, 33.

[43] As declared in its proclamation of 6 October 1830: "Elle [la Commission] s'occupera, avant tout autre chose, du nouveau mode d'élection qui sera le plus populaire possible". *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 5, p. 13, 10/10/1830. See also: Van den Steene, *De Belgische grondwetscommissie,* 32. In its proclamation of 10 October, the Provisional Government had announced: "Considérant que le congrès appelé à décider des intérêts de la Belgique doit être une véritable représentation nationale, qu'il est donc nécessaire d'adopter, dès à présent, un système d'élection directe et libérale" ("Considering that the Congress, called upon to decide on the interest of Belgium, must be a true national representation, and that it is thus necessary to adopt, from the present moment on, a direct and liberal electoral system"). *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 7, p. 5, 16/10/1830.

[44] "Never has a national assembly been derived more directly from the mass of the nation". National Archives of Belgium, Papiers Nothomb, 'Note sur la Constitution belge'. See also: Van den Steene, *De Belgische grondwetscommissie*, 32. For Nothomb, see: De Borchgrave, Nothomb (Jean-Baptiste, baron) and Van den Steene, *De Belgische grondwetscommissie*, 25–26.

opened the first session of the Congress in the Palace of the Nation in Brussels on 10 November 1830 with the words: "Le congrès national s'installe au nom du peuple belge".[45] Its decrees, as well as the Constitution, were likewise issued in the name of the Belgian people. The newspaper *Le Courrier* wrote:

> (…) la décision du congrès constituera pour tous une loi souveraine, un arrêt sans appel. C'est au congrès que la nation a délégué l'exercice de ses pleins pouvoirs; tout ce qui émane du congrès est censé émaner de la nation elle-même. Sa décision sera donc obligatoire pour tous et la moindre tentative de violation dirigée contre elle, serait un crime de rébellion contre la loi.[46]

The Congress jealously guarded its position as the only legitimate authority on the grounds of its direct election by the people. It didn't tolerate any other source of power, as its distrustful attitude towards the Provisional Government proves.[47] The issue immediately came to the fore when, at the start of the opening session, delegate De Gerlache proposed to officially inform the Provisional Government of the Congress's reunion and to invite it to attend. De Mûelenaere objected that delegating a group of Congress members to convey this message would degrade the Congress, since, on the grounds of its election by the people, it didn't recognise any authority higher than its own:

> Je crois qu'un tel mode serait contraire à la dignité du congrès nommé directement par le peuple belge qu'il représente. Le congrès se constitue de son propre mouvement et ne paraît pas devoir être installé par aucune autre autorité, puisqu'il ne reconnaît aucun pouvoir constitué supérieur au sien. En conséquence, je suis d'avis que le gouvernement provisoire soit averti par un de messieurs les membres du bureau ou par un des huissiers.[48]

The Provisional Government had been created in the midst of revolutionary confusion to assure public order after the collapse of the Dutch government. It had grown out of the *Commission administrative* that had been established in Brussels on 24 September 1830 to replace the existing urban administration.[49] In a quick

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[45] "The Congress installs itself in the name of the Belgian people". Huyttens, *Discussions*, vol. 1, p. 99, 10/11/1830.

[46] "(…) the Congress's decision will constitute for us a sovereign law, a decree without appeal. The nation has delegated the exercise of its full powers to the Congress. All that emanates from the Congress must be considered to emanate from the nation itself. Its decision will therefore be obligatory for everyone. The slightest attempt of violation against it, will be a crime of rebellion against the law". *Le Courrier* no. 35, 04/02/1831. For *Le Courrier* and its predecessor, the *Courrier des Pays-Bas*, see footnote 211.

[47] Gilissen, Le caractère collégial des premières formes de gouvernement et d'administration de l'Etat Belge (1830-1831), 621.

[48] "I believe that to act in such a way would run counter to the dignity of the Congress, directly elected by the Belgian people which it represents. The Congress constitutes itself and it does so of its own accord. It mustn't seem to have to be installed by any other authority, because it doesn't recognise any other constituted power superior to its own. Consequently, I think that the Provisional Government must be informed by one of the gentlemen of the bureau or by one of the ushers". Huyttens, *Discussions*, vol. 1, p. 100, 10/11/1830.

[49] Gilissen, Le caractère collégial, 611; Huyttens, *Discussions,* vol. 4, p. 2; Witte, *De constructie van België, 1828–1847*, 63.

succession of events, it succeeded in extending its authority over the whole Belgian territory.[50] Within this body, power was in the hand of the five-strong *Comité Central*.[51] It was this organ which, by its proclamation of the 4th of October, declared Belgian independence from the Kingdom of the Netherlands and convened the National Congress.[52] Although it spoke and acted in the name of the Belgian people, the powers of the Provisional Government did not rest on a democratic mandate. It exercised both legislative and executive power, while at the same time intervening in the judiciary sphere by appointing and dismissing magistrates.[53] In one of its first resolutions, it decreed the expiration of its mandate as soon as "worthier hands" would be ready to take over.[54] The underlying justification was that, in the power vacuum between the ending of Dutch authority and the election of the people's representatives, the circumstances had forced it to exercise sovereignty in the name of the Belgian people.[55]

The Congress followed this reasoning. Despite De Mûelenaere's objections, the members of the government were invited into the meeting hall and met with enthusiastic applause. The eldest member, the journalist and revolutionary hero Louis de Potter, delivered a speech in which he justified the coming to power of the Provisional Government by its endeavours to protect the Belgian Revolution as well as by the consent of the people.[56] Bringing to mind the revolt against the Dutch government, he said:

> Le fruit de cette victoire était l'indépendance. Le peuple l'a déclarée par notre organe. Interprète de ses vœux, le gouvernement provisoire vous a appelés, messieurs, vous, les hommes choisis par la nation belge, pour constituer cette indépendance et pour la consolider à jamais. Mais, en attendant que vous puissiez venir remplir cette tâche, un centre d'action était nécessaire pour pourvoir aux premiers, aux plus urgents besoins de l'Etat. Un gouvernement provisoire s'est établi, et il a suppléé temporairement à l'absence de tout pouvoir. La nécessité d'un gouvernement quelconque justifiait sa mission; l'assentiment du peuple confirma son mandat.[57]

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[50] Gilissen, *Le régime représentatif,* 80.

[51] *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 1, p. 6, 01/10/1830.

[52] *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 4, p. 3, 08/10/1830.

[53] Gilissen, *Le régime représentatif*, 79; Witte, *De constructie,* 64.

[54] *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 1, p. 3, 01/10/1830.

[55] "Il tenait son mandat de la nécessité. Lorsqu'un ordre de choses périt, il y a, entre le passé qui n'est plus et l'avenir qui n'est pas encore, un interrègne où le pouvoir appartient momentanément à qui le prend; si la lacune n'était pas remplie, la société elle-même serait et resterait dissoute; il faut bien que quelqu'un vienne prononcer le *fiat* tout-puissant qui doit la maintenir et la réorganiser. C'est là une légitimité incontestable". Nothomb, *Essai historique*, 75.

[56] For De Potter, see: De Potter et. al., *Louis de Potter, révolutionnaire belge en 1830*; Juste, *Louis de Potter: membre du gouvernement provisoire. D'après des documents inédits*.

[57] "The fruit of this victory was independence. The people has declared it via us. Interpreter of its wishes, the Provisional Government has called upon you, the men chosen by the Belgian Nation, to constitute this independence and to consolidate it forever. But, in anticipation of your being able to come and fulfil this task, a centre of action was needed to foresee in the first, the most urgent needs of state. A Provisional Government has been created to temporarily make up for the absence of all power. The need for any kind of government justified its mission; the approval of the people

Acting as "the interpreter of the people's wishes", the Provisional Government had met the most urgent needs of the State until the moment the people's representatives convened in Congress. De Potter didn't proceed to officially lay down the powers of the Provisional Government however, causing alarm among some of the delegates.[58] In the third session, De Foere intervened to demand urgent clarification with regard to the mission of the Provisional Government. Although he agreed that the Government had legitimately held provisional power in the interest of the nation, he insisted that its mission had ended at the first meeting of the Congress:

> (…) les gouvernements se constituent de deux manières: d'abord, dans des temps ordinaires, par l'assentiment librement exprimé des nations; ensuite, dans des temps extraordinaires, par leur assentiment tacite. J'appelle des temps extraordinaires ces transitions violentes par lesquelles les États passent d'une forme d'existence à une autre, et pendant lesquelles les nations ont recours à l'impérieuse loi de la nécessité pour établir l'ordre et la sécurité, pour garantir les États contre les horreurs de l'anarchie. Tous les publicistes admettent cette loi de la nécessité comme principe provisoirement constitutif des États anarchiques. Les jurisconsultes la rangent parmi les causes des exemptions légales, et les moralistes l'adoptent comme raison suffisante de se croire dispensé de l'observance des devoirs qui nous sont imposés par des lois humaines. Mais cette loi de la nécessité, de l'aveu de tous, a ses règles et ses bornes. II est généralement admis que cette loi, recevant son existence de la nécessité, rentre dans le néant par la cessation de cette nécessité même. Il est incontestable que notre gouvernement provisoire se soit établi sur cette loi de la nécessité, incontestable encore qu'il ait reçu son mandat de l'assentiment tacite de la nation belge; mais aussi il me semble qu'il n'est pas moins évident que cette loi a cessé par la cessation de sa cause, et que, depuis la vérification des pouvoirs des membres du congrès national, l'assentiment tacite, par lequel la nation belge avait conféré l'administration de ses intérêts communs au gouvernement provisoire, reste désormais sans application. Il résulte de ces principes, messieurs, que le pouvoir du gouvernement provisoire est expiré.[59]

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confirms its mandate". Huyttens, *Discussions,* vol. 1, p. 101, 10/11/1830. Thonissen in his authoritative constitutional manual approved of this legitimation by "the force of circumstances and the approval of the nation". Thonissen, *La Constitution belge annotée, offrant sous chaque article l'état de la doctrine de la jurisprudence et de la législation,* 335.

[58] The delay effectively reflected the Provisional Government's reluctance to release power. Especially De Potter feared that this move would thwart his plans for the foundation of a Belgian Republic, with himself as its first president. De Mulder, *De republikeinse beweging,* 14.

[59] "(…) governments are generally constituted in two ways. Firstly, in ordinary times, by the freely expressed approval of nations. Secondly, in extraordinary times, by their tacit approval. I call extraordinary times those violent transitions when states pass from one form of existence to another, and during which nations take recourse to the imperious law of necessity for establishing order and security, for safeguarding states against the horrors of anarchy. All the publicists admit this law of necessity as the provisionally constitutive principle of anarchic states. The jurists categorise it under the causes of legal exemptions, and the moralists accept it as a sufficient reason to consider one exempted from the obligations imposed by human laws. But this law of necessity has its rules and its limits, as all will agree. It is generally accepted that this law, originating from necessity, is nullified as soon as this necessity ceases to exist. It is an uncontested truth that our Provisional Government has been established under this law of necessity. It is equally true that it has received its mandate from the tacit approval of the Belgian Nation. But I consider it no less evident that this law has ceased to exist by the disappearance of its cause and that, since the moment of the verification of the powers of the members of the National Congress, the tacit approval by which the Belgian Nation had conferred the administration of its common interest to

The extraordinary circumstances which had legitimised the Provisional Government's mission having ceased, its very right of existence had ended. The anxieties of De Foere and others were soon quelled, when during the very same session the Provisional Government delegated Jean-Baptiste Nothomb to lay down its powers in the hands of the Congress.[60] The Congress responded by rendering thanks to the Provisional Government for its services and by charging it with the continued exercise of the executive power until the definite settlement of the state organisation.

However, the question of legitimacy continued to produce bouts of distrust towards the Provisional Government on the part of the National Congress. Tellingly, it refused to accept the draft Constitution drawn up by the Constitutional Commission.[61] Since the Commission had been convened by the Provisional Government before the election of the Congress, the draft could not be said to emanate from the will of the nation. Joseph Forgeur, himself the author of another constitutional proposal, protested:

> Le projet de constitution doit émaner du congrès lui-même: non que je veuille diminuer le mérite du projet imprimé qui est le fruit de consciencieuses études, mais il n'est pas convenable que le congrès donne la priorité à un projet quelconque rédigé hors de son sein.[62]

Joseph Lebeau, member of the Constitutional Commission, protested that the draft had received the approval of the nation by the election of its authors to the Congress. The Commission's president De Gerlache finally submitted the proposal in his own name, so as to strip it from its connection to the Provisional Government and make it "emanate from the Congress itself".[63]

After being accepted, the Commission's draft was in effect used as the guiding document for the debates of the constituent assembly. Preliminary discussions over each individual article took place in ten committees or 'sections' composed of 20 delegates each, who reported to a Central Section.[64] The reports drawn up by the latter served as the starting point for the subsequent plenary debates in Congress.[65] In the end, 80 % of the articles of the Commission's draft were included in the final

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the Provisional Government, is now void. As a result of these principles, gentlemen, the powers of the Provisional Government have expired". Huyttens, *Discussions*, vol. 1, p. 117, 12/11/1830.

[60] *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 31, p. 7, 18/11/1830.

[61] Huyttens, *Discussions*, vol. 1, p. 325, 25/11/1830; Gilissen, Le caractère collégial, 621; Van den Steene, *De Belgische grondwetscommissie*, 47.

[62] "The draft Constitution must emanate from the Congress itself: not that I wish to diminish the merits of the printed draft, which is the result of conscientious study, but it is not appropriate for the Congress to give priority to any draft drawn up outside of its bosom". Huyttens, *Discussions*, vol. 1, p. 324, 25/11/1830. For Forgeur, see: Caulier-Mathy, Forgeur, Joseph; Heptia, Joseph Forgeur.

[63] Huyttens, *Discussions*, vol. 1, p. 325, 25/11/1830. For Lebeau, see: Devillers, Lebeau (Joseph) and Van den Steene, *De Belgische grondwetscommissie,* 24–25.

[64] Ganshof Van der Meersch and Vanwelkenhuyzen, La constitution belge, 575.

[65] Magit, *De Volksraad*, Van den Steene, *De Belgische grondwetscommissie*.

Constitution.[66] Its basic features were generally respected, with the arrangement for the Senate as the main exception.[67] At least 20 other constitutional drafts, of divergent quality and ideological persuasion, were offered to the Congress in this period.[68] Of these, only the one by the delegates Forgeur, Barbanson, Fleussu and Liedts seems to have received any attention.[69] Its major innovation, unicameralism, was however not adopted.

Out of the same concern of safeguarding its position as the sole representative of the nation, the Congress rejected the idea of submitting the new Constitution, or parts of it, to popular referendum.[70] The proposal of the democratic delegates Alexandre de Robaulx and Pierre-Guillaume Seron to let the people sanction the decision over the form of state was subsequently not supported.[71] Forgeur reacted furiously to De Robaulx's proposal, accusing him of calling into question the Congress's constituent mandate:

> On a cherché un appui hors de cette enceinte (…) on vous a contesté votre mandat; on a refusé de vous reconnaître comme pouvoir constituant.[72]

This line of reasoning was continued in the new Constitution. Article 25 stated that all the powers must be exercised "in the manner established by the Constitution". This provision ruled out the option of lawmaking by way of referendum. Since the legislative power was exclusively exercised by the chambers and the King, the electorate was not allowed to directly intervene in the legislative process. Additionally, as we have seen above, article 32 excluded the imperative mandate, whereas article 43 forbade to personally present petitions to the chambers. The representatives of the nation were considered to decide freely and without pressure by the electorate.[73]

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[66] Gilissen, Le caractère collégial, 86.

[67] Van den Steene, *De Belgische grondwetscommissie*, 57.

[68] Magits, *De Volksraad.*

[69] 'Projet de constitution présenté par MM. Forgeur, Barbanson, Fleussu et Liedts, dans la séance du 25 novembre 1830', Huyttens, *Discussions*, vol. 4, p. 50–55; Gilissen, *Le régime représentatif*, 86.

[70] Magit, *De Volksraad*, 397.

[71] Huyttens, *Discussions*, vol. 1, p. 253–260, 20/11/1830. Delegate François Pirson made a similar proposal in the discussion over national independence, Huyttens, *Discussions*, vol. 1, p. 161, 17/11/1830. In addition, several draft constitutions submitted to the Congress, by authors of diverging political persuasions, proposed to submit the Constitution to popular referendum. See: National Archives of Belgium, Gouv. Prov. I, no. 197: Un patriote belge, 'Projet de constitution'; *Courrier de la Meuse* no. 260, 27/10/1830: 'De notre nouveau pacte fondamental'.

[72] "One has looked for support outside of this assembly. (…) one has contested your mandate; one has refused to acknowledge you as constituent power". Huyttens, *Discussions*, vol. 1, p. 229, 20/11/1830.

[73] Lefebvre, *The Belgian Constitution*, 38.

2.3 The Legitimacy of the Senate

A similar concern for the free expression of the will of the nation influenced the debate over the Senate. The Constitutional Commission had proposed a bicameral system, with a Senate appointed by the King. As to the senators' term of office, it left the choice between hereditary peerage and appointment for life. The proposal was a source of much controversy.[74] Many feared that a Senate appointed by the monarch would confer too much power to the latter, while putting political power in the hands of a hereditary peerage was seen as a violation of the principle of equality before the law. The newspaper *Den Antwerpenaer* wrote: "Het is eene zottigheyd, want dit riekt al te veel nae het oud voorrecht van leenstelsel".[75] Supporters of the Senate saw it as a necessary institution for moderating the impetuous democratic forces of the elected Chamber and as an intermediary between the latter and the monarch.[76]

In the republican political club *Reunion Centrale*,[77] a speech against the Senate and the royal veto was delivered by Joseph-Ferdinand Toussaint, a clerk of the Provisional Government with Saint-Simonian sympathies.[78] According to Toussaint, the concept of a Senate so contravened the principle of national sovereignty that, should it become reality, a new revolution would be unavoidable:

> Unissons tous nos efforts pour constituer une représentation nationale vraie, réelle, hors de l'influence des privilèges et des cours, une représentation qui, expression de vos besoins, et de tous les intérêts, soit nombreuse et digne de notre confiance. Qu'à elle seule appartienne la puissance législative; qu'à la volonté générale, dont elle est l'organe, obéissent religieusement tous les volontés particulières; et que la loi soit l'objet d'un culte sacré. Nous assurerons ainsi la liberté et le bonheur de la patrie, en restant fidèle à notre principe fondamental: la souveraineté réside dans la nation.[79]

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[74] Magits, *De Volksraad*; Stevens, Een belangrijke faze; Van den Steene, *De Belgische grondwetscommissie.*

[75] "This is a folly because it reeks too much of the old privilege of feudalism". *Den Antwerpenaer* no. 98, 23/11/1830. *Den Antwerpenaer* was a popular, democratic oppositional journal from Antwerp, expressing a liberal Catholic point of view. De Borger, *Bijdrage tot de geschiedenis van de Antwerpse pers. Repertorium, 1794–1914,* 157–159; Witte, Het natiebegrip in het Zuidelijk krantendiscours aan de vooravond van de Belgische opstand (augustus 1829-juni 1830), 225.

[76] Stevens, Een belangrijke faze.

[77] Leconte, La Réunion Centrale, club patriotique, révolutionnaire et républicain; Witte, De Belgische radicalen: brugfiguren in de democratische beweging (1830–1850), 16.

[78] Geldhof, Een orangistisch rivaal van Alexander Rodenbach. Jozef-Ferdinand Toussaint: Meulebeke 1806-Elsene 1885; Goffin, Toussaint (Joseph-Ferdinand).

[79] "Let us unite all our efforts to constitute a real, true, national representation, free from the influence of privileges and courts, a representation which, expressing your needs and every interest, is numerous and worthy of our trust. To it exclusively must the legislative power belong; all the particular wills must religiously obey the general will in whose name it speaks; and the law must be the object of a sacred cult. Thus will we be able to guarantee the liberty and happiness of the fatherland and be faithful to our fundamental principle: sovereignty resides in the nation". Toussaint, *Discours sur le Sénat et le véto du chef de l'état, prononcé à la réunion patriotique de Bruxelles*.

Within the Congress too, the proposed Senate met with fierce resistance. Unicameralism was one of the most conspicuous elements of the counterproposal launched by Joseph Forgeur and his associates.[80] Especially those delegates whose political ideals were rooted in the tradition of French republicanism considered an appointed Senate as a dangerous threat for the national sovereignty, as illustrated by the speech by Van Snick. Stating that legislative power was an inalienable and indivisible attribute of sovereignty, he argued that it should exclusively belong to the delegates of the nation:

> Chez nous, depuis notre régénération politique, la souveraineté est reconnue émaner de la nation exclusivement; la puissance législative est un des attributs essentiels, inaliénables de cette souveraineté; partager cet attribut, qui doit être exclusif à cette souveraineté, entre les délégués de la nation et les délégués de celui aux mains duquel elle aurait confié le pouvoir exécutif, me semble un acte attentoire à cette souveraineté: c'est la détruire au moment où on la proclame.[81]

The Congress finally opted for an elected Senate which, due to the very high property requirements for eligibility, would automatically take on an aristocratic character. This original choice reflected its concern to safeguard the operation of national sovereignty, unhindered by privilege or the intervention of a power of non-popular origin, while simultaneously building a conservative element into the national representation.

2.4 Nation Versus King

The debates of the Congress time and again pointed at a conception of sovereignty where the nation governs itself through its representatives. The delegates were regularly reminded that they took their mandate from 'the Belgian people'. The question of sovereignty most explicitly surfaced in the debate over the form of state. At this occasion, Jean-Baptiste Nothomb, secretary to the Constitutional Commission and future prime minister, declared:

> L'hérédité et l'inviolabilité sont deux fictions politiques, deux nécessités publiques, deux exceptions dans l'ordre social. En face de ces fictions apparaît, toujours menaçante, la

[80] Gilissen, *Le régime représentatif*; Magits, *De Volksraad*; Nandrin, Le bicaméralisme belge et le Sénat en 1830–1831: fondements doctrinaux.

[81] "Since the moment of our political regeneration, it is recognised that sovereignty emanates from the nation exclusively; the legislative power is one of the essential, inalienable attributes of that sovereignty; to subdivide this attribute, which must exclusively belong to that sovereignty, between the delegates of the nation and the delegates of him to whom the executive power is entrusted, is in my opinion an attack on that sovereignty; it is to proclaim and to destroy it in the same instant". Huyttens, *Discussions*, vol. 1, p. 404, 13/12/1830. See also: De Smaele, *Omdat we uwe vrienden zijn. Religie en partij-identificatie, 1884–1914*, 19.

> souveraineté du peuple, qui, dans les cas extrêmes, vient infailliblement les briser. En dernier résultat, c'est toujours le pays qui l'emporte.[82]

Nothomb almost literally referred to sovereignty as a last resort, and placed it in the hands of the people. His words contained an implicit legitimation of the Belgian Revolution. Royalty, according to Nothomb, was nothing but a 'necessary political fiction'. The people legally held the right to revolt against it in defence of their sovereignty. William I had forfeited his rights to the throne for having infringed on the sovereignty of the people, which was the utter source of legitimacy.

Congress delegates systematically used the terms 'nation' and 'king' or 'head of state' in opposition to each other. Both were treated as mutually exclusive entities. In the report of the Central Section on the discussion on the powers of the head of state, delegate Joseph-Jean Raikem wrote:

> On a pensé que le droit de déclarer la guerre devait rester au chef de l'Etat; que la nation avait une garantie suffisante dans le refus des subsides qui aurait lieu de la part des chambres dans le cas d'une guerre injuste.[83]

The citation indicates that only the chambers were considered to represent the nation, and that the latter was conceptually different from the head of state. Also, it confirms the interpretation of the nation as a last resort, since the chambers were, by their control over the budget, able to block any unwanted initiative of the executive, even when it stemmed from the royal prerogatives. In the discussion over the form of state, De Robaulx proclaimed:

> Je ne veux pas de monarchie, parce que sous elles les fonctionnaires s'habituent à croire qu'ils ne tiennent leurs places que du maître et non de la nation.[84]

Again, the nation and the King were treated as opposites, and the nation was recognised as the source of all powers.[85]

Article 80 stated that the King only takes function after having sworn loyalty to the Constitution in the presence of the united chambers. Since the King was only vested with his constitutional powers on the moment of taking the oath, periods of interregnum occurred every time between the death of the reigning monarch and the taking of the oath by his successor.[86] In the meantime, the monarch's constitutional powers were exercised by the Council of Ministers, under their responsibility (art.

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[82] "Heredity and inviolability are two political fictions, two political necessities, two exceptions in the social order. Opposite these fictions appears, ever menacing, the sovereignty of the people which, in extreme cases, comes and destroys them. In the end, the country always wins". Huyttens, *Discussions,* vol. 1, p. 193, 19/11/1830.

[83] "It is our opinion that the right to declare war must stay with the head of state; the nation has a sufficient guarantee in the refusal of the subsidies to which the chambers will resort in case of an unjust war". Huyttens, *Discussions,* vol. 4, p. 84.

[84] "I don't want a monarchy, because it makes the functionaries believe that they hold their place from the master and not from the nation". Huyttens, *Discussions,* vol. 1, p. 255, 22/11/1830.

[85] Van den Steene, *De Belgische grondwetscommissie,* 63.

[86] Ganshof Van der Meersch, Des rapports, 182.

79). Delegate Beyts, insisting on the importance of establishing a contract with the King as a precondition of his taking power, said:

> Je n'admets guère (…) le principe admis en France: Le roi est mort, vive le roi! Je ne crie pas, Vive le roi, s'il n'a pas juré.[87]

As with the French citizen-king who had come to power the previous summer, the royal style was 'King of the Belgians', not 'of Belgium', indicating that the monarch or the dynasty was not entitled to claim rights of possession on the territory.[88] Royalty in the Belgian Constitution was, indeed, merely a constituted power.[89] In a speech aimed at stressing the importance of the monarch's full acceptance of the Constitution, delegate Pierre Van Meenen – who had been one of the main theorists of the constitutional resistance against William I – provided an accurate yet rather unmajestic description of the monarch's position.[90] He compared it to the obligation on the part of an employee to fully subscribe the contract offered to him by his future employer as a condition for his entering in function:

> On a dit qu'elle [la Constitution] ne serait arrêtée définitivement que par l'acceptation du chef de l'État. Il est vrai qu'il se forme un contrat entre lui et la nation, mais la constitution ne forme pas la matière de ce contrat, c'est l'acceptation du mandat que lui confère la nation. Le mandant est ici un être collectif de la nation constituée. L'acceptation ne peut mettre en question toutes les parties du contrat. S'il en était autrement, chaque employé n'aurait qu'à dire, en entrant en fonctions, qu'il n'accepte que sauf des modifications à faire aux lois qu'il est appelé à exécuter.[91]

The same reasoning underlies De Robaulx's heated intervention in the debate of 6 February 1831 on article 7 of the transitory dispositions, concerning the timing of the convening of the first elected Parliament. Upon Osy's remark that the future King might possibly not agree to these regulations, De Robaulx exclaimed: "S'il n'accepte pas nos conditions, il ne sera pas roi", sparking applause from the benches

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[87] "I hardly agree to the principle allowed in France: the King is dead, long live the King! I will not cry 'Long live the King' if he hasn't sworn the oath". Huyttens, *Discussions*, vol. 2, p. 487, 07/02/1831. On the absence of this principle in the Belgian Constitution: Errera, *Traité du droit public*, 198.

[88] Errera, *Traité du droit public*, 195; Koll, Belgien, 493; Witte, *De constructie*, 95.

[89] Alen, *Treatise on Belgian Constitutional Law*, 4; Molitor, Réflexions sur la fonction royale, 16; Müβig, L'ouverture du mouvement constitutionnel, 495.

[90] For Van Meenen, see: Van den Steene, *De Belgische grondwetscommissie*, 17–19; Le Roy, Meenen, Pierre-François Van.

[91] "It has been said that the Constitution will only become definite upon its acceptance by the head of state. It is true that a contract is established between him and the nation, but the Constitution is not the subject matter of that contract, it is the acceptance of the mandate conferred to him by the nation. The mandator here is the collective being of the constituted nation. The acceptance cannot call into question the parts of the contract. Otherwise, every employee could simply refuse, when entering into function, to accept, unless modifications were made to the laws he was called upon to execute". Huyttens, *Discussions,* vol. 2, p. 492, 08/02/1831.

and the galleries.[92] The Catholic newspaper *Courrier de la Meuse* wrote, in reaction to article 4 of the draft Constitution (the later article 25):

> Si tous les pouvoirs émanent de la nation, celui du prince en émane certainement aussi; et dans ce cas, ce pouvoir ne serait qu'une délégation, qu'une commission; et c'est bien ainsi qu'on l'entend.[93]

In short, royal power was to be exercised on the terms dictated by the nation.

2.5 The Royal Veto and the National Will

However, this interpretation seems to be invalidated by the establishment of the absolute royal veto. Article 69 stated that the King sanctions and promulgates the laws. Since he cannot be forced to sign the laws presented to him by the chambers, this arrangement amounts to the absolute royal veto in legislative matters.[94] At first sight, the article contradicts the free exercise of national sovereignty by the nation's representatives, since it provides the King with the power to block the legislative process. The Congress debates shed a different light on the question. The veto was not being discussed as a reinforcement of royal power, but as a safeguard of the will of the nation. Due to the representative system, it was possible that the chambers did not correctly reflect the nation's opinion. In that case the monarch was called upon to guarantee that opinion by vetoing the proposed law or by calling new elections (via the royal right to dissolve the chambers under article 71), as the report of the Central Section on the powers of the head of state makes clear:

> Les résolutions des chambres doivent être l'expression du vœu de la nation qu'elles représentent. Mais il peut arriver que l'élection ait pour résultat d'y appeler les hommes d'un parti, et non ceux du peuple qui les élit. Dans ce cas, la marche du chef de l'Etat serait entravée, ou bien il se trouverait obligé d'agir dans un sens contraire à l'intérêt général. Il

[92] "If he doesn't accept our conditions, he will not be King". Huyttens, *Discussions,* vol. 2, p. 484, 06/02/1831.

[93] "If it is true that all powers emanate from the nation, those of the prince surely do so too; and if that be the case, his power would be nothing but a delegation or a commission; and this is precisely what is proposed". *Courrier de la Meuse* no. 266, 04/11/1830. The reactionary *Courrier de la Meuse* deplored this arrangement because the Courrier favored a strong position for the monarch. The newspaper represented the conservative, Catholic opposition in Liège. Among its collaborators was Etienne-Constantin de Gerlache. See: Capitaine, *Bibliographie liégeoise. Recherches historiques sur les journaux et les écrits périodiques liégeois*, 166–172; Cordewiener, *Etude de la presse liégeoise de 1830 à 1850 et répertoire général*; Harsin, *Essai sur l'opinion publique en Belgique de 1815 à 1830*, 34; Van den Steene, *De Belgische grondwetscommissie*, 15.

[94] Bivort, *Constitution Belge expliquée et interprétée par les discussions du Pouvoir Législatif, les arrêts des cours supérieures de Belgique et les opinions des jurisconsultes*, 14; Errera, *Traité du droit public belge*, 120; Senelle, *La Constitution belge commentée*, 246; Tempels, Droit constitutionnel, 453. Koll's assertion that the King did not have the right of veto cannot be supported. Koll, 'Belgien', 495.

> doit donc avoir le droit de faire un appel à l'opinion du pays par la dissolution des chambres.[95]

Or, in Nothomb's words:

> (…) les deux chambres se contrôlant réciproquement, le roi réserve son veto pour les cas rares où toutes les deux ont erré.[96]

Instead of being tools to increase the power of the monarch, allowing him to pursue his own policies, the royal veto and the right of dissolution were meant to guarantee the correct expression of the will of the nation. When he thought that the legislative work of the chambers did not reflect the wish of the majority of the people, it was the monarch's duty to intervene on their behalf. In the terms of the debates, he had to make an "appeal to the nation",[97] so as to ensure that the chambers correctly represented "the country's opinion" ("l'opinion du pays").[98] In the draft Constitution, only the Chamber of Representatives was subject to the royal right of dissolution, since the senators were to be appointed by the King. Upon the Congress's decision to make the Senate elective, the right of dissolution was extended to both chambers, because both now were supposed to represent the national will.

Remarkably little attention was devoted to the choice between an absolute and a suspensive veto. Although the suspensive veto was well known from earlier modern constitutions (such as the French Constitution of 1791), the option counted only a few supporters among the delegates. The issue had been raised in two out of ten sections, but failed to obtain a majority in the Central Section. During the plenary debates, only delegates Wannaar and Henry spoke in favour of the suspensive veto. Henry referred to the constitutional project proposed by Forgeur, Barbanson, Fleussu and Liedts in response to the Constitutional Commission's more conservative draft Constitution. The proposal allowed Parliament to overrule the royal veto when the succeeding legislature passed the same bill with a three-quarters majority.[99] Henry elaborated on the issue by warning his fellow delegates against the threat

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[95] "The decisions of the chambers must express the will of the nation which they represent. But it is possible that an election results in men being called to them who are of a party and not of the people which elects them. In that case, the course of the head of state will be hindered, or else he will be obliged to act in a sense contrary to the general interest. He must therefore have the right to make an appeal to the opinion of the country by dissolving the chambers". Huyttens, *Discussions,* vol. 4, p. 85.

[96] "(…) since the two chambers mutually control each other, the King reserves his veto for those rare cases when both have erred". Huyttens, *Discussions,* vol. 1, p. 426, 14/12/1830.

[97] Delegate Henry, in his intervention in favour of the suspensive royal veto, spoke of an appeal "to the sovereign nation", implying yet again that the latter did not include the King. Huyttens, *Discussions,* vol. 2, p. 79, 10/01/1831. For the concept of the appeal to the nation, see: Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, 72; Baker, Constitution, 467; Roels, *Le concept de représentation,* 94.

[98] Huyttens, *Discussions,* vol. 4, p. 85.

[99] Art. 40: "Il [le Roi] sanctionne et promulgue la loi, ou y appose son veto. Ce veto est suspensif. Il cesse et la sanction est obligée, si la même loi est reproduite et adoptée à la législature subséquente par la majorité des trois quarts". Huyttens, *Discussions*, vol. 4, p. 52.

of royal despotism inherent in the absolute veto. According to him, granting the absolute royal veto equaled turning the King into the sole legislator and relegating Parliament to the status of a consultative body.[100] The interventions by Henry and Wannaar failed to stir up any debate however, and finally they were the only ones to vote in favour of their amendments.

Clearly, the majority in Congress was satisfied with the reasoning developed by Raikem in the report of the Central Section on the powers of the head of state. The report spoke of the "grave inconveniences" caused by the introduction of the suspensive veto. By making the veto suspensive, the monarch would in effect be deprived of his share in the legislative power, thus turning it into the exclusive terrain of the chambers. Such an arrangement was dangerous for the constitutional powers of the monarch, the report warned:

> (…) de cette manière les chambres pourraient aller jusqu'au point de faire des lois qui porteraient atteinte aux pouvoirs constitutionnels du chef de l'état: celui-ce se trouverait sans défense; car, entre les chambres et lui, qui serait le juge de la question?[101]

In other words, the veto needed to be absolute so as to prevent a Parliament hostile to royal power from attacking the monarch's position. This consideration bespeaks a concern for balancing the constituted powers typical for the Belgian Constitution. The delegates may have had the example of the French Constitution of 1791 in mind, when continual constitutional conflicts had resulted from parliamentary attacks on a weak royal power, finally leading to the downfall of both the Constitution and the monarchy.

Errera in his 1918 constitutional treatise commented that the Congress had foreseen the impossibility for the King to use his veto under a parliamentary regime. He interestingly suggests that, under these circumstances, a suspensive veto would have provided him with a much more important political influence.[102] Since the absolute veto was clearly intended for exceptional use only, it was of little consequence in practice. Although the Constitution did not technically contain sufficient guarantees for parliamentary government (cfr. infra), Errera is right in asserting that the King was not supposed to use the veto against Parliament, that is, against the will of the nation. The report of the Central Section reveals that such a use would go directly against the spirit of the Constitution.

It is nevertheless striking that the restrictions imposed on the use of the veto were not made explicit in the constitutional text. The Congress delegates did not stop to consider the most extreme consequence of the constitutional system they created. For in the event of the monarch blocking the legislative through his use of the absolute veto, and Parliament paralysing the executive through its rejection of the budget,

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[100] Huyttens, *Discussions,* vol. 2, p. 79, 10/01/1831.

[101] "(…) in this way, the Chamber could get to the point of making laws which would harm the constitutional powers of the head of state: the latter would find himself without defense, because who could judge the question between him and the chambers?". Huyttens, *Discussions*, vol. 4, p. 84.

[102] Errera, *Traité du droit public belge,* 121.

complete deadlock would be at hand.[103] Writing about the situation at the beginning of the twentieth century, Errera remarked that the royal veto had fallen in complete disuse, and considered its application by the monarch "unimaginable". Even though the King was constitutionally entitled to do so, his use of the veto would not be tolerated by public opinion, and would therefore lead straight to a popular uprising. The same argument against the monarch's overstepping of his constitutional mandate was regularly used in the Congress. In the citation above, Nothomb mentioned the "ever threatening sovereignty of the people", standing ready to break royal power in the case of an extreme occurrence. Similar references to the revolutionary power of the people, faced with irresponsible or unconstitutional government, abound.

Despite this apparent weakness in the constitutional construction, political practice after 1831 neatly conformed to the Congress's intentions. In the course of the nineteenth century, the royal veto was used on merely three occasions (1842, 1845, 1884).[104] Each time the King took care not to simply refuse his sanction but to issue a Royal Decree, thus bringing his royal prerogative under ministerial responsibility. On all three occasions, the veto had been debated in the Council of Ministers beforehand and was motivated by a turnabout in the political balance.[105] As the project of law concerned was no longer supported by the new majority, letting it pass would go counter to the will of the chambers. Vetoing it came down to applying the solution provided for by the Constitution against the introduction of laws which did not correctly express the will of the nation.

2.6 Republican Monarchism

The popular origin of sovereignty was most clearly epitomised by the choice of a monarch. To be sure, many delegates recognised that a people can most truly be said to govern itself when the office of head of state is not hereditary but eligible. The Constitutional Commission had in its draft Constitution opted for the monarchy.[106] It did however yield to popular republican sentiments by using the neutral term

[103] Tempels plays down the importance of the absolute veto since its persistent use could only lead to anarchy. Tempels, Droit constitutionnel, 453.

[104] Errera, *Traité du droit public belge,* 121; Ganshof Van der Meersch and Vanwelkenhuyzen, La constitution belge, 583. Lefebvre's assertion that the royal veto has never been used is not supported by the facts. Lefebvre, *The Belgian Constitution of 1831*, 26.

[105] Errera, *Traité du droit public belge,* 121.

[106] Only one member of the Commission, Tielemans, voted for the republic. Tielemans was an ally of the republican revolutionary leader Louis de Potter. When his colleagues voted for the monarchy, he resigned from the Commission. Hymans*, Le Congrès national de 1830 et la Constitution de 1831*, 19; Van den Steene, *De Belgische grondwetscommissie,* 35. Two others members, Van Meenen and Nothomb, voted with the majority although they were of the opinion that the choice between a monarch and a republic should on principle be left to the Congress. Nothomb, *Essai historique*, 77.

'head of state' instead of 'king', hinting that the matter had not been definitively settled yet.[107] Between 19 and 22 November 1830 a heated debate, with interventions by over thirty delegates, was held over the question of the form of state.[108] The intensity of the debate is somewhat surprising given the prevailing international political situation. The great European powers, assembled at the London Conference, had made it sufficiently clear that they would not under any circumstances accept a republic. Since the young state depended entirely on the support of the powers for its survival, many delegates adopted a pragmatic attitude towards the matter.[109]

Nevertheless, all the classical arguments of political theory were brought to bear. Montesquieu was omnipresent in the arguments of both camps, turning the question into a debate over the character of the Belgians and its compatibility to either form of state. Interestingly, both parties agreed that the question of hereditary leadership was a fairly technical one. Above all, the Constitution needed to make sure that the nation governed itself. The arguments used in the debate were mainly of a practical nature and centered on the question which form of state would most benefit the nation's interests as well as befit the character of its inhabitants.[110] They did not, however, touch on the underlying principles of the Constitution.

These principles were, many speakers agreed, republican.[111] This meant, according to their own terminology: far-reaching personal liberties, self-government (in the sense of lawmaking by the representatives of the people) and the responsibility of government to Parliament.[112] To this end it was considered essential that all powers rest on the agreement of the people. In other words, as in the quote by Nothomb, the people was considered sovereign. There was a consensus in the Congress that the new Constitution needed to contain all the elements which had for so long been called for by the Belgian opposition against William I, and which would ensure the government's subordination to the will of the people: ministerial responsibility, inviolability, countersignature, the yearly voting of the budget, etcetera.[113]

Moreover, republican and monarchist speakers alike conceded that, except for inviolability and ministerial responsibility, this system could work under a monarch as well as under a president.[114] In his influential treatise on royal power of 1830, later member of the Constitutional Commission and prime minister Joseph Lebeau

[107] Gilissen, *Le caractère collégial*, 88; Nothomb, *Essai*, 78.

[108] Huyttens, *Discussions*, vol. 1, 184–260.

[109] Hymans, *Le congrès national*, 34; Magits, *De Volksraad*; Molitor, *La fonction royale en Belgique*, 16.

[110] De Dijn, In overeenstemming met onze zeden en gewoonten. De intellectuele context van de eerste Belgische constitutie (1815–1830).

[111] Nothomb, *Essai*, 306; 428.

[112] Banning defines self-government as "le gouvernement du pays par ses mandataires directs", identifying it with the legislative work of the chambers. Banning, Histoire parlementaire depuis 1830, 475.

[113] De Smaele, Eclectisch en toch nieuw, 409; Van den Steene, *De Belgische grondwetscommissie*, 61.

[114] Barthélemy, *Des gouvernements passés et du gouvernement à créer*; Harris, European Liberalism, 512; Jennings, Conceptions of England and its Constitution in Nineteenth-century

had already remarked that only heredity and inviolability distinguished kingship from presidency.[115] What counted for Lebeau was that the political order enshrined liberty, regardless of the exact form that order took. He considered the English monarchs the only ones to have fully understood this, since, discarding any non-constitutional legitimation of their power, they fully bowed to the will of the nation.

The republican priest Désiré de Haerne admonished his fellow delegates that a constitutional monarchy was nothing but a republic in disguise. It would prove unstable, since a monarch would not sit easy with the sovereignty of the people upon which the system was based. He found it wiser therefore to declare a republic straight away:

> (…) il ne s'agit pas de balancer les avantages et les désavantages des deux systèmes de gouvernement; il s'agit de savoir si nous pouvons nous tenir à une monarchie constitutionnelle représentative, qui n'est qu'une république déguisée, puisqu'elle est basée sur la souveraineté du peuple. (…) Un roi inviolable est un souverain en présence du peuple souverain.[116]

Many speakers agreed that the days of the European monarchies were numbered. In time, they expected the republican form of state to gain all of them, including Belgium. However, such times were not believed to be yet upon them.[117]

Whereas the republican delegates warned against the struggle for power that was to result from the cohabitation of popular sovereignty and monarchy, the majority believed that the two could coexist in harmony. Since sovereignty was safely vested in the nation, a hereditary head of the executive did not threaten the 'republican' essence of the Constitution. Indeed, the expression 'republican monarchy', attributed to Lafayette, was repeatedly used to describe the compromise:

> Wannaar: "Alors nous aurons les formes républicaines compatibles avec l'hérédité du chef; tous l'ont dit à cette tribune; ce sera la monarchie républicaine".[118]

> Alexandre Rodenbach: "Je vote en faveur d'une monarchie républicaine (…), parce que sous un pareil gouvernement le peuple marche avec sécurité entre deux précipices, l'abus du pouvoir et l'excès de la liberté".[119]

French Political Thought, 72; Nicolet, *L'idée républicaine en France. Essai d'histoire critique*, 407; Stengers, *L'action du Roi*, 14.

[115] Lebeau, *Observations sur le pouvoir royal ou examen de quelques questions relatives aux droits de la couronne dans les Pays Bas*, 9.

[116] "(…) this is not about balancing the advantages and disadvantages of the two systems of government; this is about knowing whether we can stick to a constitutional, representative monarchy, which is nothing but a republic in disguise, because it is based on the sovereignty of the people. (…) An inviolable King is a sovereign in the presence of the sovereign people". Huyttens, *Discussions,* vol. 1, p. 216, 20/11/1830.

[117] De Dijn, In overeenstemming met onze zeden; De Lichtervelde, Introduction, 12.

[118] "Thus, the republican forms will be made compatible with the heredity of the chief; all present have reiterated this: it will be a republican monarchy". Huyttens, *Discussions,* vol. 1, p. 222, 20/11/1830.

[119] "I vote for a republican monarchy (…), because under such a government the people safely navigates between two abysses: abuse of power and excess of liberty". Huyttens, *Discussions,* vol. 1, p. 248, 22/11/1830.

> Charles Vilain XIIII: "Je me prononcerai, messieurs, en faveur de la monarchie constitutionnelle, mais assise sur les bases les plus libérales, les plus populaires, les plus républicaines. Je rejette la république, parce que, rêve des âmes généreuses, elle me semble impraticable. Une république devrait être composée d'anges, et la société de l'an 1830 ne me paraît pas encore arrivée à la perfection angélique".[120]

In the end "la monarchie constitutionnelle représentative, sous un chef héréditaire" ("constitutional, representative monarchy, under a hereditary chief") was adopted by an overwhelming majority of 174 against 13.[121]

Constitutional monarchy was credited with the immense advantage of guaranteeing 'republican' liberty without the accompanying instability. As Wyvekens put it:

> (...) il me paraît (…) démontré que sous la garantie d'une bonne constitution qui assure les droits et les devoirs de tous, nous jouirons de tous les avantages du système républicain sans avoir à craindre son instabilité.[122]

Devaux, too, appreciated the combination of republican liberty with the advantages of stability and order, which he believed would result in an even greater degree of liberty:

> La monarchie constitutionnelle représentative, telle que je l'entends, c'est la liberté de la république, avec un peu d'égalité de moins dans les formes, si l'on veut; mais aussi avec une immense garantie d'ordre, de stabilité, et par conséquent, en réalité, de liberté de plus dans les résultats.[123]

A republican system, it was feared, would entail continual power struggles between parties and ambitious individuals. Presidential elections especially were dreaded. Monarchist delegates depicted them as recurring moments of profound crisis. The passions and rivalries they unleashed threatened to undermine the state in its very existence. The choice for a hereditary head of state would prevent these disorders, on the condition that its powers were clearly circumscribed by the Constitution. In Destriveaux' words:

> Dans le pacte qui nous unira, rédigeons en lois de précaution les prévisions contre les dangers de l'hérédité, élevons un roi sur un trône national, donnons-lui d'une main la couronne et de l'autre l'acte qui enferme les conditions de son pouvoir et les garanties de nos libertés.[124]

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[120] "Gentlemen, I will pronounce in favor of the constitutional monarchy, but based upon the most liberal, popular, republican foundations. I reject the republic, that dream of generous minds, because I think it is impracticable. A republic would need to be composed of angels, and society in 1830 has not yet, I think, reached such angelic perfection". Huyttens, *Discussions,* vol. 1, p. 199, 19/11/1830.

[121] Huyttens, *Discussions,* vol. 1, p. 259, 22/11/1830.

[122] "(...) I think (…) it has been proven that, under the protection of a good Constitution guaranteeing the rights and duties of all, we will enjoy all the advantages of a republican system without having to fear its instability". Huyttens, *Discussions,* vol. 1, p. 185, 19/11/1830.

[123] "Constitutional, representative monarchy as I understand it, means the liberty of the republic, with a little less equality in its forms maybe, but with an immense guarantee of order and stability, and consequently, with more liberty in its results". Huyttens, *Discussions*, vol. 1, p. 213, 20/11/1830.

[124] "Let us, in the pact that will unite us, formulate the measures against the dangers of heredity as precautionary laws, let us raise a King on a national throne, let us give him in one hand the crown

The proof of the republican foundations was that the monarch received his mandate from the people via its representatives in Congress. According to the monarchist delegate Leclercq, the essence of the system consisted in the people making its own laws, and in the power of the monarch as the head of the executive being clearly circumscribed by the Constitution and being subject to ministerial responsibility:

> Qui fait les lois dans une monarchie constitutionnelle représentative? Des hommes élus par tous les citoyens que leur position sociale intéresse au maintien et aux progrès de l'ordre et de la prospérité générale; des hommes qui représentent tous les intérêts, et par eux la nation; des hommes qu'enchaînent des principes consacrés par la Constitution. (…) Qui exécute les lois sous ce gouvernement? Un chef héréditaire il est vrai, et ce chef peut être vicieux; mais de combien de barrières ses vices ne seront-ils pas entourés?[125]

Even when the head of state proved vicious, his vices were safely surrounded by unshakeable constitutional barriers. Another description of the system was provided by Viscount Hippolyte Vilain XIIII in a brochure he published shortly before the meeting of the Congress, to which he was subsequently elected. For Vilain XIIII, constitutional monarchies were characterised by their combination of republican customs and monarchical calm. The vigilance of the Belgian people would make sure to remind the future monarch of his duties laid down in the Constitution. Being the cornerstone of the whole edifice, it established a contract between the sovereign people and himself:

> La monarchie constitutionnelle est là pour remplir ce but admirable, institution des sociétés modernes qui concilie la force des mœurs républicaines avec le calme et l'élégance des habitudes monarchiques, surtout quand par un pacte consacrant la souveraineté du peuple, celui-ci trouve la garantie du contrat, non dans les serments du chef héréditaire, mais dans la ligne impérieuse des devoirs que le souverain doit suivre, et dans l'énergie toujours prompte, toujours active des citoyens à la lui faire observer. (…) Le congrès national sera appelé avant tout à poser cette pierre angulaire de l'édifice; ce n'est qu'après la confection de la charte qu'on procèdera à l'élection du chef (…). Toute souveraineté émane du peuple; ce principe doit être l'intitulé de la nouvelle loi, plus de droit divin, plus de loi octroyée, plus de légitimité en dehors de la volonté nationale. Tel est le pacte constitutio[n]nel ainsi que nous le concevons entre le peuple Belge et son futur souverain.[126]

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and in the other the charter containing the conditions of his power and the guarantees of our liberty". Huyttens, *Discussions*, vol. 1, p. 199, 19/11/1830.

[125] "Who makes the laws in a constitutional, representative monarchy? Men elected by all the citizens whose social position gives them an interest in the maintenance and the progress of order and in general prosperity; men who represent all interests, and by these the nation; men who are bound by the principles consecrated by the Constitution. (…) Who executes the laws under such a government? A hereditary chief, it is true, and this chief may be vicious; but think of all the barriers that will surround his vices!" Huyttens, *Discussions,* vol. 1, p. 185, 19/11/1830.

[126] "Constitutional monarchy is there to fulfil that admirable goal, that institution of modern societies which reconciles the power of republican manners with the calm and elegance of monarchical customs. Especially so when, by a pact consecrating the sovereignty of the people, the latter finds the guarantee of the contract not in the oath taken by the hereditary chief, but in the imperious line of duties which the monarch must follow, and in the ever prompt and active energy of the citizens to make him respect it. (…) The National Congress will, before anything else, be called upon to lay this cornerstone of the building; only after the confection of the charter will we proceed to elect a chief (…). All sovereignty emanates from the people, this principle must be the title of the new

2.7 The King-Magistrate

Once the choice for the form of state was made, a candidate for the throne needed to be found. The quest for a king was harder than foreseen. Contrary to most of its constituent deliberations, the Congress's choice for a monarch heavily depended on the opinion of the European powers.[127] Initially, the Prince of Orange seemed to stand a good chance. However, due to the growing animosity against the House of Nassau, the Congress voted the perpetual exclusion of that dynasty.[128] In early February 1831, it presented the Belgian crown to the Duke of Nemours, a son of Louis-Philippe.[129] The latter declined the offer under the pressure of international diplomacy, which agitated against an expansion of France's sphere of influence.[130] The Constitution had in the meantime been adopted on the 7th of February[131] and proclaimed on the 11th, with the name of the future King provisionally left blank.[132]

The function of head of state was entrusted to a Regent in the person of Baron Erasme-Louis Surlet de Chokier, who had until that time acted as president of the Congress.[133] The Constitution came into force on 25 February, the day of the Regent's taking of the constitutional oath.[134] Surlet de Chokier prudently respected his pledge of allegiance to the representatives of the nation, up to the point of being accused of indecisiveness.[135] Just like the laws issued by the National Congress, his decrees were promulgated 'in the name of the Belgian people'. He regularly stressed that all the powers he held emanated from the 'sovereign Congress', as in a proclamation of 6 July 1831:

> Elle [l'assemblée] seule représente la nation; elle seule a le droit de donner des lois au pays. C'est du Congrès que je tiens mes pouvoirs, et je ne les ai reçus que pour faire exécuter les lois. Si je manquais à ce devoir, je violerais et mon mandat et mes sermens.[136]

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law, no more divine right, no more granted law, no more legitimacy outside of the national will". Such is the constitutional pact, as we conceive it, between the Belgian people and its future sovereign". Vilain XIIII, *Appel au Congrès, par un ami de la patrie.* For the author, see: Van Kalken, Vilain XIIII (Charles-Hippolyte, vicomte).

[127] Magits, *De Volksraad*, xxxii; Witte, *De constructie,* 79.

[128] Huyttens, *Discussions,* vol. 1, p. 319, 23/11/1830.

[129] Huyttens, *Discussions,* vol. 2, p. 455, 03/02/1831.

[130] Fishman, *Diplomacy and Revolution. The London Conference of 1830 and the Belgian Revolt*, 105; Witte, *De constructie,* 79.

[131] Huyttens, *Discussions,* vol. 2, p. 488, 07/02/1831; *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 14, p. 175, 07/02/1831.

[132] Huyttens, *Discussions,* vol. 2, p. 502, 07/02/1831.

[133] François, Surlet de Chokier, Erasme, Louis.

[134] Huyttens, *Discussions,* vol. 2, p. 592, 25/02/1831; *Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique* no. 16, p. 228, 25/02/1831. Except the legislative and constituent powers and the competence to appoint the head of state, which remained in the hands of the Congress.

[135] Witte, De Belgische radicalen, 17.

[136] "(…) Only she [the assembly] represents the Nation; only she has the right to give laws to the land. I hold my powers from the Congress and I have only received them to execute its laws. If I

Thus, the Constitution was fully operative several months before Leopold of Saxe-Coburg was elected King. His candidature was agreed to on the condition of his full acceptance of the Constitution drawn up by the Congress. *Le Courrier* commented:

> Pour porter tous les fruits que nous avons droit d'en attendre, notre révolution doit monter sur le trône du premier roi des Belges, et s'y asseoir intacte à côté de lui.[137]

Newspapers tellingly referred to the monarch as the "King-magistrate" or "the supreme magistrate".[138] Some even feared that it would be hard to find a candidate for the throne who was willing to accept so many limitations to royal power, especially when he descended from any of the ancient royal dynasties:

> Le rejeton d'une famille souveraine qui règne par le droit de naissance, à travers une longue série de générations, serait mal assis sur un trône grossièrement refaçonné par les mains révolutionnaires du people[139]; Qui sait si un roi est possible dans la vaste démocratie que le congrès organise? (…) Qui sait si un prince quelconque se soutiendra sur le trône nominal que le congrès lui élève?[140]

Leopold indeed only grudgingly accepted the Constitution. To the Congress delegation that came to offer him the crown, he replied:

> Messieurs, vous avez rudement traité la royauté, qui n'était pas là pour se défendre. Votre charte est bien démocratique; cependant, je crois qu'en y mettant de la bonne volonté de part et d'autre, on peut encore marcher.[141]

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would fail to meet this duty, I would violate both my mandate and my oaths". *Courrier de la Meuse* no. 161, 07/07/1831.

[137] "In order to bear all the fruits that we are entitled to expect from it, our revolution must mount the throne of the first King of the Belgians, and take its seat there, next to him, undamaged". *Le Courrier* no. 120, 20/04/1831.

[138] *Courrier de la Meuse* no. 310, 25/12/1830; *Courrier des Pays-Bas* no. 343, 09/12/1830; *Le Courrier* no. 104, 01/05/1831. In the French Constitution of 1791, the term 'premier fonctionnaire public' was used. Wigny, *Droit constitutionnel,* 222.

[139] "The scion of a sovereign family that has reigned by right of birth, through a long series of generations, would sit uneasily on a throne so grossly refashioned by the hands of a revolutionary people". *Le Courrier* no. 25, 25/01/1831.

[140] "Who knows whether a King is possible in the vast democracy organised by the Congress? (…) Who knows whether a prince will sustain himself on the nominal throne erected for him by the Congress?" *Le Courrier* no. 15, 15/01/1831. See also *Le Courrier de la Meuse* no. 310, 25/12/1830: "La crainte du despotisme des rois (…) fera triompher la république dans toutes les institutions importantes. La monarchie ne sera qu'un mot, et la république sera un fait. Et par conséquent, on pourra se demander aujourd'hui si l'on trouvera pour un pareil royaume un prince grande propriétaire et généralement respecté? A bien envisager la chose, cette dignité, quoique déclarée héréditaire, ne doit pas tenter beaucoup; car cette prétendue hérédité n'aveuglera aucun homme sensé".

[141] "Gentlemen, you have rudely treated royalty, which was not there to defend itself. Your charter is democratic indeed; nonetheless, I think that, with some goodwill on both sides, it can still work". Molitor, *Réflexions sur la fonction royale*, 14. It seems that these initial hopes were soon dissipated, for in 1842 he wrote to his niece, Queen Victoria: "A herd of mad democrats, in the absence of anything or anyone representing a government, fabricated in 1830 a Constitution in which they collected every means hitherto invented to render government, whatever be its name, next to impossible". Stengers, *L'action du Roi*, 26.

Leopold, who on a later occasion called the Belgian institutions "quasi-republican", fully realised that the Constitution was not based on the monarchical principle.[142] The inauguration ceremony on the Brussels Place Royale on 21 July 1831 was organised around Leopold's public taking of the oath. Upon his arrival in Brussels, he was greeted by mayor Nicolas Rouppe as the "elect of the nation" and reminded of his due respect for the Constitution:

> Elu de la nation, prince magnanime, venez prendre possession du trône où vous appellent les acclamations unanimes d'un peuple libre. Vous maintiendrez, Sire, notre charte et nos immunités.[143]

In his inaugural speech, Leopold emphasised the popular origin of the Constitution and the power which had created it:

> Cette constitution émane entièrement de vous, et cette circonstance, due à la position où s'est trouvé le pays, me paraît heureuse. Elle a éloigné des collisions qui pouvaient s'élever entre divers pouvoirs et altérer l'harmonie qui doit régner entre eux.[144]

After Leopold's taking of the oath in the hands of the president of the Congress, the delegates retreated to their assembly hall in order to conclude their final session. In his closing speech, president De Gerlache stressed the popular origin of the power held by the newly appointed King:

> Vous avez une charte, un gouvernement régulier, un roi, un roi légitime de par le peuple, et certes il est permis de croire qu'ici la voix du peuple est encore la voix de Dieu![145]

De Gerlache's formulation of the voice of the people as the ultimate source of legitimacy was quoted in the article covering the events of 21 July in the official newspaper *Moniteur belge*. Leopold was not only said to have recognised the principles of the Belgian Revolution, but also to incarnate it in his person:

> La Révolution avait adopté Léopold; Léopold adopte à son tour la révolution; il n'en renie aucun principe, aucune conséquence. Elle s'est faite homme en lui. Il n'y a là ni droit divin, ni quasi-légitimité; toutes les fictions tombent devant la réalité.[146]

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[142] Stengers, *L'action du Roi*, 28.

[143] "Elect of the nation, magnanimous prince, come and take possession of the throne to which you are called by the unanimous acclamations of a free people. You will, Sire, maintain our charter and our immunities". Huyttens, *Discussions,* vol. 3, p. 615, 21/07/1831.

[144] "This Constitution emanates entirely from you, and this circumstance, which is due to the position in which the country found itself, is, I think, a happy one. It has averted potential collisions between the various powers which would alter the harmony that must reign between them". Huyttens, *Discussions,* vol. 3, p. 619, 21/07/1831.

[145] "You have a Constitution, a regular government, a King; a King who is legitimate because of the people, and it can certainly be imagined that in this, the voice of the people is the voice of God!" Huyttens, *Discussions,* vol. 3, p. 622, 21/07/1831.

[146] "The Revolution had adopted Leopold; Leopold in turn adopts the Revolution; he renounces neither its principle nor its consequences. In him, it takes form. There is neither divine right, nor quasi-legitimacy; all these fictions succumb before reality". *Moniteur belge* no. 37, 22/07/1831. The *Moniteur* was created as official newspaper on 16 June 1831. Els Witte, *De Moniteur belge, de regering en het parlement tijdens het unionisme, 1831–1845*.

On Leopold's arrival in Belgium, *Le Courrier* wrote:

> Que Léopold, en mettant le pied sur le rivage de sa nouvelle patrie, se dépouille de ce qui pourrait rester encore au fond de ses souvenirs de préjugés gothiques, d'influences étrangères: qu'il prenne la ferme résolution de ne jamais renier son origine, le peuple, qui seul l'a fait roi. (…) Qu'il se rappelle surtout qu'en se rendant en Belgique, il vient sanctionner une révolution.[147]

Le Belge wrote:

> (…) il faut aussi que le prince, que le choix du congrès appela à régner sur nous, se pénètre de la grande vérité si souvent répétée et presque toujours inutilement: les rois sont faits pour les peuples, et non les peuples pour les rois.[148]

2.8 The Constitutional Powers of the King

Given the arguments above, it can safely be said that 'nation' in article 25 of the Belgian Constitution does not refer to any kind of compromise between royal and popular power, but instead expresses the exclusively popular origin of sovereignty. The mandate of the King rested on the popular will, thus relegating his role in the Belgian constitutional edifice to that of a *pouvoir constitué*. However, article 25 clearly distinguishes the origin of sovereignty from its exercise: "They [the powers] are exercised in the manner established by the Constitution". Although the Nation is the sole source of sovereignty, it does not exercise it in its entirety. The sovereign powers are delegated to a series of bodies which exercise them in the way established by the Constitution. The question of the constitutional powers of the King must therefore be distinguished from their origin.

The role and functions of the monarch were extensively debated in the Congress when the issue of the form of state came to the fore. The debates were strongly pervaded by the spirit of Benjamin Constant. Paraphrasing the second chapter of his *Principes de politique*, monarchist speakers described the monarch as a neutral power, whose task it was to moderate between the other powers so as to guarantee their harmonious collaboration. To be sure, the delegates reinterpreted Constant's

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[147] "May Leopold, on setting foot on the shores of his new fatherland, shake off every trace that could possibly remain in the depths of his memories of those gothic prejudices, of foreign influences; may he take the firm resolution never to renounce his origin: the people, which alone has made him King. (…) May he particularly remember that, in coming to Belgium, he comes to sanction a Revolution". *Le Courrier* no. 197, 16/07/1831.

[148] "(…) the Prince, called to reign over us by the choice of the Congress, must enshrine this great truth, which has so many times been repeated, but almost always in vain: Kings are made for the people, and not the other way around". Pinheiro-Ferreira traces the quote back to Vattel: Vattel and Pinheiro-Ferreira, *Le droit des gens,* p. 480. *Le Belge* no. 288, 15/10/1830. *Le Belge* was a liberal oppositional newspaper with radical tendencies, based in Brussels. Its editor, Adolphe Levae, was a sympathizer of Louis de Potter, who also published in it. Harsin, *Essai sur l'opinion publique,* 29, Witte, Het natiebegrip, 225; Wouters, De Brusselse radikale pers in de eerste roes van de onafhanklijkheid (1830–1844), 141.

theory rather freely, since he himself had intended his neutral monarch as a fourth power, 'floating above the others', whilst the executive power was entrusted to a separate body.[149]

While the delegates saw no wrong in putting both the executive and 'neutral' powers in the hands of the King, they strongly insisted on his moderating role.[150] He was not to act on any power of his own, but he had to intervene in the actions of the other powers when the interests of the nation required it. For him to be able to do so, the heredity principle was considered an essential prerequisite. It was often repeated that, in order to survive, every state organisation must contain elements of both movement and stability. The permanent character of royal power was necessary to counterbalance the volatility and changeability of the elected chambers, since instability was harmful to the State. The most comprehensive argumentation of this kind was provided by Nothomb:

> Il y a stabilité dès qu'il existe au centre de l'ordre politique un pouvoir qui se perpétue de lui-même et qui échappe à toutes les vicissitudes humaines. (…) Le pouvoir qui se maintient par l'hérédité et l'inviolabilité n'est qu'un pouvoir modérateur. La souveraineté se compose de la volonté et de l'exécution. La volonté est placée dans la représentation nationale, l'exécution dans le ministère. Le pouvoir permanent influe sur la volonté par l'initiative et le veto, et par la dissolution de la chambre élective; sur l'exécution par le choix des ministres et par le droit de grâce. Il n'a pas d'action proprement dite, mais il provoque ou empêche l'action de tous les autres pouvoirs qui, autour de lui, se créent ou se renouvellent par l'élection.[151]

Defining 'will' and 'execution' as the component parts of sovereignty, Nothomb placed the first in the Parliament and the second in the ministry. The King or 'permanent power' was in a position to influence both via his prerogatives, without however having a terrain of action of his own. Thus, the monarch was granted a share in sovereignty, but exclusively by delegation, and on the conditions stipulated by the nation and listed in the Constitution. The same idea underlies the intervention of De Theux de Meylandt, who spoke of:

> (...) une dynastie qui sera de notre choix, qui ne sera appelée à la souveraineté que lorsque nous aurons établi une constitution éminemment libérale, et lorsque nous aurons complété toutes les lois organiques de cette constitution.[152]

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[149] Constant, *Principes de politique,* 40.

[150] E.g. the intervention by Forgeur: "Le chef de l'État n'aura qu'un pouvoir neutre; il rectifiera l'action de tous les pouvoirs. L'exécution sera dans le ministère; si le ministère est inhabile, il sera privé des moyens de gouvernement". Huyttens, *Discussions,* vol. 1, p. 226, 20/11/1830.

[151] "There is stability when in the center of the political order exists a power which perpetuates itself and which escapes all human vicissitudes. (…) The power which maintains itself through heredity and inviolability is only a moderating power. Sovereignty is composed of will and action. The will is placed in the national representation, the execution in the ministry. The permanent power influences the will through the initiative and the veto, and through the dissolution of the elected Chamber; the execution through the choice of the ministers and the right of pardon. He doesn't really act himself, but he provokes or prevents the action of the other powers around him which are created or renewed via election". Huyttens, *Discussions*, vol. 1, p. 193, 19/11/1830.

[152] "(...) a dynasty which will be of our own choice, and which will only be called to sovereignty after we will have established an eminently liberal Constitution, and after we will have completed all the organic laws of this Constitution". Huyttens, *Discussions,* vol. 1, p. 224, 20/11/1830.

Nonetheless, the monarch's constitutional powers were extensive. Alongside being part of the legislative power (art. 26), heading the executive (art. 29) and disposing of the absolute legislative veto (art. 69) and the right to dissolve Parliament (art. 71), his prerogatives included the command of the armed forces, the rights to declare war and conclude treaties and the rights of pardon and coinage (art. 68). He furthermore appointed the ministers as well as a range of civil servants and judges (art. 65, 66, 99, 101) and created nobility (art. 75). Moreover, the Constitution granted the King a share in constituent sovereignty in the case of constitutional revision (art. 131). When the sitting chambers declared a number of articles subject to revision, Parliament was dissolved and new elections ensued. The new chambers decided on the revision in common agreement with the King.[153] This arrangement is consistent with the argumentation of the Central Section concerning the royal veto for normal legislation. If it was feared that a Parliament hostile to the King might attempt to threaten the latter's constitutional position through legislative initiatives, the same was a fortiori true for a constituent assembly.

It was however impossible for the monarch to use these powers autonomously. Except for the 'passive' use of the royal veto and the appointment and dismissal of ministers, all of his actions were subject to ministerial responsibility through the obligatory countersign. As Lebeau put it:

> La royauté, en effet, n'est pas, à proprement parler, un pouvoir. Comment dire qu'il y ait pouvoir, lorsque toute faculté d'agir est interdite sans l'assentiment d'autrui? Telle est la position de la couronne, assujettie qu'elle est par le contreseing à la volonté du conseil.[154]

Lebeau went on to say that the Council of Ministers itself was controlled by the Parliament. Even if few speakers went as far as Lebeau, it is clear from the debates that the King was expected to act in accordance with the will of Parliament. For the delegates, the ultimate guarantee for aligning the monarch's conduct with the national will was the yearly vote over the budget. Time and again they testified to their belief that the budget was Parliament's key to controlling the government. Lebeau for example used the argument to cut down the discussion over the royal prerogatives. To Van Meenen's insistent demand for a constitutional clause forbidding the monarch to conclude treaties that risked to financially burden the State, Lebeau replied:

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[153] Pierre Wigny's objection that the King cannot really refuse to sanction a constitutional revision rests on evidence provided by Belgian political custom rather than by the provisions of the Constitution itself: Wigny, *Droit constitutionnel*, 223; 618.

[154] "Indeed, royalty doesn't really have any power. How can one say that it has power, when its every faculty of action is forbidden without the approval of someone else? That is the position of the Crown, subjected as it is, by the countersign, to the will of the council". Huyttens, *Discussions*, vol. 1, p. 208, 20/11/1830.

> C'est inutile, parce que les chambres votent le budget, et que par conséquent on ne peut grever l'État sans leur assentiment; et quand le roi reconnaîtrait une dette de vingt millions, il ne pourrait en grever l'État, parce qu'on lui refuserait les subsides.[155]

A similar remark was made by the Count d'Arschot in reply to Le Bègue's proposal to abolish the royal prerogative to declare war. Le Bègue found this a too dangerous prerogative because it gave the monarch the right to put the people's lives at risk. D'Arschot reminded him "that the vote over the army is annual, and that the King consequently disposes as little of our lives as he disposes of our pennies".[156]

Lebeau predicted a parliamentary system in which the vote over the budget came down to a vote of confidence over the cabinet:

> La chambre, une fois composée, confirme, modifie ou renvoie le ministère, selon le degré de confiance ou de défiance qu'il lui inspire. La chambre élective, ouvrant et fermant à volonté la bourse des contribuables, tient dans sa main la destinée du cabinet; elle impose à la couronne ses exclusions et ses choix; elle élit donc en réalité, quoique indirectement, le ministère tout entier. Or, le ministère, ainsi élu ou confirmé, ne peut vivre qu'à la condition d'administrer selon le vœu de la majorité de la chambre; c'est-à-dire selon le vœu du pays qu'elle est censée représenter.[157]

The monarch's only real action was the choice of ministers, but even that was imposed on him by the chambers.

One cannot fail to remark that the keystone of the system described by Lebeau, the political responsibility of ministers to Parliament, was missing from the Constitution.[158] Although the question wasn't explicitly discussed, it is clear from Lebeau's account that he considered it an unnecessary measure. In his view, the control over the budget sufficed to force the King to take his ministers out of the parliamentary majority. By not inscribing the political responsibility of ministers

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[155] "It is useless, because the chambers vote the budget, and consequently one cannot burden the State without their consent; and when the King would contract a debt of 20 million, he could not burden the State with it, because one would refuse to vote his subsidies". Huyttens, *Discussions,* vol. 2, p. 77, 10/01/1831.

[156] "(…) le comte d'Arschot rappelle que le vote sur l'armée est annuel et que, par conséquent, le roi ne dispose pas plus de nos vies que de nos écus". Huyttens, *Discussions,* vol. 2, p. 77, 10/01/1831.

[157] "Once it will have been composed, the Chamber will confirm, modify or dismiss the ministry, according to the degree of confidence or distrust it inspires in it. The elective Chamber, opening or closing the taxpayers' purse at will, holds the cabinet's destiny in its hands. It imposes its exclusions and its choices on the King; so that in reality it elects the whole ministry, be it indirectly. The ministry, being elected or confirmed in this way, can only live on the condition of administering according to the will of the majority of the Chamber; in other words, according to the will of the country it must represent". Huyttens, *Discussions*, vol. 1, p. 208, 20/11/1830.

[158] Ganshof Van der Meersch, Des rapports entre le Chef de l'Etat et le gouvernement en droit constitutionnel belge, 183; Gilissen, Die belgische Verfassung von 1831, 62; Koll, Belgien, 499. Articles 63 and 64 stipulated the juridical responsibility of ministers, but not their political responsibility to Parliament. See: Müβig, L'ouverture du mouvement constitutionnel, 499; Van Velzen, *De ongekende ministeriële verantwoordelijkheid. Theorie en praktijk, 1813–1840.* This fact tends to be overlooked in accounts that attribute a pivotal position to the Belgian Constitution in the turn from constitutional to parliamentary government. See for example: Luyten and Magnette, Het parlementarisme in België; Mirkine-Guetzévitch, L'histoire constitutionnelle comparée.

into the Constitution, the Congress did however create ambiguity. Even if the limitation of royal power in favour of the representatives of the people certainly was one of the Congress's guiding principles, the debates do not allow to assess to what extent Lebeau's vision on parliamentary government was shared by his colleagues. Further research is therefore needed. It is however certain that the realisation of this vision in practice came only much later.

Contrary to what some authors have concluded with hindsight on developments in the second half of the nineteenth century, parliamentary government didn't materialise in the first decades after the Constitution's promulgation.[159] True, from a very early stage Leopold I took care to appoint ministers who enjoyed parliamentary support. As soon as 1833, after using his prerogative to dissolve the Chamber of Representatives because it proved unable to form a government, Leopold stipulated by decree that governments could only function when being supported by stable parliamentary majorities.[160] Nonetheless, the first decades of Leopold's reign have been characterised as "a semi-parliamentary system with a monarchical counterpart"[161] or even a "monarchical constitutionalism with precedence for Parliament".[162] Due to the unionist composition of cabinets (i.e. composed of ministers from both rivalling political blocs, Catholic and liberal, alike) and the absence of formal party organisations in this period, it was not exactly clear which parliamentary majority they actually represented.[163] Belgium's first King used the advantage to strengthen his position vis-à-vis the Parliament and to keep a firm grip on the executive.[164] Only after 1857, when the last unionist alliance shattered, did the King's influence on the government diminish.[165] Thus, the exact balance of powers in the Belgian political order bore the mark of political custom as much as of constitutional provisions.[166]

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[159] For examples of such accounts, see: Böckenförde, Der Verfassungstyp der deutschen konstitutionellen Monarchie im 19. Jahrhundert; Fusilier, *Les monarchies parlementaires. Etudes sur les systèmes de gouvernement*, 360; Mirkine-Guetzévitch, 1830 dans l'histoire constitutionnelle de l'Europe.

[160] Gilissen, *Le régime représentatif*, 114.

[161] Witte, De evolutie van de rol der partijen in het Belgische parlementaire regeringssysteem, 96.

[162] Kirsch, Monarch und Parlament im 19. Jahrhundert: der monarchische Konstitutionalismus als europäischer Verfassungstyp - Frankreich im Vergleich, 190. In 1918, Errera remarked that the form of state inscribed in the Constitution did not conform to political practice any more: "La monarchie belge est strictement parlementaire et non point seulement constitutionnelle et représentative". Errera, *Traité du droit public belge*, 116. Parliamentarism developed over time, resting on political custom as much as on constitutional provisions. See also: Müβig, L'ouverture du mouvement constitutionnel, 515.

[163] De Smaele, Politieke partijen in de Kamer, 1830–1914.

[164] Senelle judges that Leopold, despite faithfully respecting the letter of the Constitution, manifestly overstepped the limits of the role intended for him by the Congress. Senelle, Le monarque constitutionnel en Belgique, 56.

[165] Van den Wijngaert et al., *België en zijn koningen. Monarchie & macht,* 165.

[166] For the evolution of this balance over time, see: Stengers, *L'action du Roi en Belgique depuis 1831: pouvoir et influence*; Van den Wijngaert et al., *België en zijn koningen.*

3 National or Popular Sovereignty?

3.1 A False Opposition

In spite of its underdetermined formulation, article 25 can thus safely be said to proclaim national sovereignty in the sense of sovereignty from below.[167] This did not, however, avert the dangerous ambiguity pointed at by Grenier at the beginning of this chapter. Although it may have been clear to all that the nation was the ultimate source of legitimacy and that the members of Parliament represented it (at the exclusion of the King), the article did not specify of whom the sovereign nation was composed, nor who was entitled to membership. Grenier's warning bespeaks his fear of a narrow, elitist interpretation of the concept of nation, as foreshadowed by the composition of the Congress itself:

> (…) le Congrès ne représente que ceux qui l'ont nommé; c'est-à-dire, la propriété notable, quelques professions libérales et le corps du clergé. Il s'ensuit que le Congrès, bien qu'il n'agisse entièrement que dans l'intérêt de la nation, ne représente point la nation, mais les notabilités seulement. Tous les citoyens n'ont pas concouru à son élection.[168]

With his remark, Grenier laid bare the thorny issue of the distinction between popular and national sovereignty. It is surprising how little attention has been given to this semantic question, especially given the almost complete lack of debate in the Congress over article 25. At no point in its lengthy deliberations did the Congress take care to define the central concept on which in grounded the legitimacy of its existence as well as of its primary legacy, the Constitution. Whether the undisputed acceptance of this notion must be seen as a sign of a commonly shared understanding about its meaning among the delegates, or whether the vagueness of the term conveniently cloaked fundamental disagreement, or whether the pressing circumstances of the Revolution simply did not allow enough time for profound theoretical reflection, remains a matter of debate. What is sure is that it has facilitated the development of diverging interpretations over time.

Today's constitutional manuals are unambiguous over the meaning of 'nation' in the Belgian Constitution. For André Alen, it is: "an abstract, indivisible collectivity comprising the citizens of the past, the present and the future".[169] John Gilissen, while admitting that the term didn't have a fixed meaning in the political science of the time, defines it as "a community of people who want to live together" but not coinciding with the members of that community.[170] Pierre Wigny calls it "collective being to which a political organisation has given a juridical unity which expresses

[167] De Smaele, *Omdat we uwe vrienden zijn*, 30.

[168] "The Congress represents only those who have constitued it; in other words: landed property, some liberal professions and the clergy. It follows that the Congress, although it entirely acts in the interest of the nation, doesn't represent the nation but only the notables. Not all citizens have contributed to its election". Grenier, *Examen du projet de constitution.*

[169] Alen, *Treatise on Belgian Constitutional Law,* 11.

[170] Gilissen, *Le régime représentatif*, 13.

itself by a personality distinct from the one of each of its members".[171] In every case the nation is defined as a collective, abstract being transcending the concrete community of people. Their unanimity is deceiving however, for the cited definitions are of much later origin than the Constitution. Upon careful inspection, they cannot be traced back to the time of the Constitution's formation or to the years immediately following it. Constitutional manuals and comments from the first decades after the Constitution's promulgation offer very diverging interpretations of the meaning of article 25.

The oldest constitutional manual, the *Manuel constitutionnel de la Belgique* published in April 1831, proclaimed:

> (...) cet article établit la souveraineté du peuple que la République française proclama la première (…). La *légitimité divine* (la grâce de Dieu) des rois a disparu devant la *volonté,* la *force* et *l'union* des peuples.[172]

The liberal university professor Antoine Becart wrote in 1848:

> Le peuple est souverain, car il est l'objet de la souveraineté, mais s'il est la raison de tout ce qui se fait, il ne doit pas en être l'auteur lui-même: tout doit se faire pour lui mais non par lui. Donc la souveraineté ne réside pas réellement dans le peuple.[173]

Jean Stecher in his *Onpartydige volkshistorie des Belgische grondwet* ("Impartial national history of the Belgian Constitution"*)* of 1851 wrote:

> Het Bestuer bezit geene andere magte dan diegene, welke het Volk hem heeft toevertrouwd. Het Volk, als soeverein, is de oorsprong aller staetsmagten. In den maetschappelyken kring is de volksmagt boven alles – behalve boven God.[174]

The same stance was taken in a liberally inspired article published in the Catholic *Journal historique et littéraire* in 1852. It called the people sovereign and defined the nation as:

> l'ensemble des membres dont la société se compose dans un Etat, c'est la réunion de tous les individus. Les individus meurent et sont remplacés par d'autres individus; la nation ne meurt pas, elle ne fait que se renouveler sans cesse.[175]

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[171] Wigny, *Droit constitutionnel*, 224.

[172] "(...) this article established the sovereignty of the people, first proclaimed by the French Republic (…). The divine legitimacy (the grace of God) of kings has disappeared before the will, the power and the union of the people". N.N., *Manuel constitutionnel de la Belgique*, 40.

[173] "The people is sovereign because it is the object of sovereignty. But, despite being the reason of all that is done, it mustn't itself be the author of it: all must be done for it but not by it. So sovereignty doesn't really reside in the people". *Le Progrès belge* no. 8, 23/07/1848.

[174] "The Government has no other powers that those it has been entrusted with by the people. The people, being the sovereign, is the source of all powers of state. In society, the power of the people is superior to everything except God". Stecher, *Onpartydige volkshistorie des Belgische grondwet*, 15.

[175] "(…) the whole of all the members of which society is composed in a State; it is the reunion of all individuals. The individuals die and are replaced by other individuals; the nation doesn't die, it perpetually rejuvenates itself". Kersten, De la Constitution belge et de l'influence qu'elle exerce sur l'esprit et les mœurs, 86.

A somewhat less popular interpretation was defended by Hippolyte-Jérôme Wyvekens, who in his *Notions élémentaires sur la Constitution belge et les lois politiques et administratives* ("Elementary notions on the Belgian Constitution and the political and administrative laws") of 1854, wrote:

> Le gouvernement de la Belgique est constitutionnel, monarchique, représentatif. La souveraineté y est partagée entre le Roi, les représentants du peuple et les tribunaux, de la manière fixée par la Constitution. (…) Tous les pouvoirs émanent de la nation: l'exercice en est conféré au Roi, aux représentants du peuple et aux tribunaux.[176]

In his *Manuel des institutions constitutionnelles & administratives, des droits et des devoirs des belges* of 1856, the historian A. Docquier defined the Nation as:

> (...) la totalité des hommes réunis en un même Etat (…). Ils forment un peuple lorsqu'ils ont la même origine ou la même langue.[177]

Docquier continued by calling Belgium's Constitution a mixed government because it contained element of democracy, monarchy and oligarchy. Later in the century, a very different sound was heard in the work of Masson and Wiliquet (1883):

> Le gouvernement de la Belgique est essentiellement démocratique, la Constitution le déclare nettement: tous les pouvoirs émanent de la nation (Const. 25). L'institution de la royauté elle-même, qui n'a conservé de la royauté d'autrefois que la majesté, le respect, la grandeur, est essentiellement populaire: c'est la nation qui a conféré l'autorité royale à Leopold de Saxe-Cobourg; c'est par sa volonté solennellement proclamée en 1831, que cette autorité est héréditaire.[178]

The cited works can hardly be said to be unanimous about the meaning of nation and national sovereignty. More importantly, many other constitutional manuals and comments simply chose not to define these concepts at all, confining themselves to repeating the vague formula of article 25. Clearly, the nineteenth-century interpreters of the Belgian Constitution could not fall back on a generally accepted standard formula of national sovereignty. The diversity of their writings disclaims the existence of a common theoretical concept of nation shared by all the parties involved,

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[176] "The Belgian government is constitutional, monarchical, representative. Sovereignty is divided between the King, the representatives of the people and the tribunals, in the way fixed by the Constitution. (…) All the powers emanate from the nation: their exercise is attributed to the King, the representative of the people and the tribunals". Wyvekens, *Notions élémentaires sur la Constitution belge et les lois politiques et administratives, à l'usage des athénées, des écoles moyennes et primaires et des aspirants aux emplois civils,* 14–15.

[177] "(…) the totality of all men united in the same State (…). They constitute a people when they share the same origin and the same language". Docquier, *Manuel des institutions constitutionnelles & administratives, des droits et des devoirs des belges, ou principes du droit public et privé de la Belgique*, 10.

[178] "The Belgian government is essentially democratic, the Constitution straightforwardly declares it: all the powers emanate from the Nation (Const. 25). The institution of royalty itself, which of the royalty of former times has only conserved its majesty, its respect, its grandeur, is essentially popular: it is the nation which has conferred royal authority to Leopold of Saxe-Coburg; this authority is hereditary by its own will, solemnly proclaimed in 1831". Masson and Wiliquet, *Manuel de droit constitutionnel*, 39.

such as the one that is accepted by the leading constitutional manuals of today. The meaning of article 25 has, instead, been a battlefield were authors of diverging political persuasions met in an effort to ascertain who was entitled to membership of the nation and, more importantly, to the exercise of political rights.

More is therefore at stake than simply a question of definitions. Henk de Smaele has shown that the presently accepted interpretation of national sovereignty in the Belgian Constitution was only developed *post factum*. It goes back to Carré de Malberg's classical distinction between national and popular sovereignty in his *Contribution à la théorie générale de l'État* (1920–22). De Smaele follows the lead of Guillaume Bacot in arguing against the validity of this distinction when applied to the end of the eighteenth and the beginning of the nineteenth century.[179] Carré de Malberg distinguished between two mutually exclusive conceptions of sovereignty and traced them back to the works of Rousseau and Sieyès respectively.[180] Hence the well-known binary opposition still associated with these thinkers and concepts today: the sovereignty of the concrete, physical people versus the sovereignty of an abstract, transcendent and ahistorical nation; political participation as a right versus a function; universal versus limited suffrage; the French Constitution of 1793 versus the one of 1791.[181]

Bacot argues that Carré de Malberg exaggerated the antithesis between the ideas of Rousseau and Sieyès.[182] According to him, the meaning of the terms 'nation' and 'people' was not at all fixed in this period. Both were often used as synonyms, which counters the importance usually attributed to the choice of words in the Constitutions of 1791 and 1793. Rousseau's and Sieyès' conceptions of sovereignty are furthermore obscured by the internal paradoxes characterising the writings of both thinkers. It is not the aim of this chapter to take a stance in the debate. Bacot's observations do prove helpful however for coming to terms with the underdetermined character of national sovereignty in the Belgian Constitution.

What is striking about the constitutional manuals and commentaries cited above, is that many explicitly identified national sovereignty with the sovereignty of the people. In this they were consistent with the language employed in the National Congress. When used in combination with 'sovereignty', the meaning of the terms 'nation' and 'people' was interchangeable. Often both were alternately used by the same speaker, without entailing a change of meaning. Tellingly, in the official Dutch version of the Constitution, which had no legal force, 'nation' was translated as 'people'. Article 25 thus read: "Alle gezag komt van het volk" ("All the powers

[179] Bacot, *Carré de Malberg*; De Smaele, *Omdat we uwe vrienden zijn.* Roels too, despite his otherwise faithful adherence to Carré de Malberg, recognises that the latter exaggerated this distinction. Roels, *Le concept de représentation*, 97.

[180] Bacot, *Carré de Malberg*, 7.

[181] Space does not allow to do justice to this complicated subject matter here. For more comprehensive accounts, read: Baker, Constitution; Baker, Souveraineté; Brunet, *Vouloir pour la nation. Le concept de représentation dans la théorie de l'Etat*; Roels, Le concept de représentation; Deinet, The Development of the Constitutional Concepts in the First Part of 19th Century France.

[182] Bacot, *Carré de Malberg.*

emanate from the people").[183] This use of language indicates that the creators of the Constitution of 1831 did not presuppose a theoretical difference between national and popular sovereignty. In fact, they did not hesitate to call popular sovereignty the guiding principle of the new constitutional system. When the priest Vander Linden intervened against the proposed formulation of article 25, his arguments were tellingly directed against the sovereignty of the people.[184] None of his colleagues contradicted him.

Equally indicative is Etienne de Gerlache's brochure *Essai sur le mouvement des partis en Belgique* ("Essay on the movement of parties in Belgium") of 1852, in which he fulminated against the popular sovereignty enshrined in the Belgian Constitution. De Gerlache was not just anybody. He had been president of both the Constitutional Commission and the National Congress. His brochure was aimed against the new tendency of one party governments that put an end to almost two decades of unionism in Belgian politics. Most Catholics deplored this evolution. They saw parliamentarism as a threat to national unity and to the preservation of conservatism.[185] De Gerlache's critique on popular sovereignty was meant to discredit republicanism in the French tradition:

> Le dogme de la souveraineté du peuple, sur lequel reposent toutes nos théories constitutionnelles, est gros de révolutions, inconciliable avec l'ordre et la paix, et avec tout Gouvernement régulier. C'est la plus détestable flatterie, le plus insigne mensonge que les démagogues aient jamais pu jeter aux masses".[186]

Although his feelings about it had visibly changed, De Gerlache thus recognised popular sovereignty as the basis of the Belgian institutions, just as he had done in the closing speech he delivered in the Congress's final session. In this speech, cited above, he insisted on the "voice of the people" as the Constitution's ultimate source of legitimacy. Marnix Beyen's research into the use of political languages in Parliament has furthermore shown that the reality of the principle of popular sovereignty was generally accepted by the Belgian political parties in the nineteenth century. In parliamentary debates, the concept was referred to in a positive way, lending legitimacy to the arguments it was associated to.[187] All of this is rather hard to

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[183] *Recueil des décrets du Congrès national de la Belgique et des arrêtés du pouvoir exécutif*, 4th series, vol. 2, 135. Likewise, the French name of the Congress's assembly hall, *Palais de la Nation* ("Palace of the Nation"), was translated into Dutch as *Volkshuys* ("House of the People").

[184] Huyttens, *Discussions*, vol. 2, p. 14, 03/01/1831.

[185] De Smaele, Politieke partijen in de Kamer, 147; Witte, De evolutie van de rol der partijen in het Belgische parlementaire regeringssysteem; Van den Wijngaert, *België en zijn koningen*, 162.

[186] "The dogma of popular sovereignty, on which all our constitutional theories rest, is full of revolutions and irreconcilable with order and peace, and with every regular government. It is the most detestable, the most extraordinary lie ever thrown at the masses by the demagogues". De Gerlache, *Essai sur le mouvement des partis depuis 1830 jusqu'à ce jour,* 65. In his history of the Kingdom of the Netherlands of 1859 he wrote that the Belgian Constitution, as opposed to the Dutch Fundamental Law, was dominated by "the popular principle". De Gerlache, *Histoire du Royaume des Pays-Bas depuis 1814 jusqu'en 1830*, 317.

[187] In the debates of the Dutch Estates General, the opposite was true. Beyen and Te Velde, Modern Parliaments in the Low Countries.

reconcile with the antithesis between national and popular sovereignty that is supposed to have existed at the time of the Constitution's creation.

3.2 The Limitation of Political Participation

De Smaele classifies the application of the absolute distinction between popular and national sovereignty to the Constitution of 1831 as part of the 'liberal myth' by which liberal politicians have, later in the nineteenth century, canonised their reinterpretation of article 25.[188] As they grew conscious of the radical potential of the formulation of the article and its roots in the French republican tradition, they theorised a concept of national sovereignty distinct from the idea of popular sovereignty. In doing so, they relied heavily on the works of the French doctrinal liberals, who had successfully developed a liberal interpretation of sovereignty that precluded popular political participation.[189] Liberty, according to this tradition, mainly consisted of personal, administrative liberties without automatically supposing political rights.[190]

The Belgian Constitution was indeed famed for the 'catalogue of liberties' it contained and which were an important object of political propaganda fostered by the political elites.[191] Political rights were presented as a different thing altogether. Since the nation was conceived of as impersonal and trans-historical, citizenship by no means automatically implied entitlement to political participation.[192] The function of representing the nation could safely be delegated to that part of the population which by its socioeconomic situation was most suited to the task. The exact turning point in the constitutional interpretations is as yet unascertained, but it must in all likelihood be sought in the second half of the nineteenth century and possibly even towards the end of the century.[193] In any case, our analysis confirms that applying Carré de Malberg's 'liberal' definition of national sovereignty to the Constitution of 1831 amounts to an anachronistic reading of it.

In the National Congress there was no trace of a theoretical distinction between both kinds of sovereignty. However, counting few disciples of Rousseau, the assembly evidently shared Sieyès' concern for the limitation of political participation.

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[188] De Smaele, Eclectisch en toch nieuw.

[189] Demoulin, Le courant libéral.

[190] Bacot, *Carré de Malberg*, 131; Brunet, *Vouloir pour la nation*, 33; Collins, *Liberalism in Nineteenth-century Europe,* 8; Jennings, Conceptions of England; Marteel, *Inventing the Belgian Revolution*, 151.

[191] Huygebaert, Les quatres libertés cardinales. De iconologie van pers, onderwijs, vereniging en geloof in België, als uitdrukking van een populariserende grondwetscultus vanaf 1848; Janssens, *De Belgische natie viert. De Belgische nationale feesten, 1830–1914*; Marteel, *Inventing the Belgian Revolution.*

[192] Brunet, *Vouloir pour la nation*, 31.

[193] De Smaele, Eclectisch en toch nieuw, 413.

Along with Montesquieu, the political scientist most cited in its midst was Benjamin Constant, who himself was influenced by Sieyès.[194] His 'English' system, with its checks and balances, its limited suffrage and pluralistic vision of politics, appealed greatly to the founders of the Belgian Constitution.[195] Nevertheless, Constant explicitly recognised that the French *Acte Additionnel* of 1815 was based, and could only be based, on the sovereignty of the people:

> Notre Constitution actuelle reconnaît formellement le principe de la souveraineté du peuple, c'est-à-dire la suprématie de la volonté générale sur toute volonté particulière.[196]

At the same time, Constant agreed with Sieyès that the people must by necessity delegate the exercise of sovereignty to its representatives, so that direct democracy was out of the question.[197] Also, both considered the restriction of suffrage to a part of the population as an obvious necessity.

In other words, in the language of political theory of the day, and contrary to later interpretations, popular sovereignty did not equate to universal suffrage. The same is evidently true for the Belgian National Congress. It seems logical to assume that the lack of debate over the theoretical nature of sovereignty in the Congress reflected, among other things, a tacit common opinion over its practical manifestation. After all, article 25 merely indicated the nation as the *source* of sovereignty, leaving open every option as to the modalities of political participation. It is true that all its talk of popular sovereignty did not prevent the Congress from carefully restricting political rights. Not a single call for universal suffrage was heard in the assembly room.[198] Even delegates from the republican left, like Seron, explicitly rejected it.[199] Despite his former Jacobinism – Seron had been secretary to Georges Danton – he denounced the anarchy inherent in systems of 'pure democracy'.[200] The conservative, Catholic newspapers *Courrier de la Meuse*, protesting against the proclamation of popular sovereignty in the Constitution, accused the liberals of inconsistency:

> Nos confrères libéraux eux-mêmes n'exigent pas de notre part un aussi grand sacrifice; que disons-nous? Eux-mêmes reculent devant la démocratie pure, et personne d'entr'eux ne demande ni ne songe à établir le suffrage universel.[201]

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[194] Idem, 31; Gilissen, Die belgische Verfassung von 1831, 59; Marteel, Polemieken over natievorming, 45.

[195] Gilissen, *Le régime représentatif*, 11; Van Velzen, De invloed van de theorie van Benjamin Constant op het regime van koning Willem I, 42.

[196] "Our present Constitution enshrines the principle of the sovereignty of the people, that is the supremacy of the collective will over any private wishes." Constant, *Principes de politique,* 13.

[197] Hoogers, *De verbeelding van het souvereine. Een onderzoek naar de theoretische grondslagen van politieke representatie*, 143.

[198] Gilissen, *Le régime représentatif*, 90.

[199] Van den Steene, *De Belgische grondwetscommissie*, 32. For Seron, see: Discailles, Seron (Pierre-Guillaume).

[200] Huyttens, *Discussions*, vol. 1, p. 198, 19/11/1830.

[201] "Even our liberal colleagues do not demand such a sacrifice from us. They themselves shrink from pure democracy, and not one of them either asks for nor thinks of establishing universal suffrage". *Courrier de la Meuse* no. 1, 01/01/1831.

Much as the National Congress recognised the people as the source of all legitimate authority, it had no intentions of letting the voice of the people dictate politics. The Congress was a socially conservative body.[202] Almost 75 % of the members belonged to the moneyed bourgeoisie; the remaining 25 % consisted of nobles. The delegates held clear views on who was to represent the nation and who was not. In the words of Joseph Forgeur:

> La meilleure des garanties à demander aux électeurs, c'est le payement d'un cens qui représente une fortune, une position sociale, afin qu'ils soient intéressés au bien-être et à la prospérité de la société.[203]

The Constitutional Commission had proposed to fix the property requirements for the franchise by ordinary law. Delegate Eugène Defacqz, however, successfully proposed to include these requirements in the Constitution itself, so as to ensure their permanent character. Defacqz even motivated his proposal by a concern to stave off calls for universal suffrage in the future. By the introduction of direct election, the nation would finally have real representatives (as opposed to the indirectly elected members of the Estates General under the Dutch regime). This did not mean however that the whole nation was called to the urns:

> Cependant la nation ne peut pas concourir directement et en entier à l'élection, car quelque beau, quelque séduisant que fût le spectacle d'un peuple concourant tout entier à l'élection de ses mandataires, nous savons malheureusement que cela est impossible.[204]

Joseph Forgeur agreed and warned his colleagues that the whole constitutional edifice depended on immutable franchise requirements:

> (…) si vous n'avez pas dans la constitution une disposition qui fixe le cens électoral, comme c'est là-dessus que repose tout l'édifice constitutionnel, il se pourrait que les législatures à venir, en le modifiant, renversassent tout votre ouvrage.[205]

The resulting census suffrage requirements inscribed in the Constitution were higher even than under the preceding Dutch regime.[206] Capacity suffrage, which had been allowed for the election of the Congress itself, was abolished under the pretense that it created privilege. Property requirements for the Senate were so high that only a group of about 400 landowners, most of them aristocrats, was eligible.[207]

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[202] De Lichtervelde, *Le Congrès National de 1830,* 64; Magits, De *Volksraad*, 272.

[203] Huyttens, *Discussions,* vol. 2, p. 29, 06/01/1831.

[204] "But the nation cannot in its entirety and directly participate in the election. However beautiful, however seductive the spectacle of an entire people participating in the election of its representatives may be, unfortunately we all know that it is impossible". Huyttens, *Discussions,* vol. 2, p. 28, 06/01/1831.

[205] "(…) if you don't include in the Constitution a stipulation fixing the census suffrage requirements, for on them rests the entire constitutional edifice, future legislatures may, by changing it, overturn your entire work". Huyttens, *Discussions,* vol. 2, p. 29, 06/01/1831.

[206] Witte, *De constructie*, 87.

[207] Stevens, Een belangrijke faze, 658.

The debates of the Congress do not allow to distill a distinct picture of the nation as it existed in the minds of the delegates. This was all the more so because in questions of sovereignty, the nation and the people were treated as synonyms. If the nation was indeed conceived of as an entity different from the concrete people, that difference was not put into words. What is clear, however, is that the idea of limited suffrage was not considered to contradict the sovereignty of the nation or the people. Suffrage had by necessity to be delegated to a portion of the population that could speak for the whole. In this sense, the principle of representation operated not only on the level of the Chamber of Representatives, but also on that of the electors. The limitation of political participation was inherent to it, if only for pragmatic reasons.

4 Reception

4.1 The Contested Nature of Popular Sovereignty

The newspapers too, agreed on the meaning of article 25. Regardless of their political inclination, they interpreted it as the proclamation of popular sovereignty. The anti-democratic, conservative *Courrier de la Meuse* called it "(…) le principe de la souveraineté populaire absolue, lequel vient d'être nettement posé dans la constitution".[208] The radical *Le Belge* wrote:

> C'est dans le peuple que réside aujourd'hui la souveraineté. Cette souveraineté il l'exerce par ses représentans. Tout pouvoir, toute société qui voudrait décider nos grandes questions avant que le peuple n'ait eu le temps de se prononcer par l'organe de ses représentans, attenterait véritablement à la souveraineté nationale.[209]

The radical *Courrier de la Sambre* defined nation as:

> (...) une réunion d'hommes qui s'associent pour tout ce qui concerne la garantie des leurs intérêts privés et communs: de ce fait il découle nécessairement qu'à eux seuls appartient le droit de déterminer le mode le plus avantageux et le moins onéreux de parvenir à ce but.[210]

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[208] "The principle of absolute popular sovereignty, which has been clearly enshrined in the Constitution". *Courrier de la Meuse* no. 6, 07/01/1831.

[209] "Sovereignty nowadays resides in the people. It exercises this sovereignty by way of its representatives. Every power, every society wishing to decide our great questions before the people has had time to pronounce via its representatives, would veritably be attacking national sovereignty". *Le Belge* no. 287, 14/10/1830.

[210] "A nation is nothing but a reunion of men who associate for everything which concerns the guarantee of their private and communal interests. It necessarily follows that the right to determine the most advantageous and least onerous way to obtain this goal, exclusively belongs to them". *Courrier de la Sambre* no. 189, 20/11/1830. The *Courrier de la Sambre* was the mouthpiece of the liberal, constitutional opposition in Namur. Its editors were involved in the radical club *Réunion patriotique de Namur,* the reports of which it published. See: Doyen, *Bibliographie namuroise,* no. 1764; Dulieu, *Namur 1830: une fringale de liberté*; Fivet, *Le Pays de Namur et la Révolution de*

The liberal *Courrier des Pays-Bas* very literally identified the nation with the people:

> Deux êtres qui n'étaient au fond que le même, sous deux modes différens d'existence: la nation, c'est-à-dire, tout le peuple; et la représentation nationale, c'est-à-dire, le peuple encore, mais agissant sous une forme convenue, pour se faciliter à lui-même l'exercice de sa volonté.[211]

Elsewhere the newspaper jubilantly exclaimed:

> Qu'elle est noble, majestueuse, imposante, l'assemblée qui remplit l'auguste mission de fonder les institutions politiques d'un peuple libre! Son existence est la preuve la plus éclatante, la plus solennelle que la souveraineté est dans le peuple, source et origine de tout pouvoir social. Qu'on vienne, en présence du congrès belge, nous persuader que les rois tiennent leur pouvoir directement de Dieu, et non pas de la volonté des peuples; qu'on vienne, en présence des débris de la couronne de Guillaume 1[er], nous dire que l'insurrection n'est pas l'acte extrême, mais légitime, de la souveraineté national outragée.[212]

The radical *L'Emancipation* wrote that sovereignty by necessity resided in the nation and equated it with popular sovereignty.[213] These findings are consistent with Els Witte's research into the concept of nation used in the period directly preceding the Belgian Revolution. Via discourse analysis methods she concluded that, although the term 'nation' was used more often in Belgian newspapers than 'people', the former concept was positively associated with popular sovereignty.[214]

1830: récit des événements; Istace-Deprez, Le Courrier de la Sambre et la Révolution de 1830; Warnotte, *Etude sur la presse à Namur, 1794–1914*, 127.

[211] "Two beings which were essentially the same, under two different forms of existence: the nation, in other words the people; and the national representation, in other words, the people again, but acting in an agreed-upon form, to facilitate the exercise of its will". *Courrier des Pays-Bas* no. 321, 17/11/1830. The *Courrier des Pays-Bas*, based in Brussels, was one of the leading liberal and anticlerical newspapers of the opposition against the regime of William I. Among its collaborators were prominent revolutionary leaders, several of whom rose to political power in the course of the Revolution: Louis de Potter, Edouard Ducpétiaux, Alexandre Gendebien, Lucien Jottrand, Jean-Baptiste Nothomb, Jean-François Tielemans, Pierre Van Meenen. On 1 January 1831, the title of the newspaper changed into *Le Courrier.* Gilissen, Jean-Baptiste Nothomb, 6; Harsin, *Essai sur l'opinion publique,* 29; Witte, De Belgische radicalen, 16; Wouters, De Brusselse radikale pers, 139.

[212] "How noble, how majestic, how imposing is the assembly, fulfilling its august mission of founding the political institutions of a free people! Its existence is the most solemn, the most brilliant proof of the sovereignty of the people, the source and origin of all social power. Who will, in the presence of the Belgian Congress, persuade us that kings hold their powers directly from God, and not from the will of peoples? Who will, in the presence of the debris of William I's crown, tell us that insurrection is anything else than an extreme, but legitimate act of injured national sovereignty?" *Le Courrier* no. 34, 03/02/1831.

[213] *L'Emancipation* no. 34, 23/11/1830. *L'Emancipation*, based in Brussels, was a radical newspaper sponsored by French republican émigrés. Its contributors moved in the circles of radical thinkers and revolutionaries such as Buonarroti and De Potter. Its principle editor was the republican delegate to the National Congress De Robaulx. Kuypers, *Les égalitaires en Belgique. Buonarroti et ses sociétés secrètes d'après des documents inédits (1824–1836)*; Leconte, La Réunion centrale; Wouters, De Brusselse radikale pers, 141–142.

[214] Witte, Het natiebegrip.

In the newspapers under investigation, popular and national sovereignty were treated as exact synonyms. The newspapers systematically contrasted popular sovereignty with Old Regime royal sovereignty and divine right. Whether they supported or rejected the principle, they presented its proclamation in Belgium in a historical perspective. The Belgian Revolution was depicted as yet another phase in the fight to the death which had been going on between both conceptions of sovereignty since 1789. The Belgians were said to have been inspired by the French July Revolution, and to have taken it further by explicitly ruling out the last traces of monarchical sovereignty: "Après ce principe, l'origine du pouvoir a été déplacé; elle n'a plus sa source dans la dynastie, mais dans la nation".[215]

However, the exact meaning of popular sovereignty was a source of controversy. The concept was explicitly discussed by journalists and led to sharp disputes between rival newspapers. The *Courrier de la Meuse*, while supporting the Revolution, deplored the course taken by the Congress. While it recognised that the Revolution had been driven by the popular principle, it fiercely opposed turning it into a principle of government. The newspaper considered it a dangerous concept, since it was unfit to serve as the basis of a stable government:

> (…) si on veut combattre efficacement le despotisme populaire, le despotisme des partis, la tyrannie des tribuns et des anarchistes, non seulement il n'est pas nécessaire, d'admettre le principe de la *souveraineté du peuple*, mais il est même très dangereux de l'admettre. (…) Malheur à nous, malheur au pays si notre nouvelle charte consacrait ce principe funeste! Ce serait le germe de sa mort, et par conséquent la cause de nouveaux bouleversements. Un gouvernement quelconque *fondé sur ce principe*, n'a que la force brute pour se défendre.[216]

What the newspaper feared above all was the reign of the populace:

> (…) la souveraineté des rues, souveraineté terrible, brusque, aveugle, sourde, cruelle et inexorable. (…) cette souveraineté monstrueuse qui parcourt les rues une torche à la main et qui ne vit que des désordres.[217]

Following the newspaper, the principle of popular sovereignty was not only dangerous, but also impracticable. It endorsed the *Journal des Flandres'* description of the principle as "an absurd and chimeric supposition" since it considered it impossible to fully realise.[218] In every human society, the exercise of power is by necessity delegated to a fraction of the population. Whichever political regime would be

[215] "By this principle, the origin of power has shifted, it is no longer in the dynasty but in the nation". *Le Courrier* no. 139, 19/05/1831.

[216] "(…) when wishing effectively to combat popular despotism, the despotism of parties, the tyranny of tribunes and anarchists, it is not only unnecessary to admit the principle of popular sovereignty, but it is even very dangerous to do so. (…) Woe to us, woe to the country, should our new charter consecrate this fatal principle! It will be the seed of its death, and consequently the cause of new upheavals. Any government founded on this principle has nothing but brute force to defend itself". *Courrier de la Meuse* no. 262, 29/10/1830.

[217] "(….) the sovereignty of the streets, which is a terrible, sudden, blind, deaf, cruel and inexorable sovereignty. (…) this monstrous sovereignty which roams the streets torch in hand and which lives from disorders only". *Courrier de la Meuse* no. 169, 15/07/1831.

[218] *Courrier de la Meuse* no. 271, 10/11/1830.

instated by the Constitution, it would never fully conform to the implications of article 25. Therefore new revolts, followed by new failed attempts at popular governments, were unavoidable:

> Vouloir que ces faits [the establishment of a new government] aient lieu véritablement en vertu de la souveraineté du peuple, c'est vouloir l'impossible, c'est vouloir ce qui ne s'est jamais vu. (…) c'est vouloir tous les jours une nouvelle révolution, c'est vouloir anéantir la société. (…) il faut, de toute nécessité, qu'il y ait un pouvoir souverain et ce pouvoir souverain sera toujours, quoi qu'on fasse et quoi qu'on veuille, celui d'un ou de plusieurs individus, celui d'un ou de plusieurs corporations.[219]

The newspaper arrived at this conclusion by its identification of sovereignty with the actual exercise of power. While it did approve of the idea that every power needed to rest on the consent of popular opinion, it rejected as impossible the idea of entrusting the exercise of power to the entire people. This would require a distribution of power among all citizens, which meant its annihilation altogether. In every society, power is held by a limited group of people who command, while the rest of the population obeys. Only the holders of power can truly be called sovereign: "(…) car toute souveraineté est absolue en ce sens qu'elle décide en dernier ressort et que personne ne résiste".[220] In line with the newspaper's Catholic and reactionary background, it defended the view that sovereignty emanates not from the people but from God and that it should be vested in the powerful hands of a hierarchically constituted government, preferably of a monarchical kind. The newspaper went on to observe that even the National Congress, by its own composition, contravened the popular principle it so proudly proclaimed. Far from taking its mandate from the hands of the entire people, it took it from the infinitesimal minority that had been allowed to vote. Without the introduction of universal suffrage, to which even the liberals objected, power could not be said to really emanate from the nation:

> Chez nous, la souveraineté appartiendra vraisemblablement désormais à un vaste collège d'électeurs, qui sera composé peut-être d'environ 50,000 membres; ce sera *une quatre-vingtième de la nation*; et les 79 autres 80^{mes}, seront nécessairement sujets. (…) jamais on ne pourra, et quand on le pourrait, jamais on n'oserait y placer la nation toute entière.[221]

Liberal and radical newspapers contested the *Courrier de le Meuse*'s critique on the concept of popular sovereignty. *Le Vrai Patriote* accused it of confusing the

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[219] "To wish that the establishment of a new government really takes place by virtue of the sovereignty of the people is to wish the impossible, is to wish something that has never been seen before. (…) it is to wish a new revolution every day, to wish the annihilation of society. (…) it is necessary to have a sovereign power and this sovereign power will always, despite what one does or wishes for, belong to one or several individuals, to one or several groups". *Courrier de la Meuse* no. 269, 07/11/1830.

[220] "(…) because all sovereignty is absolute in the sense that it decides in last resort and that no one resists". *Courrier de la Meuse* no. 59, 10/03/1831.

[221] "Henceforward, sovereignty will probably belong to a vast college of electors, which will be composed of around 50,000 members; it will consist of one eightieth part of the nation, and the other 79 parts will by necessity consist of subjects. (…) never will one be able to place sovereignty in the hands of the entire people, nor would one dare to do so, if one were able to". *Courrier de la Meuse* no. 269, 07/11/1830.

origin and the exercise of power. It considered popular sovereignty to be self-evident because a government only exists where a people exists, and a people always has the power to change its mandataries. However, this by no means implied the establishment of pure democracy.[222] The radical *Courrier de la Sambre* likewise pointed out that the origin and the exercise of power were two different things. It furthermore argued that the formulation of article 4 of the draft Constitution ("emanates from" instead of "resides in") clearly implied government by representation, not direct democracy.[223] The liberal *Courrier des Pays Bas* held a similar view:

> Nous convenons que la souveraineté est absolue. Mais la souveraineté n'est pas dans les pouvoirs; elle est dans la nation. Les pouvoirs, loin d'être souverains, sont liés par la constitution, qui est le véritable acte de la souveraineté. Ils peuvent, je le sais, franchir les limites constitutionnelles, mais dans ce cas il y a rébellion des pouvoirs contre la souveraineté nationale.[224]

The point was that, even if sovereignty was undividable, a careful balance of powers could be built upon its base. Also, universal suffrage was absolutely out of the question. Nonetheless, popular sovereignty was a reality, because the people was the source of all powers.[225]

The *Courrier de la Meuse* could not be convinced. Its fears were made worse by the composition of the National Congress, which it judged to be all too democratic. Already sovereignty was fatally divided among so many electors and so many Congress delegates. Furthermore, the new Constitution accorded a far too preponderant position to the Chamber of Representatives, at the expense of the monarch. Instead of monarchy, the Congress had created a pure democracy in disguise:

> Notre congrès s'est, à la vérité, d'abord décidé pour une monarchie constitutionnelle; mais des résolutions postérieures ont complètement détruit cette décision; et maintenant il est évident que nous ne pouvons avoir qu'une vraie démocratie. Le roi ou le duc que nous aurons ne fera rien à l'affaire.[226]

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[222] *Le Vrai Patriote* no. 29, 10/11/1830. *Le Vrai Patriote,* based in Brussels, was the short-lived successor of the defunct Orangists newspaper *Gazette des Pays-Bas*. It systematically criticised the Provisional Government and favoured the return of the Nassau dynasty. Wouters, De Brusselse radikale pers, 140.

[223] *Courrier de la Sambre* no. 189, 20/11/1830.

[224] "We agree that sovereignty is absolute. But sovereignty is not in the powers, it is in the nation. The powers, far from being sovereign, are bound by the Constitution, which is the veritable act of sovereignty. It is true that they can transgress the constitutional limits, but in that case there is rebellion of the powers against the national sovereignty". *Le Courrier* no. 64, 05/03/1831.

[225] However, the newspaper expected universal suffrage to become a reality in the future, as the people, by its progressive enlightenment, would develop the necessary capacities: "En effet, quelque avantage qu'on attende de l'abaissement du cens électoral, et de l'abolition intégrale du cens d'éligibilité, il est évident que les législateurs futures, sortant d'une société moralement et politiquement progressive, étendront successivement le cercle des capacités électorale et élective, et le jour viendra où les masses populaires seront assez éclairées pour concourir, sans aucune exception, et sans danger, à l'élection des députés". *Le Courrier* no. 118, 28/04/1831.

[226] "At first our Congress has, to be sure, decided for constitutional monarchy; but posterior resolutions have completely destroyed this decision; and now it is evident that we can have nothing else

The popular principle was fated to cause the downfall of the Constitution which enshrined it:

> (…) nous ne pensons pas que ce que nous constitutions maintenant, soit pour l'avenir, c'est-à-dire, qu'il puisse durer. La charte à laquelle nous travaillons (nous croyons pouvoir le prédire) ne sera qu'une de ces constitutions éphémères dont le vieux et le nouveau monde ont vu des exemples par douzaines depuis une quarantaine d'années.[227]

The controversy goes to show that, despite a general understanding that national sovereignty, as enshrined in article 25, was synonymous with popular sovereignty, a widely shared definition of it was not at hand. All parties agreed that the new principle implied that all powers derived from below. They differed on the questions of the division of powers and the extent of political participation.

4.2 Legal Order, Legitimate Representation and Political Participation

The question of who was entitled to represent the nation was a cause for controversy from the very beginning. It directly concerned the legitimacy of the Revolution and the source of sovereignty. At first, the Belgian opposition had taken recourse to the Fundamental Law for legitimising its claims. The years 1827-'29 were marked by systematic attacks on the Dutch government, based on the real or supposed provisions of the Constitution of 1815.[228] It earned the Belgian opposition the nickname 'constitutionals', as opposed to the 'ministerials' siding with the government.[229] The French newspaper *Le Constitutionnel* commented: "L'insurrection est décidemment nationale et constitutionnelle".[230] The *Courrier des Pays-Bas* encouraged the Belgian delegates to the Estates General to persist in their "legal resistance" against "the violations of the Fundamental Law" and against the "anti-constitutional projects of the ministers".[231] It confirmed that what the opposition desired was respect for the will of the Fundamental Law, and added: "Nous le répétons, nous ne sommes ni en révolution, ni en insurrection".[232]

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but a pure democracy. Our future King or Duke will change nothing to the fact". *Courrier de la Meuse* no. 6, 07/01/1831.

[227] "(…) we do not think that the thing we are currently constituting, will be the future, in other words, that it will last. The charter we are working on (we believe we can predict) will be but one of these ephemeral constitutions of which the old and the new world have seen scores of examples in the last forty years or so". *Courrier de la Meuse* no. 8, 09/01/1831.

[228] Cordewiener, *Etude de la presse liégeoise*, 65; Harsin, *Essai sur l'opinion publique.*

[229] Marteel, Polemieken over natievorming.

[230] "The insurrection is definitely national and constitutional". Quoted in: *Courrier de la Sambre* no. 140, 13/09/1830.

[231] *Courrier des Pays-Bas* no. 260, 17/09/1830.

[232] "We repeat that we are neither waging a revolution nor an insurrection". *Courrier des Pays-Bas* no. 244, 01/09/1830.

Soon afterwards, however, a new legitimation was needed. Violent actions in the streets of Brussels led to the creation of new forms of authority alongside the official ones. As the Belgian protests started to resemble a proper rebellion, the government denounced them as illegal. In his Royal Message of 5 September, King William announced that a debate over the grievances of the Belgian opposition could only be opened on the condition of the latter's "return into the legal order".[233] The opposition replied that the legal order, as it was meant by William, was tyrannical because it harmed the rights of the Belgian Nation. The *Courrier des Pays-Bas* commented:

> Nous ne sommes plus dans l'ordre légal tel que le ministère Van Maanen l'avait organisé, parce que cet ordre légal était tyrannique pour nous, et ce prétendu ordre légal n'étant autre chose que l'oppression organisée et couverte d'un vernis de légalité, c'est lui qu'il faut modifier et corriger.[234]

It contested the legality of the existing order on account of its tyrannical character and of the harm it caused to the Belgian Nation: "Cet ordre, c'est l'oppression de le Belgique systématiquement organisée avec un faux semblant de légalité".[235] *Le Vrai Patriote* maintained that a people was free to choose a new leader when the social contract was being violated.[236] As the opposition left the legal order behind, the rights of the nation were increasingly being named as the only legitimate source of authority. The *Courrier de la Sambre* wrote:

> Et qu'on ne dise pas qu'il faut le consentement des états-généraux; nous sommes aujourd'hui en dehors de l'ordre légal; toute mesure est légale en ce moment dès qu'elle a pour base l'assentiment de la nation.[237]

Towards the end of September, Dutch troops violently clashed with an improvised army of insurrectionists on the streets of Brussels, sparking general rebellion against the Dutch government. The killing of Belgian citizens by the Dutch troops was presented as a final attack on the Belgian Nation by which the Dutch government forfeited its remaining claims to legitimate authority. *Le Courrier* proclaimed

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[233] *Courrier des Pays-Bas* no. 252, 09/09/1830.

[234] "We are no longer under the legal order organised by the Minister Van Maanen, because that legal order was tyrannical for us. Since it is nothing but organised oppression covered with a varnish of legality, this supposed legal order must be modified and changed". *Courrier des Pays-Bas* no. 256, 13/09/1830. Cornelis Felix van Maanen (1769–1846) was William I's Minister of Justice. As the driving force behind the press trials directed against prominent opposition members in the years preceding the Belgian Revolution, and as a staunch supporter of William's autocratic style of government, he became the personification of the 'ministerial' regime abhorred by the Belgian opposition. Van Sas, Het politiek bestel onder koning Willem I; Vermeersch, Willem I en de pers in de Zuidelijke Nederlanden, 1814–1830.

[235] "This order is the systematically organised oppression of Belgium with a fake semblance of legality". *Courrier des Pays-Bas* no. 260, 17/09/1830.

[236] *Le Vrai Patriote* no. 29, 10/11/1830.

[237] "Don't tell us that we need the consent of the Estates General. We are now outside of the legal order. Presently, every measure is legal as soon as it is founded on the approval of the nation". *Courrier de la Sambre* no. 137, 09/09/1830.

that the only legitimate source of authority in the contemporary world was the people's right to self-determination:

> Aujourd'hui ce n'est pas le fait antérieur, ni les convenances de tel souverain qui peuvent autoriser sans leur consentement respectif la réunion de deux peuples en une seule famille politique. Le principe qui a triomphé en septembre est l'association consentie. (…) Le principe de l'association consentie, est aujourd'hui tellement inhérent au principe du gouvernement populaire, que le règne de la liberté ne pourra pas autrement s'établir en Europe, qu'en laissant à chaque peuple la faculté de s'unir à l'association politique qui est le plus conforme à ses vœux.[238]

As Dutch authority was eroded, the Provisional Government filled the void. From that moment on, respect for the old legal order needn't concern the Belgians any more, the newspapers agreed.

> "(…) cette question a été résolue dans les journées de 23, 24, 25 et 26 septembre; c'est cette solution qu'il fallait solennellement faire connaître; c'est le seul titre du gouvernement provisoire; il y puise sa légitimité".[239]

> "La guerre a prononcé, c'est la légitimité de son mandat improvisé au milieu de la lutte".[240]

> "Secondons de tous nos efforts l'autorité naissante, autorité éminemment populaire et qui est avoué par la nation".[241]

The Provisional Government's mandate was considered legitimate by its acting in the interest of the nation.[242] The latter was said to have endorsed it by tacit agreement:

> "La nation qui ne pouvait agir par elle-même, laissait agir en son nom le gouvernement provisoire, tant que les circonstances le rendaient indispensable".[243]

> "Il arrive parfois que des hommes montent au pouvoir vacant sans élection directe et que le peuple les souffre sans répugnance manifeste. Le peuple les élit en ne le renversant pas. C'est la position de notre gouvernement provisoire.[244]

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[238] "Nowadays neither prior facts nor the liking of such or such sovereign can authorise, without their respective consents, the reunion of two peoples into one political family. The principle which has triumphed in September is that of consented association. (…) The principle of consented association is today so inherent to popular government that the reign of liberty cannot establish itself in Europe but by leaving each people the faculty to unite with the political association most conforming to its wishes". *Le Courrier* no. 173, 22/06/1831.

[239] "(…) this question has been answered during the days of 23, 24, 25 and 26 September; this solution had to be solemnly announced; it is the only title of the Provisional Government; it is the source of its legitimacy". *Courrier des Pays-Bas* no. 278, 05/10/1830.

[240] "War has pronounced, it is the legitimacy of its mandate improvised in the middle of the battle". *Courrier des Pays-Bas* no. 274, 01/10/1830.

[241] "Let us support with all our efforts the nascent authority. This eminently popular authority is avowed by the nation". *Courrier de la Sambre* no. 162, 11/10/1830.

[242] Gilissen, *Le régime représentatif*, 80.

[243] "Not being able to act by itself, the nation let the Provisional Government act in its name as long as the circumstances rendered it indispensable". *Courrier des Pays-Bas* no. 321, 17/11/1830.

[244] "It sometimes happens that men ascend to the vacant power without being directly elected and that the people tolerates them without manifest repugnance. The people elects them by not overthrowing them. Such is the position of our present government". *Le Vrai Patriote* no. 29, 10/11/1830.

The Provisional Government therefore legitimately represented the nation until such time as the nation was in a position to designate the representatives of its own choice:

> Le gouvernement provisoire, comme seule représentation nationale d'alors, avait au nom de la nation et comme si c'eût été cette nation elle-même qui agissait, déterminé, pour une époque postérieure, une autre forme de représentation nationale. Cette nouvelle forme réalisée, la première était anéantie, à moins qu'on ne soutînt qu'il fût convenable que la nation fût représentée à la fois de deux manières.[245]

The newspapers thus endorsed De Potter's justification of the Provisional Government's actions presented in the opening session of the National Congress. The argument was essential for the legitimacy of the mandate of the Congress itself. For if the Provisional Government hadn't legitimately represented the nation, how could a body that had been single-handedly convened by its initiative be said to do so? At stake was the very origin of sovereignty. In general, few observers outright rejected the legitimation provided by the Provisional Government for taking power. However, this sensitive question did now and then surface in the press in the following months, in particular when a newspaper didn't agree with the line taken by the Government or the Congress.

In its crusade against the principle of popular sovereignty, the *Courrier de la Meuse* didn't hesitate to qualify the Provisional Government's claim to represent the people as pure fiction:

> Deux cent hommes, choisis par quelques milliers de notables du pays, vont se réunir à Bruxelles; ils y vont exercer les droits de la souveraineté; de qui les tiennent-ils, ces droits? De nous électeurs; et nous électeurs, de qui tenons-nous les nôtres? Du gouvernement provisoire; et le gouvernement provisoire ne tient les siens de personne, il les tient de lui-même.[246]

The Provisional Government could not by right claim to represent the nation. Neither could the Congress, since, as the Fundamental Law had been abolished, it had been convened in the absence of a valid electoral law:

> La nécessité veut que les hommes qui vont décider de notre avenir, ne doivent leur droit de voter qu'à une simple ordonnance, émanée d'un pouvoir provisoire qui ne tient son mandat que de lui-même: nouvelle preuve de l'impossibilité d'appliquer au corps social le principe de la souveraineté du peuple.[247]

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[245] "Being the sole representative of the nation at that moment, the Provisional Government had in the name of the nation, and as if through the action of the nation itself, determined for a later moment another form of national representation. As soon as that new form was realised, the first one was nullified, unless one had found it suitable for the nation to be represented in two ways at the same time". *Courrier des Pays-Bas* no. 321, 17/11/1830.

[246] "Two hundred men, chosen by a few thousand of the country's notables, will unite in Brussels; there they will exercise the sovereign rights. But from whom do they take these rights? From us, the electors. But from whom do we, electors, take ours rights? From the Provisional Government. And the Provisional Government doesn't take them from anyone, it takes them from itself". *Courrier de la Meuse* no. 269, 07/11/1830.

[247] "By way of necessity, the men who are to decide over our future owe their right to vote to a simple ordinance, issued by a provisional power which took its mandate from itself only: another

Whereas the newspaper approved of the Provisional Government's actions, it denied that its mandate rested on popular or national sovereignty.

Most newspapers didn't contest the Provisional Government's popular mandate though, and praised its members for their competent government. They did however show a measure of distrust towards this non-elected authority. The mandate of the Constitutional Commission in particular was a matter of debate in the press, just as it was in the Congress. *Le Belge* published a letter by Alphonse Dujardin, who contested the Commission's right to present a draft Constitution to the Congress, since only the latter represented the people:

> (…) car il n'appartient à aucun pouvoir, ni fraction de pouvoir, non seulement d'octroyer ou de concéder, mais même de proposer une constitution.[248]

Whereas the Provisional Government was considered to legitimately exercise public authority in anticipation of the installation of a proper national representation, it was felt that drawing up a new Constitution, even when it was only a draft version, should not be within its competence. To a great extent these critiques were motivated by a rejection of the conservative slant of the draft Constitution, which was generally poorly received in the press.[249]

The most radical protest was indeed heard on the left side of the ideological spectrum. The conservative *Courrier de la Meuse* signalled that many democrats and republicans had been disappointed by the property requirements for suffrage of the constituent elections:

> Le mécontentement fut même si grand que beaucoup d'entre ces derniers annoncèrent très-clairement qu'ils ne se croiraient pas liés par les décisions du congrès.[250]

Since it had been elected by less than 1 % of the population, the Congress was not considered by these people to truly represent the nation. The democratic newspaper *L'Emancipation* blamed the Provisional Government for its 'unlawful' introduction of census suffrage:

> Nous disions au gouvernement qu'il se fît dictateur pour le bien du pays. Il a abusé de ses pouvoirs pour dépouiller de leurs droits les neuf dixièmes de la nation. Il s'est privé de tous ceux-là surtout qui faisaient sa force et son appui.[251]

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proof of the impossibility to apply to the social body the principle of popular sovereignty". *Courrier de la Meuse* no. 252, 17/10/1830.

[248] "(…) for it does not belong to any power, nor to any fraction of a power, not only to grant or to concede, but even to propose a Constitution". *Le Belge* no. 304, 31/10/1830. Dujardin further expounded his opinion in a separately published brochure: Dujardin, *La Belgique au 16 octobre 1831*. See also: Magits, *De Volksraad*, 354.

[249] Magits, *De Volksraad*, 354; Nothomb, *Essai*, 78.

[250] "So discontented were they, that many of them publicly announced their conviction that they were not bound by the decisions of the Congress". *Courrier de la Meuse* no. 40, 16/02/1831.

[251] "We told the government to become dictatorial for the well-being of the country. It has abused its powers so as to rob nine tenths of the nation of its powers. It has especially discarded power from those who constituted its power and its support". *L'Emancipation* no. 15, 03/11/1830.

The *Courrier de la Sambre* likewise protested against the 'arbitrary' and 'absurd' limitation of suffrage introduced by the Provisional Government, which in its view completely undermined the principle of national sovereignty:

> Le congrès tient son mandat d'une petite fraction de la nation belge, mais cette petite fraction ne tient le sien que du percepteur des contributions.[252]

Very few radicals were elected to the Congress, since most of their sympathisers did not have the vote.[253] The few of them that were involved in the Provisional Government and the Congress quickly realised that they belonged to an infinitesimal minority.[254] Jean-François Tielemans quit the Constitutional Commission when his colleagues decided to maintain the monarchy instead of establishing a republic.[255] His friend and mentor Louis de Potter stepped down from the Provisional Government soon after the National Congress's first session.[256] He too found the draft Constitution a far too conservative piece of work and slightingly commented: "Ce n'était pas la peine de verser tant de sang pour si peu de chose".[257] Since his republican and democratic programme had no chance of being endorsed by those who had now come to power, he shifted his actions to other terrains.

Disappointment over the suffrage requirements indeed prompted some radicals to dispute the Congress's aptitude to represent the nation.[258] Typical examples of this line of reasoning are Grenier's calling into question the mandate of the Congress and Toussaint's threat of a new popular revolution against the institution of a Senate (both cited above). Radicals took their cue from Rousseau in arguing that the sovereignty needed to be shared by the whole nation, which they identified as the physical people. They typically accused the government of depriving those who didn't have the vote of their citizenship, as in a letter to the *Courrier de la Sambre* signed by "un ex-citoyen à fl. 49,99 ¾" ("an ex-citizen" who fell short of the suffrage requirements by less than one cent).[259]

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[252] "The Congress takes its mandate from a small fraction of the Belgian nation, but that small fraction takes its own from the tax collector only". *Courrier de la Sambre* no. 202, 26/11/1830.

[253] With Els Witte, we count as radicals those who contested the social inequality upon which the power position of the bourgeoisie was based. This heterogeneous group of people shared the common goal of striving for the introduction of democratic and social reforms, usually via parliamentary action. Witte, *Politieke machtsstrijd*, 349; Witte, De Belgische radicalen; Witte, *De constructie van België*, 109. For the radical press, which was often of a republican persuasion, see: Vermeersch, De structuur van de Belgische pers, 1830–1848, 104–115 and Wouters, De Brusselse radikale pers.

[254] Witte, De Belgische radicalen, 16.

[255] Hymans, *Le Congrès national*, 19; Van den Steene, *De Belgische grondwetscommissie*, 35. For Tielemans, see: Freson, J.F. Tielemans; Van den Steene, *De Belgische grondwetscommissie*, 18–19.

[256] Witte, *De constructie*, 88.

[257] "There was no point in spilling so much blood for so little result". Nothomb, *Essai*, 98; Van den Steene, *De Belgische grondwetscommissie*, 41.

[258] In the spring of 1831 the radicals' dissatisfaction culminated in a failed attempt at a democratic coup. Witte, De Belgische radicalen, 17.

[259] *Courrier de la Sambre* no. 205, 29/11/1830.

The radical club *Réunion centrale* used the questionable representativeness of the Congress as an argument against the 'reactionary' draft Constitution of the Commission, formally petitioning the Provisional Government to substitute it with a new, republican alternative:

> L'ordonnance électorale dictée par le même esprit, enlève à 9/10 des citoyens leurs droits civiques. Quand l'état se reconstitue, tout citoyen a le droit de concourir à la formation de la constitution qui doit le régir. Si on lui refuse ce droit, il conserve celui de protester contre l'œuvre anti-populaire qu'une représentation manquée pourrait produire, ainsi que le droit d'exprimer ses vœux, et de déclarer ses volontés par une autre voie que celle dont il est *illégalement* exclu. Ce droit, nous l'exerçons au nom du peuple, en vous faisant connaître qu'il regarde le projet de constitution comme indigne d'un peuple libre.[260]

It predicted a new outbreak of revolutionary violence if the 'tyrannical' draft Constitution was put into force. The *Courrier de la Sambre* put into doubt the mandate of the Congress on the same grounds. It did so in response to the Congress's decision in favour of a monarchical form of state, whereas the majority of the people, according to the newspaper, desired a republic:

> Tous les doutes devraient disparaître si les élections des membres du congrès eussent été plus populaires, si les neuf-dixièmes de la nation n'eussent pas été arbitrairement destitués de l'exercice de leurs droits politiques par le gouvernement provisoire. Mais, à la manière dont les choses ont été, il est bien permis à l'immense majorité du peuple de protester contre la décision de la *majorité* d'une chambre qui ne représente que la *minorité*.[261]

L'Emancipation too, fiercely attacked both the Constitutional Commission and the National Congress, neither of which, in its view, really represented the people. After vividly describing the Belgian Revolution as the triumph of the people over the despotism of monarchs, it expressed its indignation over this fact:

> (…) que quelques hommes arriérés, stationnaires, d'une société qui n'est plus, que d'autres trop timides, trop faibles, trop craintifs pour être du siècle auquel ils appartiennent par leur âge, osent sans mandat vous présenter une constitution qui, sous d'autres formes, n'est que la loi fondamentale que vous avait imposée Guillaume *le sanguinaire*. (…) Ce congrès, nous l'appellerons impopulaire, déplorable, parce qu'il ne peut être l'expression du vœu général; le gouvernement provisoire ayant limité le droit électoral, droit que nul pouvoir, nulle puissance ne peut limiter, qui est inhérent au caractère du citoyen, et que dans une

[260] "The same spirit dictated the electoral regulation, which deprives 9/10 of the citizens of their civic rights. When a state is being reconstructed, every citizen has the right to contribute to the formation of the Constitution which is going to govern him. If he is being denied this right, he preserves the right to protest against the anti-popular piece of work which a failed representation may produce, as well as the right to express his wishes and to declare his will by another means than the one from which he has illegally been excluded. We exercise this right in the name of the people when we let you know that we consider the draft Constitution unworthy of a free people". *L'Emancipation* no. 20, 09/11/1830; National Archives of Belgium, Gouv. Prov. III, no. 412. See also: Leconte, La Réunion Centrale, 969.

[261] "All doubts should have disappeared, if the elections of the members of the Congress had been more popular, if nine tenths of the nation had not arbitrarily been deprived of the exercise of their political rights by the Provisional Government. But given the turn things have taken, the great majority of the people has every right to protest against the decision of the majority of a chamber which represents only a minority". *Courrier de la Sambre* no. 202, 26/11/1830.

> société qui se reconstitue on a encore moins le droit de limiter, si on veut que les lois adoptées par le congrès soient obligatoires pour tous.[262]

It, too, predicted the outbreak of a new revolution and more bloodshed in order to establish a Constitution based on the true principles of the Belgian Revolution.

5 Conclusions

Since the end of the nineteenth century it is a commonplace in Belgian constitutional manuals to remark that whereas the terms of the Constitution are fixed, their meaning changes over time. Due to its longevity, the Belgian Constitution has shored up a succession of political systems, each of which has been shaped by the needs and expectations of an evolving society. Although the political mechanism has for a long time been made up of the same fixed set of components, the mutual relations between the components and the impact of each component on the whole have undergone remarkable evolutions. Some of these changes have been formalised via constitutional revisions (the first two of which, made in 1893 and 1921, mainly concerned electoral law), but considerable parts of the 1831 Constitution survive until this day, although their meaning for political practice has changed dramatically.[263] Notable examples concern the stipulations on the role of the monarch in the legislative process, such as the royal veto and the royal right to dissolve the chambers, his right to appoint and dismiss the ministers and his function as commander-in-chief of the army.

Article 25's chances for survival were no doubt enhanced by its concise and underdetermined formulation.[264] Under its flag several diverse systems have fared: census suffrage with an electorate of less than 1 % of the population (1831), universal plural manhood suffrage (1893), universal manhood suffrage (1919) and universal suffrage for all citizens of over 18 years of age (1948). Despite the historical consciousness displayed by some authors of constitutional manuals, debate over the exact meaning of national sovereignty as intended by the creators of the Constitution in 1830–1831 has been scarce. Moreover, diverse ideological readings have post factum been projected on the term. This chapter has attempted to restore article 25 to its proper historical context within the genesis of the Belgian Constitution.

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[262] "(…) that some retarded, stationary men, stemming from a society which no longer exists, and others who are too timid, too weak, too faint-hearted to be of the century to which they by their age belong, dare, without a mandate, to present to you a Constitution which is nothing other than the Fundamental Law, imposed unto you by William *the Bloody*, under a new form. (…) We call this Congress unpopular and deplorable because it cannot be the expression of the general will, since the Provisional Government has limited the electoral rights. No force or power can limit these rights, which are inherent to the character of the citizen, and which in a society which is reconstructing itself must be even less limited, if one wishes the laws adopted by the Congress to be obligatory for all". *L'Emancipation* no. 14, 04/11/1830.

[263] Gilissen, *Le régime représentatif*, 18.

[264] Van den Steene, *De Belgische grondwetscommissie*, 64.

It can come as no surprise that a diversity of political languages was present in Belgium's constituent assembly. Terms and concepts associated with thinkers like Montesquieu, Constant, Rousseau or De Lamennais, carrying diverging theoretical and ideological implications, can be distinguished. The language used by a minority of republican delegates, like Seron and De Robaulx, probably stands out most for its consistency.[265] However, it would be a mistake to assume that impenetrable barriers separated these languages. In fact, many terms and concepts, although often central to the debates, lacked a generally accepted definition. The confusion over words like republic, democracy and monarchy was at times complete. Different terms were used for the same concept, whereas different concepts could hide under the same term. The interpenetrability of the languages used in the Congress was reflected by the sometimes very slight minorities by which key elements of the new state system, like the Senate, were decided upon.[266] It must not be forgotten that the confection of the Belgian Constitution was an ad hoc affair. While the Constitutional Commission concluded its work on the draft Constitution in 6–10 days, the Congress needed a little over 2 months for debating and approving the final Constitution.[267] Although around half of the delegates held a degree in law, they were for the most part *homines novi*, without extensive prior experience with the workings of a legislative assembly, let alone a constituent one.[268]

In this context it may be easier to understand why a central concept like the nation did not have an unambiguous meaning, not even for the creators of the Constitution. The debates in the National Congress clearly show that for many delegates 'nation' and 'people' meant the same thing. Indeed, 'sovereignty of the people' was freely used as a synonym for 'national sovereignty'. It can therefore not be maintained that the choice for the term 'nation' in article 25 mirrors a specific political-theoretical position. The interpretation of the term was not fought out in bouts of abstract theorisation (even article 25 was passed with very little discussion) but in very practical debates over the division of and access to power, most notably in the questions of census suffrage, the powers of the monarch and bicameralism.[269] As a result, the state system organised by the Belgian Constitution bears traces of different political-theoretical traditions, just as the constitutional text itself is a mosaic of articles borrowed from existing examples.[270]

What can be ascertained beyond a doubt is that article 25 was meant to enshrine a system where sovereignty came from below. Since the mandate of the Congress

[265] De Smaele, Eclectisch en toch nieuw.

[266] Gilissen and Magits, Les déclarations de droits dans l'historiographie du droit des provinces belges*, 7.*

[267] Huyttens, *Discussions*, vol. 1–2; Magits, *De Volksraad*, 346; Van den Steene, *De Belgische grondwetscommissie*, 39.

[268] De Lichtervelde, Introduction; Magits, *De Volksraad*, 261.

[269] Descamps, *La mosaïque*, 51; Van den Steene, *De Belgische grondwetscommissie*, 37.

[270] Descamps, *La mosaïque.* De Smaele highlights the resulting eclecticism of the Constitution, calling it a mixture of elements from the liberal and republican traditions. De Smaele, Eclectisch en toch nieuw.

originated in a revolt directed against irresponsible royal government, its members were logically concerned with safely vesting the key to state power in the hands of the nation. This is made abundantly clear by the stipulations on ministerial responsibility (with countersignature and royal inviolability), the limitation imposed on royal power, the yearly vote of the budget and the election of both chambers. At the same time, the Congress was a socially conservative body elected by and composed of members of the aristocracy and the upper bourgeoisie.[271] It was as anxious to prevent the tyranny of the masses as royal despotism. National or popular sovereignty was therefore perfectly compatible, in its view, with the limitation of suffrage to the propertied classes.

This is not to say that the Congress's interpretation of national sovereignty went uncontested. In the press, the meaning of article 25 was a cause of heated and sometimes bitter debate. Whereas all newspapers agreed that it enshrined popular sovereignty, opinions diverged over the desirability and the possibility of constructing a functional political system on its basis, and on the conditions for doing so. Whereas moderate liberal and Catholic journals generally backed the interpretation of the Congress in these matters, their counterparts on the far right and the far left loudly protested against it. For them, national or popular sovereignty was indissolubly linked to universal suffrage. Its realisation was a source of apprehension for some, a source of frustrated craving for others. Both camps, being underrepresented in the Congress, reacted by calling into question the legitimacy of the constituent assembly. Their efforts remained without effect, however, just as their bleak auspices of imminent state collapse or popular revolution remained unfulfilled.

6 Summaries (French & Dutch)

6.1 La souveraineté de la Nation dans la Constitution belge de 1831. Sur les significations de l'article 25

L'Article 25 de la Constitution belge de 1831 prévoit que tous les pouvoirs émanent de la Nation. Pourtant la Constitution reste silencieuse sur ce que recouvre le concept de Nation. Curieusement, la question n'a guère soulevé de discussions dans le Congrès national. En conséquence, la définition de la souveraineté nationale proclamée dans la Constitution de 1831 reste indécise. Paradoxalement, les manuels de droit constitutionnel contemporains l'interprètent comme l'antithèse de la souveraineté du peuple. Ils s'inspirent pour cela d'une longue tradition intellectuelle, qui relie ces deux concepts à autant de courants mutuellement excluant en théorie politique. Abstraite et transhistorique, l'idée de 'nation' de l'abbé Sieyès aurait été délibérément préférée à celle du 'peuple', conçue comme réelle et historique, proposée par Rousseau. Alors que cette dernière notion aurait été presque

[271] Magits, *De Volksraad,* 1977.

automatiquement associée à la démocratie directe et au suffrage universel, la première fournirait la justification théorique pour limiter la participation politique aux seules couches sociales supérieures. Ce dernier but a sans aucun doute été poursuivi par le Congrès national belge. Aucun des délégués n'a appelé à l'introduction du suffrage universel ou à n'importe quel autre élargissement significatif de la participation politique.

Néanmoins, la dichotomie peuple/nation ne suffit pas à expliquer la formulation de l'article 25. D'autres auteurs soulignent qu'à la fin du XVIIIe et au début du XIXe siècle, ces deux termes n'avaient pas de signification précise dans la théorie politique. Il s'avère en outre que dans les débats du Congrès national, les deux termes étaient utilisés de façon interchangeable. Dans la discussion sur la souveraineté, les deux étaient considérés comme synonymes. Le Congrès lui-même n'a pas hésité à expliquer l'article 25 comme la proclamation de la souveraineté du peuple. Le Congrès et le Gouvernement Provisoire se référaient explicitement au mandat qu'ils tenaient du peuple. Dans le contexte de la Révolution belge, dirigée contre le gouvernement autocrate du roi Guillaume I, cela est à peine surprenant. La Constitution de 1831 peut en effet être lue comme l'antithèse du système de gouvernement précédent, basé sur le principe monarchique. Elle limitait expressément le pouvoir royal à une liste de domaines spécifiques. Tous les pouvoirs résiduels étaient désormais du ressort du parlement. Dans la pratique, le régime parlementaire a failli se réaliser pendant les premières décennies après la promulgation de la Constitution. Néanmoins, l'origine de la souveraineté avait incontestablement changé de place. Désormais le pouvoir émanait d'en bas au lieu d'en haut. Le vocabulaire utilisé dans les débats du Congrès le confirme d'ailleurs: 'nation' et 'roi' y étaient traités comme des unités conceptuellement séparées, voire opposées l'une à l'autre. En ce sens, l'article 25 proclame bel et bien la souveraineté populaire. Les membres du Congrès ne voyaient pas de contradiction entre ce principe et la restriction de la participation politique à l'élite socio-économique par l'introduction simultanée du suffrage censitaire.

Les débats menés dans les journaux confirment cette analyse. Aucun des journaux analysés ne contestait l'idée que l'article 25 impliquait la souveraineté du peuple. Vu les évènements révolutionnaires précédents, ils considéraient ce principe comme une évidence. Néanmoins, sa pertinence était vivement débattue par cette même presse. Le journal liégeois le Courrier de la Meuse, d'opinion catholique et réactionnaire, rejetait la souveraineté populaire, qu'il considérait comme un principe dangereux et impossible à réaliser. Selon lui, il allait également à l'encontre de la souveraineté divine. De son côté, la presse radicale et démocratique était critique. La façon dont le principe proclamé par l'article 25 était converti en un règlement électoral s'est heurtée à une vive résistance de leur part. Alors que les journaux libéraux et catholiques modérés soutenaient l'introduction du suffrage censitaire, la presse radicale la considérait comme une violation injustifiable de la souveraineté du peuple. Cette critique les a poussés à remettre en cause la légitimité du mandat du Congrès national et du Gouvernement Provisoire. Les vues radicales n'étant guère représentées dans le Congrès, ces idées ont trouvé peu d'écho cependant.

En guise de conclusion on retient que, malgré le flou entretenu autour du concept de souveraineté nationale dans la Constitution belge de 1831, les auteurs de cette dernière avaient à l'esprit un système politique assez bien défini. Souveraineté nationale et souveraineté populaire étant pour eux synonymes, les deux concepts ne pouvaient pas, dans ce cas-ci, être considérés comme contraires. Ce sont des interprétations ultérieures qui les ont investis d'un sens qu'ils n'avaient décidemment pas à l'époque. Cependant, s'il est sûr que la constituante a placé la source de la souveraineté dans le peuple, il est également certain qu'elle n'a pas voulu lui confier l'exercice du pouvoir. Les membres du Congrès, convoqués à la hâte et pressés par les évènements, étaient moins attentifs à des débats abstraits sur la signification des concepts politico-théoriques, qu'à l'établissement du pouvoir d'Etat dans les mains de l'élite socio-économique (pour autant qu'elle était hostile au régime hollandais).

6.2 Nationale soevereiniteit in de Belgische Grondwet van 1831. Over de betekenis(sen) van artikel 25

Artikel 25 van de Belgische Grondwet van 1831 bepaalt dat alle machten uitgaan van de Natie. Over wie of wat de Natie precies is, zwijgt de Grondwet echter. Opvallend genoeg werd er in het Belgisch Nationaal Congres ook nauwelijks debat gevoerd over de kwestie, waardoor de precieze betekenis van de geproclameerde nationale soevereiniteit allesbehalve eenduidig is. Hedendaagse handboeken grondwettelijk recht interpreteren haar onomwonden als tegenpool van de volkssoevereiniteit, waarbij ze zich laten inspireren door een invloedrijke traditie die beide concepten terugleidt tot twee elkaar uitsluitende politiek-theoretische stromingen. Sieyès' abstracte, transhistorische natieconcept zou doelbewust de voorkeur hebben gekregen boven Rousseau's concrete en historische opvatting van het volk. Terwijl het laatste concept automatisch associaties met directe democratie en universeel stemrecht zou hebben opgeroepen, zou het eerste een vrijgeleide zijn geweest voor de beperking van de politieke participatie tot de maatschappelijke toplaag. Dit laatste doel werd ongetwijfeld nagestreefd door het Belgisch Nationaal Congres. Geen enkele afgevaardigde deed een oproep tot de invoering van het algemeen stemrecht of tot een andere aanzienlijke verruiming van de politieke participatie.

Toch voldoet de tweedeling natie/volk niet om de formulering van artikel 25 te verklaren. Eerdere auteurs wezen er al op dat de precieze betekenis van deze termen in de politieke theorie aan het einde van de achttiende en het begin van de negentiende eeuw nog niet vastlag. Ook in de debatten van het Nationaal Congres bleken ze in grote mate inwisselbaar: wanneer ze voorkwamen in combinatie met soevereiniteit, deden beide termen dienst als synoniem. Meer nog, de politieke leiders van het moment aarzelden niet om artikel 25 uit te leggen als de proclamatie van de volkssoevereiniteit. De Congresleden en het Voorlopig Bewind beriepen zich uitdrukkelijk op hun door het volk verleende mandaat. In de context van de Belgische

Revolutie, die gericht was tegen het als autocratisch ervaren bewind van koning Willem I, verbaast dit nauwelijks. De Grondwet van 1831 kan gelezen worden als de antithese van Willems op het monarchale principe gestoelde regeersysteem. De koninklijke macht werd uitdrukkelijk beperkt tot de door de Grondwet vastgelegde domeinen. Alle residuele bevoegdheden waren voortaan het terrein van de volksvertegenwoordiging. Hoewel het zwaartepunt van de macht in de eerste decennia na de afkondiging van de Grondwet in de praktijk nog niet verschoof naar het parlement, kwam de soevereiniteit volgens deze regeling voortaan ondubbelzinnig van onderuit. Het woordgebruik van de Congresleden bevestigt dit: 'natie' en 'vorst' werden als conceptueel gescheiden en zelfs aan elkaar tegengestelde eenheden behandeld. In die zin proclameerde het Congres met artikel 25 dus inderdaad de volkssoevereiniteit. De gelijktijdige beperking van de politieke participatie tot de elite via het cijnskiesrecht werd door de betrokkenen meestal niet als een contradictie ervaren.

Dit blijkt ook uit een analyse van de krantendebatten. Alle onderzochte kranten interpreteerden artikel 25 uitdrukkelijk als de proclamatie van de volkssoevereiniteit die ze, gezien de revolutionaire gebeurtenissen, als vanzelfsprekend beschouwden. Toch was het principe de inzet van verhitte debatten. Een reactionair katholiek blad zoals de Luikse *Courrier de le Meuse* verwierp de volkssoevereiniteit omdat het haar beschouwde als een gevaarlijk en niet te realiseren principe, dat bovendien inging tegen de goddelijke soevereiniteit. Vooral in de radicale, democratisch gezinde pers klonk de kritiek echter hard. De manier waarop het in artikel 25 geproclameerde principe werd omgezet naar een kiesreglement, stootte bij hen op grote weerstand. Terwijl de gematigde katholieke en liberale bladen het Congres steunden bij de invoering van het cijnskiesrecht, beschouwde de radicale pers deze als een onrechtmatige aantasting van de volkssoevereiniteit. Deze kritiek leidde hen er zelfs toe om de legitimiteit van het mandaat van het Nationaal Congres en het Voorlopig Bewind in vraag te stellen. Aangezien de radicale standpunten nauwelijks in het Congres waren vertegenwoordigd, vonden ze echter weinig weerklank.

Als conclusie kan gelden dat, hoewel de nationale soevereiniteit in de Belgische Grondwet van 1831 geen eenduidige politiek-theoretische betekenis had, de opstellers ervan wél een duidelijk politiek systeem voor ogen stond. Aangezien nationale soevereiniteit en volkssoevereiniteit voor de betrokkenen synoniem waren, kunnen beide concepten in dit geval niet worden beschouwd als elkaars tegendeel. Latere interpretaties hebben er een invulling aan gegeven die ze op het moment zelf nog niet hadden. Zeker is echter dat, hoewel de oorsprong van de soevereiniteit door de grondwetgever overduidelijk in het volk werd gevestigd, er geen sprake van was om haar ook door het volk te laten uitoefenen. De inderhaast bijeengeroepen Congresleden hadden minder aandacht voor abstracte politiek-theoretische debatten dan voor het vestigen van de staatsmacht in handen van (het antihollands gezinde deel van) de sociaal-economische elite.

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The *Omnipotence of Parliament* in the Legitimisation Process of 'Representative Government' under the Albertine Statute (1848–1861)

Giuseppe Mecca

Abstract The present contribution is a study concerning the legitimization of representative government in Piedmont-Savoy. The essay considers normative factors alongside with constitutional practice, public debate and juridical representations. The purpose is to highlight the wider community's perceptions of the Constitution. The focal points of the argument are 'Constitution', 'Sovereignty' and 'Parliament', terms whose meaning in a specific context is explored in depth.

What is at stake here is not the philosophical or constitutional affirmation of the concept of sovereignty, but rather the notion as to how the sovereign power was supposed to take shape and operate within the institutional system.

The formula used by the Albertine Statute to describe the new constitutional regime is «representative government» (Art. 2 St. Alb.). This formula assumes different meanings depending upon the specific socio-political conjuncture. So, in the Italian case, the question of sovereignty is closely intertwined with the form of government, as well as with the legitimization of the representative government.

The meanings of sovereignty and representative government are analysed in terms of their dictionary definitions, the political catechism of Michelangelo Castelli and Giorgio Briano, and newspaper articles. The essay also takes into account contemporary culture and the range of available foreign models. In the Piedmont-Savoy the absolute power of the Sovereign had been circumscribed by the gracious concession of the Constitution. The monarchical principle was not in fact understood in the same way as the *Charte* of 1814 had been, since in France supreme authority had been enclosed within the person of the King, whereas the Albertine Statute presuppose the more modern meaning of a monarchy which through the granting of the constitution, bound itself fully and irrevocably to it. On the other hand, representation was considered to be a genetic element of the new legal order. Furthermore, the metaphor of the pact between sovereign and people served to legitimize the new constitutional regime. The theory of the omnipotence «omnipotence of Parliament» was intended to steer a middle path between the monarchical principle and the

G. Mecca (✉)
Faculty of Law, University of Passau, Passau, Germany
e-mail: giuseppe.mecca@uni-passau.de; giuseppe.mecca@unimc.it

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excesses of popular sovereignty. The British theory avoided the serious inconvenience of constituent power. There was, indeed, but a single ordinary sovereignty.

Keywords Parliament • Consensus • Representative government • Legitimation • Omnipotence of Parliament • Sovereignty • Constituent power • Constitution • Albertine Statute • Italy • Piedmont-Savoy

1 Parliament, Consensus and Public Opinion

In Italy, throughout 1848, there was an ongoing battle of representations through which a redefinition of the sources of legitimisation of politics is reached. This phenomenon is to be inserted within a European-type context. Indeed, following the French Revolution and throughout the nineteenth century, the Monarchy had to face up to the difficult passage from one form of dynastic legitimisation to a new legitimisation of a national-representative type.[1] The restored Monarchies established strategies oriented towards rethinking traditional foundations of sovereignty. Spaces, rituals and symbols of traditional politics would have the constitutional winds, which will blow throughout Europe, and the affirmation of national Parliaments to reckon with. A mirror effect will be created, therefore; Parliaments will soon have to engage with royal power, cut out their own spaces for autonomy, and find formulas capable of legitimising themselves as representative entities of common interests.[2] Forcing the intentions of the very same sovereigns and the

[1] Guazzaloca, Giulia (ed). 2009. *Sovrani a metà. Monarchia e legittimazione in Europa tra Otto e Novecento*. Soveria Mannelli: Rubbettino. Also, see: Rials, Stéphane. 1987. Monarchie et philosophie politique: un essai d'inventaire. In *Révolution et contre-révolution au XIXème siècle*, Paris: DUC Albatros. Lauvaux, Philippe. 1996. Les monarchies: inventaire des types. *Pouvoirs* 78: 23–41. Kirsch, Martin. 1999. *Monarch und Parlament im 19. Jahrhundert. Der monarchische Konstitutionalismus als europäischer Verfassungstyp – Frankreich im Vergleich*, Göttingen: Vandenhoeck & Ruprecht. Kirsch, Martin. 2006. La trasformazione politica del monarca europeo nel XIX secolo. *Scienza & Politic*a 34: 21–35. Colombo, Paolo. 1999. *Il re d'Italia. Prerogative costituzionali e potere politico della Corona (1848–1922)*. Milano: Franco Angeli.

[2] An initial attempt at writing the history of the Parliament of the Kingdom of Sardinia accompanied by an abundant collection of documents will be accomplished by one of the protagonists: Brofferio, Angelo. 1865–1869. *Storia del Parlamento Subalpino*. Milano: Eugenio Belzini. Analogously, as regards the Italian parliament see Mauro, Matteo Auguro and Magni, Basilio. 1882–1891. *Storia del parlamento italiano*. Roma: A. Sammaruga (later the Tipografia della Camera dei Deputati and Stabilimento Tipografico dell'Opinione). Generally, literature is abundant. Nevertheless, we must highlight the lack of organic works regarding the legitimisation of Parliaments in Italy. However, among old and new studies on the Parliament, we may recall: Flora, Emanuele. 1958. Lo Statuto Albertino e l'avvento del regime parlamentare nel regno di Sardegna – Premesse per una ricerca. *Rassegna storica del risorgimento* XLIV: 26–38; Caracciolo, Alberto. 1960. *Il Parlamento nella formazione del Regno d'Italia*. Milano: Giuffrè; Perticone, Giacomo. 1960. *Il Regime parlamentare nella storia dello Statuto Albertino*. Roma: Edizioni dell'ateneo; Sardo, Giuseppe. 1963–1966. *Storia del Parlamento italiano*. Palermo: Flaccovi. Vol. 1: *Le assemblee elettive del '48*; Vol. 2: *Dal Ministero Gioberti all'ingresso di Cavour nel Governo*; Vol. 3:

governments that constituted them, parliaments tied legitimisation to the forceful topic of presenting themselves as 'voices of the people' and 'voices of the nation'.[3] Public opinion, which follows the constitutional wave, was destined to break up in numerous places and printed pamphlets, observed the work of the legislative assemblies, criticised their works, suggested choices and methods. With the advent of representative regimes, the idea that the constitutional system worked as long as there were balance and harmony between the institutions and public opinion took root.[4]

Above all, for the success of a constitutional regime the consensus of the governed people was indispensable.[5] On these aspects, we may recall a reflection of Domenico Berti, who highlighted the importance of a link between constitutional process and consensus. First of all, the author noticed those differences between the movement of 1820–1821, which had led to adopting the Spanish constitution of Cádiz, and Italian constitutionalism of 1848.[6] According to Berti, the difference was to be looked for in the character of spontaneity, or rather, the presence of public discussion.[7] In other words, the 1848 constitutional process was the fruit of a «popular-governmental movement».

Dall'ingresso di Cavour nel governo alla crisi Calabiana; Vol. 4: *Dalla crisi Calabiana alle annessioni*; AA.VV., 1988. *Il Parlamento italiano (1861–1887). Vol. 1: L'Unificazione italiana (1861–1870). Da Cavour a Menabrea*. Milano: Nuova CEI Informatica spa; Violante, Luciano (ed.). 2001. *Il Parlamento. Annali 17 Storia d'Italia*. Torino: Einaudi. AA.VV. 2011. *Il Primo parlamento italiano. Catalogo della mostra*. Roma: Camera dei deputati. We may add a substantial work on the first law-making activity of the Parliament of the Kingdom of Sardinia by Ferrari Zumbini, Romano. 2008. *Tra identità e ideologia. Il Rinnovamento costituzionale nel Regno di Sardegna fra la primavera 1847 e l'inverno 1848*. Torino: Giappichelli. Besides these studies, some important pages in more general works on the history of constitutional law are dedicated to the theme. I especially refer to: Allegretti, Umberto. 1989. *Profilo di storia costituzionale italiana*. Bologna: il Mulino; Ghisalberti, Carlo. 2002. *Storia costituzionale d'Italia (1848–1994)*. Roma-Bari: Laterza and Martucci, Roberto 2002. *Storia costituzionale italiana. Dallo Statuto albertino alla Repubblica (1848–2001)*. Roma: Carocci.

[3] Petrizzo, Alessio. 2012. La legittimazione contesa. L'avvento dei parlamenti nell'Italia del 1848. *Passato e presente* 86: 39–61.

[4] Lacchè, Luigi. 2003. Per una teoria costituzionale dell'opinione pubblica. Il dibattito italiano (XIX secolo). *Giornale di storia costituzionale* 6: 273–290 (especially 284–286).

[5] Costa, Pietro. 1986. *Lo Stato immaginario. Metafore e paradigmi nella cultura giuridica italiana fra Otto e Novecento*. Milano: Giuffrè, 197–207.

[6] Cf. Berti, Domenico. 1849. Statuto, stampa e Parlamento sardo. *Rivista italiana. Giornale mensile* 2: 1–33. The author refers to events which happened in Piedmont in 1821 where the young Carlo Alberto, as Prince Regent, granted – with the aim of quelling the insurrectionary movements – the constitution of Cádiz which remained in force for 3 months. On these aspects, please see: Colombo, Paolo. 1998. La costituzione come ideologia. La rivoluzione italiana del 1820–1821 e la costituzione di Cadice. In *La Nazione cattolica. Cadice 1812: una costituzione per la Spagna*, Jose Maria Portillo Valdes ed., 129–157. Manduria: Lacaita. Corciulo, Maria Sofia. 2000. La Costituzione di Cadice e le rivoluzioni italiane del 1820–1821. *Le Carte e la storia* VI, 18–29. Corciulo, Maria Sofia. 2011. Costituzionalismo (1820–1821). In *Dizionario del liberalismo italiano*. Soveria Mannelli: Rubbettino, vol. I, 293–300.

[7] Berti, Domenico. 1849. Statuto, stampa e Parlamento sardo, cit., 3: «Esso fu spontaneo perché non prodotto dall'azione della società segrete o da influenza straniera, ma dallo svolgimento natu-

The remarks, which above we refer to, are also interesting since they gather together certain key themes concerning the institutional renewal of Savoy Piedmont. As can be assumed from the same title, Berti understands the connection between Parliament, legitimisation and the press. For the author, the representative government is synonymous with democratic government in keeping with eclectic thinking adapted to the Italian monarchical context:

> «per governo democratico o forma democratica di governo, noi intendiamo il governo che ha per base la sovranità nazionale o più chiaramente l'assenso del popolo, e per fine, il razionale miglioramento delle classi povere. La quale parola usata come qualificativo della monarchia costituzionale, ha per unico oggetto di sceverarla dalla monarchia oligarchica o censitaria. Perciò i principii fondamentali di quella sono i diritti politici in ragione della capacità, mentre i principii fondamentali di questa sono i diritti politici in ragione del censo. Il fine di quella è il bene dell'universale, il fine di questa è il bene dei particolari, in quella il re è fatto pel re. Ecco il senso che noi diamo alla parola democrazia o monarchia democratica».[8]

It would appear that for Berti, a government is democratic and it is legitimate whenever it enjoys the consent of the people and thus is the constitutional monarchy. In such a way, the Author draws close to the ideologies of moderate liberal groups, defending the statutory legality against any future democratic excesses. A central role in the politics of consensus was played by the press, which, abandoning all polemics and abstract reasonings, had to take on the function of 'practical policy', that is guarantee publicity and transparency.

The topic of consensus and legitimisation came forcefully back close to the national unification (1860). By way of an example, we may still recall a page of *La Nazione* which underlined the constitutional role of public opinion so much so as to establish that:

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rale delle idee, accelerato dalle dottrine de' migliori scrittori ed assecondato liberamente dai governi … I governi vedessero o non vedessero, volessero o non volessero le conseguenze delle loro prime concessioni, il vero è che essi si arresero ai desideri dei popoli espressi con tanta moderazione, ed il movimento nostro pigliò quel carattere di spontaneità di cui parlammo: cioè fu un movimento popolare-governativo, senza lotta e senza uso della forza» (It was spontaneous since not produced by the action of secret societies or by foreign influence, rather by the natural unfurling of ideas, hastened by the doctrines of the best writers and seconded freely by the governments… The governments saw or did not see, wished or did not wish the consequences of their initial concessions, the truth is that they gave in to the desires of the peoples which were expressed with such moderation, and our movement took on that character of spontaneity of which we spoke: i.e. it was a popular-governmental movement, without struggle and without the use of force).

[8] *Ibidem*, 23: «by democratic government or democratic form of government, we mean the government which has national sovereignty or more clearly the consent of the people as its base, and has the rational betterment of the poor classes as its goal. This word used as qualifier of the constitutional monarchy, has the sole aim of distinguishing it from oligarchical or based-on-census monarchy. Therefore, the fundamental principles of the former are the political rights because of capability, while the fundamental principles of the latter are the political rights because of census. The final goal of the former is the good of the whole, the end of the latter is the good of the individuals, in the former the king is made for the king. This is the meaning that we give to the word democracy or democratic monarchy».

> «ogni potestà deriva oggi da essa [l'opinione pubblica] la legittimità sua, perché ella è la legittimità stessa, una cui goccia vale tutto l'olio, onde una volta erano fatti re in nome di Dio uomini scelleratissimi e indegni. La sua alleanza non si acquista per oro o per patti di famiglia e matrimoni abborriti: il suo arbitrato non si travolge per pratiche o macchinazioni. Ella è un magistrato dove i suffragi si contano a milioni: i suffragi paiono talvolta diversi, ma la sentenza è unanime. E quando ella ha parlato, la causa è definita, e non giova opposizione. Ciò che è ora l'opinione pubblica era una volta il papato».[9]

These two examples taken from the sources have been used to highlight how, in two instances central to Italian constitutional history (the passage from absolute monarchy to constitutional monarchy; the process of the unification of the Kingdom of Italy under the monarchy of the royal House of Savoy) the topic of consensus and political legitimisation is a question as fundamental as ever. The present essay is a contribution to the study of the legitimisation of the form of representative government in Italy and it proposes some considerations which place the normative data together with constitutional practice, public debate and juridical representations.[10] Through the use of juridical works on the Statute, the portraying contained in the press as well as some comments of the main protagonists, this contribution aims to provide certain representations which the community has of the constitution.[11]

2 Between Lemmas and Culture

In Italy, a political-constitutional lexicon comes forward rather late compared to the nearby France. Besides, a study on the sources of legitimisation and sovereignty has to consider the fluidity of political language, as well as the difficult and slow formulation of juridical concepts. In Italy, even during the 3-year Jacobin period, there is a «subordination of language to politics» and very often, words are used as propaganda, for their evocative and ideological potentials or rather they are adapted to the

[9] *La Nazione. Giornale politico quotidiano* 8 Gennaio 1860, n° 8: «every power derives today its own legitimacy from it [public opinion], since it is the legitimacy itself, a drop of which has the same value of all the anointment oil, by which once villainous and unworthy men were proclaimed kings in the name of God. Its alliance is not to be bought for gold or family pacts and loathed marriages: its arbitration is not to be overturned by practices or scheming. It is a magistrate where votes number millions: the votes sometimes appear different, but the verdict is unanimous. And when she has spoken, the case is decided, and appeal does not help. That which is now public opinion was once the papacy».

[10] For every methodological reference within which this research work is included, please see Müβig, Ulrike. 2014. Reconsidering Constitutional Formation. Research challenges of Comparative Constitutional History. *Giornale di storia costituzionale* 27: 107–131.

[11] On this point, some important considerations are contained in Mannori, Luca. 2010. Il governo dell'opinione. Le interpretazioni dello Statuto Albertino dal 1848 all'Unità. *Memoria e Ricerca. Rivista di storia contemporanea* 35: 83–104. In order to understand the way in which the Constitution was perceived by the community and to come to an authentic interpretation of Piedmont constitutionalism the author suggests combining together the first comments to the Statute with the reading of newspapers, with parliamentary debates, as well as with private sources.

mobile needs of the political battle.[12] This phenomenon is destined to widen throughout the Nineteenth century when language is linked to the need for a fatherland and nationality.

However if it is true that the birth of modern political language goes hand in hand with the appearing of new modern forms of political life which that language partially mirrors and from which it flows, then we believe that, owing to the ambiguity and the delays with which modern political entities in Italy are formed, our investigation would be unfruitful and sterile if not seen through the lens of the "anomaly" of the Italian context.[13] Indeed, if by sovereign power we mean, according to modern traditional formulation, the sum of all powers or the absolute power of command from whence all the powers of the state would derive and find their basis, it would not be easy to place, into this pattern, the observable phenomena and public debates in the period that goes from the granting of the Albertine Statute to the birth of the Kingdom of Italy. Besides, in the Italian experience, there lack a constituent assembly, as for example is the case in revolutionary France or in the Belgian experience (1831), and a public debate coeval to the publication of the constitutional text. All this, since, in the moment of granting the Albertine Statute all reference to the genesis of legitimate power is missing, yet sovereignty is *in re ipsa* in the act of granting the Statute.[14]

In other words, looking at sovereignty in its dual, technical meaning of original and independent power, it would seem that it is a question presupposed to the drafting of a constitution, the latter being the space wherein juridical and political exercise of powers would be established and conflicts between them would be solved. In this sense, Fernanda Mazzanti Pepe has well made clear that in Subalpine

[12] Leso, Erasmo. 1991. *Lingua e rivoluzione. Ricerche sul vocabolario politico italiano del triennio rivoluzionario 1796–1799*. Venezia: Istituto Veneto di scienze lettere ed arti, 30–31. In a more specific way on constitutional lexicon, terminology and the meaning of concepts, see Bambi, Federico (ed.). 2012. *Un secolo per la Costituzione (1848–1948). Concetti e parole nello svolgersi del lessico costituzionale italiano. Atti del Convegno di Firenze*, Villa Medicea di Castello, 11th November 2011. Firenze: Accademia della crusca.

[13] The author talks of "anomaly" to indicate that the Italian constituent process was not the fruit of a revolution, rather it places itself at the peak of a reforming movement. Scirocco, Alfonso. 1999. Costituzioni e Costituenti del 1848: il caso italiano. *Clio. Rivista trimestrale di studi storici* 35: 571–593.

[14] It is not possible to here provide exhaustive references on the topic of sovereignty. For a long-term, historical reconstruction: Quaglioni, Diego. 2004. *La sovranità*. Roma-Bari: Laterza. For a theoretical and philosophical framwork: Matteucci, Nicola. 1976. Sovranità. In *Dizionario di politica*, eds. Norberto Bobbio and Nicola Matteucci, 973–981. Torino: Utet. Regarding our period, Fioravanti, Maurizio. 1998. *Costituzione e popolo sovrano. La costituzione italiana nella storia del costituzionalismo moderno*. Bologna: il Mulino and also Fioravanti, Maurizio. 2012. Principio di sovranità e rigidità costituzionale: dallo Statuto alla Costituzione repubblicana. In *Un secolo per la Costituzione (1848–1948). Concetti e parole nello svolgersi del lessico costituzionale italiano*, Federigo Bambi (ed.), cit., 67–83 are fundamental.

Piedmont the nation and its sovereignty remained in the background, mere theoretical legitimisation of a power in some ways self-referential.[15]

Really, the question to be discussed does not so much regard the philosophical or constitutional affirmation of the concept of (whether popular or national) sovereignty, as rather, the idea by which sovereign power would take shape and the sufficiently organic and coherent ways of operating and ruling within the institutional system sketched out by the Statute. With these premises, as regards the Italian case, the question of sovereignty is closely intertwined with the question of the form of government as well as with that of the legitimisation of the representative government. The questions concerning sovereignty can thus be summed up: in the case of contrast between powers who should have the final say? The Parliament or the King? What is the constitutional space within which the formation of consensus, general will and constitutional legitimisation is outlined? Ultimately, the real issue is not so much the origin or the legal ownership of sovereignty rather the ways of exercising it.

2.1 Constitution and Sovereignty Within the 'Consiglio di Conferenza'. *Some Choices Between Political Opportunity and Juridical Reasoning*

The Albertine Statute is proclaimed on 4th March 1848.[16] It is a well-known fact that the constitutional charter – preceded by the *Proclama dell'8 febbraio* (Proclamation of 8th February) with which the impending issuing of «a Statute

[15] Mazzanti Pepe, Fernanda. 2004. *Profilo istituzionale dello Stato italiano. Modelli stranieri e specificità nazionali nell'età liberale (1849–1922)*. Roma: Carocci, 25–34.

[16] The bibliography on the Albertine Statute is boundless. As an example, I recall: Manno, Antonio. 1885. *La concessione dello Statuto: notizie di fatto documentate*. Pisa: Tipografia F. Mariotti; Moscatelli, Alfredo. 1908. *Lo Statuto del Regno*. Roma: Stamperia Reale; Maranini, Giuseppe. 1926. *Le origini dello Statuto albertino.* Firenze: Vasecchi editore; Marchi, Teodosio 1926. Lo Statuto albertino e il suo sviluppo storico. *Rivista di diritto pubblico e della pubblica amministrazione in Italia* XVIII: 187–209; Crosa, Enrico. 1936. *La concessione dello Statuto. Carlo Alberto e il ministro Borelli «redattore» dello Statuto*. Torino: Istituto Giuridico della R. Università di Torino; Romano, Santi. 1969. Le prime carte costituzionali. In *Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale*. Milano: Giuffrè; Enrico Guastapane, Enrico. 1983. Lo Statuto albertino. Indicazioni bibliografiche per una rilettura. *Rivista trimestrale di diritto pubblico* 3/XXXIII: 1070–1093; Di Simone, Maria Rosa. 1988. Lo Statuto Albertino. In *Il Parlamento italiano 1861–1988. Vol. 1: 1861–1865: l'unificazione italiana da Cavour a La Marmora*. Milano: Nuova CEI informatica, 77–106; Pene Vidari, Gian Savino. 1998. Lo Statuto albertino dalla vita costituzionale subalpina a quella italiana. *Studi Piemontesi* XXVII: 303–314; Rosboch, Michele. 1999. Lo Statuto Albertino dalla concessione all'applicazione. *Bollettino storico Veronese* 1: 59–86; Ulrich, Hartmut.1999. The Statuto Albertino. In *Executive and Legislative Powers in the Constitutions of 1848–1849*, ed. Horst Dippel. Berlin: Duncker & Humblot; Rebuffa, Giorgio. 2003. *Lo Statuto albertino.* Bologna: il Mulino; Colombo, Paolo. 2003. *Con lealtà di Re e con*

fundamental to establish (…) a completed system of representative government»[17] was announced – it was born already old, even though it will be the only constitution on the Italian peninsula to survive over time, so much so as to be extended over the Kingdom of Italy. The main events that led to the publication of the Constitution and the feelings of the court of Charles Albert are to be found in the well-known *Notes et souvenirs* of the Chevalier Des Ambrois De Nevâche who will tell how the main constitutional norms were drawn up by the ministers of the king[18] examining every political constitution in force throughout Europe and particularly the French *Charte* of 1830. The king limited himself to small observations and to the suggestions of little changes. The moment of the signature was a solemn act and marked the end of the absolute power of the Monarchy. At the end of the ceremony all Ministers, upon the example of Borelli, kissed the hand of the sovereign who granted the constitution and resigned from their ministerial post thus leaving room for the first government of the constitutional era.[19]

The day following its coming into force, the press highlighted the limits of the constitutional text:

> «noi non vogliamo nascondere che alla prima lettura dello Statuto, siamo per un momento rimasti incerti se fosse il medesimo per corrispondere alla grande aspettazione che se ne aveva; modellato in gran parte sulla Costituzione francese del 1830, esso ci parve a primo aspetto mancante e incompleto»[20]

Also Bianchi Giovine noticed that

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affetto di padre. Torino, 4 Marzo 1848: la concessione dello Statuto albertino. Bologna: Il Mulino; Soffietti, Isidoro. 2004. *I tempi dello Statuto albertino. Studi e fonti.* Torino: Giappichelli.

[17] «uno Statuto fondamentale per istabilire (…) un compiuto sistema di governo rappresentativo».

[18] The Statute was elaborated within the bounds of the *Consiglio di Conferenza* (King's Council), a collegiate body of the *Ancien Regime*, whose institution dated back to 1815 thanks to King Vittorio Emanuele I. The administrative organ was headed by the King and by the representatives of various ministries. With the reign of Charles Albert, the institution had greater impulse and the possibility of convening *Consigli di Conferenza* (King's Councils) that were widened to include eminent people who belonged to military, administrative and judicial orders. Cf. Buraggi, Gian Carlo. 1939. Il Consiglio di Conferenza secondo nuovi documenti. *Atti della Reale Accademia delle scienze di Torin* 74 and Salata, Francesco. 1939. Consiglio di Stato e Consiglio di conferenza nel Regno di Carlo Alberto. In *Scritti giuridici in onore di Santi Romano,* IV, 603–28. Padova: Cedam. At the sittings (from 7th February to 4th March 1848) for the drafting of the Statute the following people intervened: Ministers Borelli (Home Affairs), Avet (Justice), Thaon di Revel (Finance), Des Ambrois De Nevâche (Public Works), Asinari di San Marzano (Foreign Affairs), Broglia (War) and Alfieri (Education); the four Members of the *Consiglio di Stato* (Council of State): Sallier de La Torre, Peyretti di Condove, Raggi and Provana di Collegno; one diplomat: Berardo di Pralormo; two Judges of the Supreme Court: Coller and Gromo and finally: Gallina, Querelli di Lesegno, Sclopis di Salerano.

[19] Des Ambrois De Nevâche, Luigi Francesco. 1901. *Notes et souvenirs inédits du chevalier Lois Des Ambrois De Nevâche*. Bologna: Zanichelli.

[20] *Il Costituzionale Subalpino*, Monday 6th March 1848, N° 5: «we do not wish to hide that upon the first reading of the Statute, we remained a bit uncertain as to whether it was the same one to correspond to the great expectation we had of it; modeled largely upon the 1830 French Constitution, it appeared to be incomplete and lacking at first glance».

> «lo Statuto o la costituzione preconizzata l'otto febbraio e di cui il re ne annunciò gli elementi preliminari, fu pubblicata nel suo intiero il 4 corrente; ma è notabile che se la prima concitò un giubilo straordinario, non fu così della seconda che anche in vista dei nuovi avvenimenti in Francia, avrebbe potuto essere un po' più disimpacciata»[21]

Nonetheless, it was recognised that

> «la costituzione Carl'Albertina in nessun altro articolo può essere inferiore alle altre due costituzioni italiane».[22]

Against the 'malevolent critics' who complained about the brevity and the backwardness of the constitution text, intervened Camillo Cavour who, in a famous article which appeared in the *Il Risorgimento* newspaper, clarified that

> «uno statuto organico deve racchiudere, a senso nostro, i principi fondamentali della costituzione e nulla di più. Onde siamo disposti a credere piuttosto essere sceso in troppi particolari. Le leggi organiche che il legislatore ci annunzia, quella elettorale segnatamente, sono il completamento dello Statuto, sono esse che ne costituiranno in massima parte il merito reale».[23]

The famous statesman underlined that:

> Una nazione non può spogliarsi della facoltà di mutare con mezzi legali le sue leggi politiche. Non può menomamente, in alcun modo, abdicare il potere costituente. Questo, nelle monarchie assolute, è riposto nel sovrano legittimo; nelle monarchie costituzionali il Parlamento, cioè il Re e le Camere, ne sono pienamente investiti … Ma se un tale potere sta nel Parlamento da noi dichiarato onnipotente, il Re solo non lo possiede più. Un ministro che gli consigliasse di fare un uso senza consultare la nazione, violerebbe i principi costituzionali, incorrerebbe nella più grave responsabilità.[24]

With this article Cavour contributed to spreading the idea that the constitutional text was flexible and could be broadened and updated through organic laws.[25]

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[21] *L'Opinione*, Wednesday 8th March 1848, N° 30: «the Statute or the constitution heralded on eighth February and whose preliminary elements the king announced, was published in its entirety on 4th day of the current month; yet it is noticeable that if the former provoked extraordinary joy, it was not thus for the latter one which, also because of the new events in France, could have been a bit more untightened».

[22] «The Charles Albert constitution in none of its aspects can be inferior to the other two Italian constitutions». *L'Opinione*, 8th March 1848, N° 30.

[23] *Il Risorgimento*, 10th March 1848, N° 63: «an organic statute must encompass, according to us, the fundamental principles of the constitution and nothing else. Therefore we are prepared to believe, rather, to have gone down into too much detail. Organic laws that the legislator announces to us, especially the electoral laws, are what completes the Statute, it is they that will represent, to a large extent, its real merit».

[24] *Ibidem:* «A nation cannot wipe away the faculty of changing its political statute laws with legal means. It cannot remotely abdicate, in any way, its constituent power. This, in absolute monarchies, lies with the legitimate sovereign; in constitutional monarchies, with the Parliament, that is the King and the Houses are fully invested with it … However if such a power resides in Parliament, which has been declared omnipotent by us, the King alone does not possess it any more. A minister who suggested him to use it without consulting the nation, would violate the constitutional principles, would incur the most serious responsibility».

[25] Concerning the character of flexibility of the Statute, see: Rossi, Luigi. 1940. La "elasticità" dello Statuto italiano. In *Scritti giuridici in onore di Santi Romano*, 1, 25–43. Padova: Cedam.

Weighing upon these negative judgments, recalled Federico Sclopis, there was the shadow of the second French republic which put an end to the Monarchy of July raising the doubt that a constitution granted by the King is one of those «po-tions of quacks».[26] It is opportune, however, to highlight that some choices and anachronisms of the Albertine Statute can be explained by the circumstance that Charles Albert was determined to overcome the obstacle of the constitution in the political sense of the word, of the representative and democratic constitution, degrading and limiting royal authority with the granting of a legal order which profoundly changes the State, which constitutes real progress as regards the preceding regime. In other words, the Statute of Charles Albert served to defend the monarchy from the threat of the people by way of a conciliatory act and renounced the word constitution in favour of the word statute thus recalling in such a way the constitutional statutes of the Kingdom of Italy (1805–1810) as well as municipal tradition.

In the Minutes of the Consiglio di Conferenza (Conference Council),[27] we can read that the royal granting had to

> «combinare e calcolare tutti gli elementi di cui si potrebbe disporre per formulare un progetto conservatore capace di tutelare la dignità sovrana, l'autorità reale e la tranquillità del paese»[28]

Marquis Cesare Alfieri di Sostegno, the Minister for Education, noted that

> «l'opinione pubblica più o meno illuminata sulle questioni più gravi, ma sovraeccitata dalla stampa liberale, soverchia il Governo da ogni parte, al punto da intralciare nel modo più allarmante la sua azione e la sua iniziativa; e se ciò è così, non è meglio costituire legalmente

Pace, Alessandro. 1996. *La causa della rigidità costituzionale. Una rilettura di Bryce, dello Statuto Albertino e di qualche altra costituzione*. Padova: Cedam. Bignami, Marco. 1997. *Costituzione flessibile, Costituzione rigida e controllo di costituzionalità in Italia (1848–1956)*, Milano: Giuffrè. Soddu, Francesco. 2003. Lo Statuto albertino: una Costituzione «flessibile»? In *Parlamento e Costituzione nei sistemi costituzionali europei ottocenteschi/Parlament und Verfassung in den konstitutionellen Verfassungssystemen Europas*, eds. Anna G. Manca and Luigi Lacchè, 425–433. Bologna, il Mulino, Berlin, Duncker & Humblot.

[26] Sclopis, Federico. 1849. Della introduzione del Governo rappresentativo in Piemonte. In I"Colombo, Adolfo. 1924. *Dalle riforme allo Statuto di Carlo Alberto. Documenti editi ed inediti*. Casale: Tipografia Cooperativa Bellatore, Bosco e C.; Falco, Giorgio, 188.

[27] Numerous are the editions of the minutes of the Consiglio di Conferenza (Conference Council): Manno, Antonio. 1885. La concessione dello Statuto: notizie di fatto documentate, Pisa, Tip. F. Mariotti; Zanichelli, Domenico. 1898. *Lo Statuto di Carlo Alberto secondo i processi verbali del Consiglio di Conferenza dal 3 febbraio al 4 marzo 1848,* Roma: Società editrice Dante Alighieri; Colombo, Adolfo. 1924. *Dalle riforme allo Statuto di Carlo Alberto. Documenti editi ed inediti*, cit.; Falco, Giorgio. 1945. *Lo Statuto albertino illustrato dai lavori preparatori*. Roma: Capriotti; Negri, Guglielmo and Simoni, Silvano. 1992. *Lo Statuto Albertino e i lavori preparatori*. Roma: Fondazione di San Paolo Torino; Ciaurro, Luigi. 1996. *Lo Statuto albertino illustrato dai lavori preparatori.* Roma: Dipartimento per l'informazione e l'editoria.

[28] In this current contribution, quotations from the Minutes are taken from Ciaurro, Luigi. 1996. *Lo Statuto albertino illustrato dai lavori preparatori*, cit., 117: «combine and calculate all elements which could be at their disposal in order to formulate a conservative project able to protect sovereign dignity, royal authority and peace throughout the land».

> l'opinione in Parlamento, anziché lasciar durare questo stato di antagonismo, il cui urto diretto ed immediato scuote ogni giorno la Monarchia fin nelle sue fondamenta?» [29]

For such reasons, within the *Consiglio di Conferenza* (Conference Council), the idea strengthened that the constitution was a «calamity», but it was always the «lesser evil in order to avoid larger catastrophes». Therefore, for Count Avet, the only alternative was a «moderate constitution, like that of France, or any other that was compatible with the honor of the Crown».[30]

Finally, the Albertine charter attempted to sterilise popular sovereignty and constituent power by avoiding every reference to it. Royal sovereignty is the only source of political legitimacy and all the *auctoritas* resides in the person of the monarch who has decided to grant the constitution as well as limiting himself. In this way, it joined with the opinion of the time, expressed by Talleyrand and by Metternich and included for the first time in the famous preamble of the *Charte* of 1814, according to which the monarchy maintained the *plentitudo potetastis* of absolute monarchy within the constitutional regime and via the granting of a fundamental law reaffirmed its supremacy. An idea of "rational monarch" came to the fore in this way, one which went comfortably together with the old figure of the royal sacredness.[31] Therefore, the Albertine Statute may be fully placed within that which Werner Daum defined monarchical constitutionalism with monarchical predominance which saw, from 1814 to 1815, widespread radiation throughout Europe and opposed monarchical constitutionalism with parliamentary predominance, which remained a sporadic form, except for Spain (1820–1823), Naples (1820–1821), Piedmont (1821), Portugal (1822–1823), at least till the revolutions of 1848.[32]

2.2 Culture, Foreign Models and Coeval Experiences

From the minutes of the *Consiglio di Conferenza* (King's Council), it clearly emerges that the model which inspired the compilers was the French constitutional ordinances adapted to the context of Piedmont. The King when entrusting the task was, however, careful to underline the non-servile imitation of the foreign

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[29] *Ibidem*, 118: «public opinion which was more or less enlightened on the more serious issues, but overexcited by the liberal press, over-whelms the Government from all angles, to the point where it hampers its action and initiative in the most alarming way; and if it is so, is it not better to legally constitute opinion in Parliament, rather than let this state of antagonism, whose direct and immediate impact every day shakes the Monarchy to its very bones, persist?».

[30] *Ibidem*, 119.

[31] Lacchè, Luigi. 2009. Le carte ottriate. La teoria dell'octroi e le esperienze costituzionali nell'Europa post-rivoluzionaria. *Giornale di storia costituzionale* 18: 229–254.

[32] Daum, Werner. 2012. Verfassungsstruktur der zentralen staatlichen Ebene. In *Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel,* Werner Daum, Peter Brandt, Martin Kirsch, Arthur Schlegelmilch (eds.), Bonn: J.H.W. Dietz Nachf. Vol. 2: 1815–1847.

constitutional texts, mindful of the events of 1812 that witnessed the promulgation of a constitution (the Cádiz constitution) disconnected from the political and economic situation of the kingdom. The foreign models were 'adapted at a lower level', fruit of practical and empirical changes determined more by the needs of events than by matured choices and organic, theoretic elaborations.[33]

On the topic of sovereignty, Italian authors found their theoretic reference points and began their rebuilding journey from Romagnosi and Sismondi with continual references to the English tradition as seen through French culture.[34] The choice of the French, restoration model meant the non-acceptance of the revolutionary tradition. The French Revolution had dethroned the sovereign leaving the question of filling the 'empty throne'.[35] The sovereignty of the absolute monarch was transferred to the people.

The *Chartes* of 1814 and 1830 had recourse to the contractual technique.[36] The Charte of 1814 makes express reference to the pact between sovereign and people. The 1830 *Charte* is not *octroyée* (granted) but it is the emanation of the French parliament and Louis-Philippe accepts subscribing to a pact becoming king of France. The doctrinarians from Orléans qualified sovereignty in negative terms and formulated the doctrine of sovereignty of the Constitution.[37] François Guizot pointed out that both the sovereignty of the people and the sovereignty of the absolute monarch led to tyranny.[38] The author used, moreover, the distinction between origin and

[33] On this point, cf. Allegretti, Umberto. 1989. *Profilo di storia costituzionale italiana*, cit., 192–193.

[34] On the characters of Italian constitutionalism, see Lacchè, Luigi. 2012. Il Costituzionalismo liberale. In *Il Contributo italiano alla storia del Pensiero – Diritto*.

The article can now be consulted on the website: http://www.treccani.it/enciclopedia/il-costituzionalismo-liberale_%28Il_Contributo_italiano_alla_storia_del_Pensiero:_Diritto%29/.

The author has the merit of having faithfully summarised the peculiar characters of Italian constitutionalism which is greatly centred on the connection between freedoms of the press, public opinion, constitutional government/representative monarchy. He has, besides, underlined that the liberal constitutional culture has British roots but a French form, filtered through Constant, Rossi, Charles-Guillaume Hello and other Orléanist writers.

[35] Viola, Paolo.1989. *Il trono vuoto. La transizione della sovranità nella rivoluzione francese*. Torino: Einaudi.

[36] As regards French constitutionalism, see Saitta, Armando. 1975. *Costituenti e Costituzioni della Francia rivoluzionaria e liberale (1789–1875).* Milano: Giuffrè. Guchet, Yves. 1993. *Histoire costitutionelle de la France 1789–1974*. Paris: Economica. Rasanvallon, Pierre. 1994. *La monarchie impossible. Les Chartes de 1814 et de 1830.* Paris: Librairie Arthème Fayard. Lacchè, Luigi. 2002. *La libertà che guida il Popolo. Le Tre Gloriose Giornate del luglio 1830 e le «Chartes» nel costituzionalismo francese.* Bologna: il Mulino. Alvazzi Del Frate, Paolo. 2013. La Charte del 4 giugno 1814: una introduzione. *Historia et ius. Rivista di storia giuridica dell'età medievale e moderna* 3 (http://www.historiaetius.eu/num-3.html).

[37] Lacchè, Luigi. 2002. *La libertà che guida il Popolo. Le Tre Gloriose Giornate del luglio 1830 e le «Chartes» nel costituzionalismo francese*, cit., 155 ff.

[38] Guizot, François Pierre Guillaume. 1851. *Histoire des origines du gouvernement représentatif en Europe*. Paris: Didier, Libraire-éditeur. The author said: «la souveraineté du peuple réduit à n'être plus que la souveraineté de la majorité. (…) la majorité n'a aucun droit que celui de la force même qui ne peut être, à ce titre seul, la souveraineté légitime. (…) la majorité en tant que majorité, c'est-

exercise of sovereignty. According to him, the people delegated the exercise of sovereignty to the representatives to the end of guaranteeing the functioning of the new institutions via a contract. The distinction between the exercise and origin of sovereignty served the purpose of limiting and neutralising popular sovereignty.[39] Also Charles Guillaume Hello, deputy of the July Monarchy, noted that the English constitution was the work of the parliament while in France the parliament was the work of the Constitution. This historical fact caused that, in France, the illusion of constituent power developed. Fruit of the rational method that wants a separation between creative moment and creation. This distinction was not however needed any more and was no longer present in the *Charte*.[40]

From this point, the liberals recognised the attribute of sovereign entity to the Constitution and in it, was the absorption of the sovereignty of the people, the Constitution became an *ab origine* depositary of the supreme power. The theory of sovereignty of the Constitution, elaborated throughout the course of the Restoration, constituted a phase for the ultimate definition of the concept of national sovereignty.[41]

The compilers of the Albertine Statute were aware of the French debate on sovereignty and for this reason every reference to the origin of legitimate power was left out. The protagonists of the constituent process in Piedmont, even if imbued in French culture, did not think ill of looking beyond the Channel, the father-land of all liberties. Concerning the topic of sovereignty and within the view of an evolutionary interpretation of the Statute, there were several references to English works and among those most mentioned was the reconstruction contained in the Commentaries of Blackstone:

> «The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, "si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima". It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. (…) It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what

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à-dire en tant que nombre, ne possède donc la souveraineté légitime ni en vertu de la force qui ne la confère jamais, ni en vertu de l'infaillibilité qu'elle n'a point (…) Le principe de la souveraineté du peuple, c'est-à-dire le droit égal des individus à l'exercice de la souveraineté, ou seulement le droit de tous les individus de concourir à l'exercice de la souveraineté, est donc radicalement faux; car, sous prétexte de maintenir l'égalité légitime, il introduit violemment l'égalité où elle n'est pas, et viole l'inégalité légitime. Les conséquences de ce principe sont le despotisme du nombre, la domination des infériorités sur les supériorité, c'est-à-dire, la plus violente et la plus iniques des tyrannies» (I, 106–108).

[39] Laquièze, Alain. 2002. *Les origines du régime parlementaire en France (1814–1848).* Vendôme: Presses Universitaires de la France, 109–119 (spec. 115–116).

[40] Hello, Charles Guillaume. *Du régime constitutionnel*. Paris: Gustave Pissin libraire, 114 ff.

[41] Bacot, Guillaume. 1985. *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*. Paris: Éditions du CNRS.

> the parliament doth, no authority upon earth can undo: so that it is a matter most essential to the liberties of this kingdom that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge».[42]

In these famous pages, the author contributed to the development of the doctrine of the *Sovereignty of Parliament,*[43] according to which there was no supreme authority which could limit the powers of the legislature and there was no subject that couldn't be discussed and approved in Parliament. On the other hand, the authority of the Parliament did not find constitutional limits so that it could change the Constitution. In particular, Blackstone referred to Sir Edward Coke. When Coke spoke of «transcendent and absolute» authority, he recognized that the powers inherent in Parliament were derived from the law and no other authority.[44] By virtue of the supremacy of the law, all powers, including those of the King, were subjected to the law. Coke limited the prerogatives of royal power through parliamentary control and the common law. This was because the law did not include only the law of the reigning monarch, but also the laws of his predecessors and the Parliaments convened in the past. Following this line of reasoning, with simple and attractive

[42] C.f. Blackstone, William.1893.*Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes*. Philadelphia: J.B. Lippincott Co. Book 1, Chaper 2.

[43] The doctrine of the Sovereignty of Parliament is one of the fundamental elements underpinning the British constitution. Therefore, the literature in this respect is immeasurable. It should be remembered here the classic study of Goldsworthy. Jeffrey. 1999. *The Sovereignty of Parliament: History and Philosophy*. Oxford: Clarendon Press. We can also refer to: Roy Stone De Montpensier. 1966. The British Doctrine of Parliamentary Sovereignty: A Critical Inquiry. *Louisiana Law* 26: 753 ff. Dickinson, Harry T. 1998. The ideological debate on the British constitution in the late eighteenth and early nineteenth centuries. In *Il modello costituzionale inglese e la sua recezione nell'area mediterranea tra la fine del 700 e la prima metà dell'800. Atti del Seminario internazionale di studi in memoria di Francisco Tomás y Valiente (Messina, 14–16 novembre 1996)*, ed. A. Romano, Milano: Giuffrè, 145–192 (spec. 166–177). Varela Suanzes-Carpegna, Joaquín. 2003. Sovereignty in British legal doctrine. *Historia Constitucional (revista electrónica)* 4 (http://hc.rediris.es/04/index.html). Müβig, Ulrike. 2008. Constitutional conflicts in seventeenth-century England. *Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du Droit/The Legal History review* 76: 27–47.

[44] Coke, Eduard. 2002. *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts*. Union New Jersey: The Lawbook Enchange (originally published: London: W. Clarke, 1817), I, chap. *The high Court of Parliament*, 36 ff. C.f. Gough, John Wiedhofft. 1955. *Fundamental Law in English Constitutional History*. Oxford: Clarendon Press; Gray, Charles M 1980. Reason, Authority, and Imagination. The Jurisprudence of Sir Edward Coke. In *Culture and Politics from Puritanism to the Enlightenment*, ed. Perez Zagorìn. Berkley-Los Angeles- London: University of California Press, 25–66; Boyer, Allen. 2003. *Sir Edward Coke and the Elizabethan Age.* Stanford, California: Stanford University Press; Berman, Harold J. 2010. *Diritto e rivoluzione. II. L'impatto delle riforme protestanti sulla tradizione giuridica occidentale*. Bologna: il Mulino, 429–442 (originally published: *Law and Revolution. II. The Impact of the Protestant Reformation on the Western Legal Tradition*. Cambridge-London: Harvard University Press).

lexicon, Blackstone not only described the British parliamentary system, but contributed with his work to create the myth of the British Constitution.[45]

In 1822, the Commentaries of Blackstone are translated and annotated in French and through this edition circulated in Piedmont. M. Christian explained the meaning of "omnipotence of Parliament" to the public. The French judge said:

> «L'omnipotence du parlement n'est que le pouvoir souverain de l'État, ou un pouvoir d'action qui n'est contrôlé par aucun pouvoir supérieur. En ce sens, le roi dans l'exercice de ses prérogatives, et la chambre des lords dans l'exercice de l'interprétation des lois, sont de même tout-puissants; c'est-à-dire que la constitution n'a établi aucun supérieur pour restreindre en cela leur pouvoir».[46]

Alexis de Tocqueville, too, who had a great influence in Italy, noted that:

> «En Angleterre, on reconnaît au parlement le droit de modifier la constitution. En Angleterre, la Constitution peut donc changer sans cesse, au plutôt elle n'existe point. Le parlement en même temps qu'il est corps législatif et corps constituants».[47]

The British doctrine of Sovereignty of Parliament occupied the place that elsewhere was assigned to the sovereignty of people or the sovereignty of the State.[48] In

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[45] See Schiera, Pierangelo. 1998. La costituzione inglese tra storia e mito. In *Il modello costituzionale inglese e la sua recezione nell'area mediterranea tra la fine del 700*, cit., 39–58.

[46] C.f. Blackstone, William. 1822–1823. *Commentaires sur les lois Anglaises, par W. Blackstone, avec des notes de m. Ed. Christian. Traduits de l'anglais sur la quinzième édition par N.M. Chompré*. Paris: Rey et Gravier, libraires. 1, 279: «the omnipotence of parliament is but the sovereign power of the State, or a power of action which is not controlled by any superior power. In this sense, the king in exercising his prerogatives, and the house of lords in exercising the interpretation of laws, are both all powerful; that is that the constitution has not established any superior to restrain their power in this».

[47] Tocqueville, Alexis. 1954. *Oeuvres complètes. De la Démocratie en Amérique*. Paris: Gallimard, 166–167: «In England, the right to change the constitution is recognised to the parliament. In England, the Constitution may change umpteen times, or more accurately, it does not exist at all. Parliament, at the same time as it is legislative body and constituent body».

As is known, Tocqueville never wrote systematic pages on English constitutionalism. For movement on the English model in France from a wide literature see: Zeldin, Theodore. 1959. English Ideas in French Politics during the Nineteenth Century. *The Historical journal* 2: 40–58; Bonno, Gabriel. 1970. *La constitution britannique devant l'opinion française de Montesquieu à Bonapart.* Geneve: Slatkine. Jennings, Jeremy. 1986. Conceptions of England and its Constitution in Nineteenth-Century French Political Thought. *The Historical Journal* 29: 65–85; Bacot, Guillaume. 1993. Les monarchiens et la constitution anglaise. *Revue de la Recherche juridique* 3: 709–737; Tillet, Edouard. 2001. *La constitution anglaise, un modèle politique et institutionnel dans la France des Lumieres.* Aix-en-Provence: Presses universitaires d'Aix-Marseille; Griffo, Maurizio. 2002. La Costituzione inglese in Francia all'epoca delle due carte: il giudizio dei contemporanei. In *Le costituzioni anglosassoni e l'Europa. Riflessi e dibattito tra '800 e '900*, ed. Eugenio Capozzi. Rubettino. Soveria Mannelli: Rubbettino, 33–53; Ferrara, Gerri. 2005. Il modello inglese: le Chartes del 1814 e del 1830. In *La Costituzione britannica/The British Constitution. Atti del convegno dell'Associazione di diritto pubblico comparato ed europeo, Bari, Università degli studi, 29–30 maggio 2003*, eds. A. Torre and L. Volpi. Torino: Giappichelli, II, 1053–1075.

[48] Torre, Alessandro. 2005. La circolazione del modello costituzionale inglese. In *Culture costituzionali a confronto. Europa e Stati Uniti dall'età delle rivoluzioni all'età contemporanea. Atti del Convegno internazionale. Genova 29–30 aprile 2004*, ed. Fernanda Mazzanti Pepe. Genova: Name, 86.

England, the concept of sovereignty would be tightly connected to the concept of freedom and people: sovereignty was no longer a vague, imprecise idea, rather it was the expression and the function of an individual sovereignty. Sovereignty was considered as belonging to the people since it was made up of individuals who each possessed rights wherein elements of sovereignty could be seen. In contrast to the French case, where the *pouvoir constituant* was an exceptional sovereignty, the doctrine of the Omnipotence of Parliament considered constituent power as a historical combination derived from the balance of powers.[49] Parliament had many functions, not only the legislative one.[50] The Parliament was the place where it resolved clashes. In addition, the legislature was the place which linked the consent of governed people with rulers. If Blackstone insisted on the Sovereignty of Parliament, John Locke had, however, the merit of recognizing a particular strength of the consensus.[51] In fact, he said:

> «This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it. Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society, over whom nobody can have a power to make laws but by their own consent and by authority received from them; and therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts».[52]

Later, on this particular aspect, Walter Bagehot clarified that the link between the governed/rulers focused on the fact that «the mass of the English people yield a deference rather to something else than to their rulers. They defer to what we may call the *theatrical show* of society».[53] According to Bagehot, the British constitutional system was made up on the mass of the people who yielded obedience to a select few and «the few rule by their hold, not over the reason of the multitude, but over their imaginations, and their habits; over their fancies as to distant things they

[49] Pombeni, Paolo. 1992. Introduzione. In *Potere costituente e riforme costituzionali*, ed. Paolo Pombeni. Bologna: Il Mulino, 9. See also in the same volume: Burrow, John W. *Il dibattito costituzionale nella Gran Bretagna del diciannovesimo secolo*, 13–32.

[50] Jennings, Ivor. 1969. *Parliament.* Cambridge: Univerity Press, 3–4, 8: «In emphasising the 'transcendent and absolute' authority of Parliament we tend, moreover, to stress too strongly the legislative functions of the both Houses. (…) Here it is necessary to emphasise that, when the Government has a majority in both Houses, the 'transcendent and absolute' authority of Parliament is the authority of the Government. It is not really transcendent and absolute. Behind the Government and behind the House of Commons stands public opinion».

[51] On this aspect see, diffusely, Steinberg, Jules. 1978. *Locke, Rousseau and the Idea of Consent. An Inquiry into the Liberal-Democratic Theory of Political Obligation*. London: Greenwood press and Varela Suanzes-Carpegna, Joaquín. 2003. Sovereignty in British legal doctrine. *Historia Constitucional*, cit., 282 ff.

[52] Locke, John. 1952. *The second treatise of government,* ed., with an introduction, by Thomas P. Peardon. New York: The Bobbs-Merrill company. Book II, Chapter 11: Of the Extent of the Legislative Power, § 134.

[53] Bagehot, Walter. 1873. *The English Constitution*. Boston: Little, Brown, and company, 198.

do not know at all, over their customs as to near things which they know very well».[54]

Drawing experience from the English Constitution, the Subalpine liberals agree to the idea that the Constitutional Government rests upon public opinion. Indeed, even in later moments, reference to the English experience remained a constant for Italian constitutionalists.[55]

In conclusion, it is possible to observe that the Albertine Statute was also coherent with those Italian *octroyées* constitutions of 1848 which, on this matter, opted for silence and drew inspiration from the French Charters.[56] Such were the *Constitution of the Kingdom of the Two Sicilies*,[57] published on 10th February 1848 by Ferdinando II, the *Statute of the Grand Duchy of Tuscany*[58] published on 15th February by Leopoldo II, and the *Fundamental Statutes of the Papal States*,[59] elaborated by a commission of clergymen in a single month (14th February – 12th March 1848) during the papacy of Pius IX. Being born in order to subdue the uprisings, they were similarly brief and laconic and left a lot to constitutional practice. Nevertheless, we are dealing with charters that had a very brief lifespan and were unable to translate themselves into experience. Diametrically opposed to Italian constitutional choices will be, the *Constitution of the Roman Republic*,[60] voted by

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[54] *Ibidem*, 201.

[55] Alessandro Torre noted that the English constitutional experience is paradigmatic not so much in terms of the immediate reproduction of institutions but because of the processes activated. Cf. Torre, Alessandro. 2005. La circolazione del modello costituzionale inglese. In *Culture costituzionali a confronto*, cit., 111: «Sia il caso dell'evoluzione costituzionale francese della prima metà dell'Ottocento sia quello dello Statuto albertino confermano se non altro che il "modello inglese" ha assunto in alcuni momenti della storia europea una esplicita valenza paradigmatica non tanto sotto il profilo dell'immediata riproduzione di istituti e del trapianto istituzionale, quanto piuttosto per i processi attivati. Gli slittamenti extra-formale delle esperienze costituzionali della Francia restaurativa e dell'Italia statutaria, che inevitabilmente si producono nel senso dell'affermazione di equilibri».

[56] Casanova, Paola. 2001. *Le costituzioni italiane del 1848-'49*. Torino: Giappichelli.

[57] For a general overview, see Morello, Maria. 2007. Per la storia delle costituzioni siciliane. Lo Statuto fondamentale del regno di Sicilia del 1848. *Studi Urbinati di scienze giuridiche politiche ed economiche* 57, 309–361. References in Quazza, Romolo, 1942. Il governo napoletano nei primi due mesi del 1848. *Rassegna storica del Risorgimento* 2–3/XXIX: 207–230 and 327–370. Scirocco, Alfonso. 1993. Il Parlamento e la lotta politica a Napoli dopo il 15 maggio 1848. *Clio. Rivista trimestrale di studi storici* 3/XXIX: 445–460. Spanoletti, Angeloantonio. 1997. *Storia del Regno delle Due Sicilie*. Bologna: Il Mulino, 282–301.

[58] As regards this constitution, see Chiavistelli, Antonio. 2006. *Dallo Stato alla nazione. Costituzione e sfera pubblica in Toscana dal 1814 al 1849*. Roma: Carocci and Mannori, Luca. 2015. *Lo Stato del Granduca 1530–1859. Le istituzioni della Toscana moderna in un percorso di testi commentati*. Pisa: Pacini eitore, 267 ff.

[59] Wollenborg, Leo. 1935. Lo statuto pontificio nel quadro costituzionale del 1848. *Rassegna storica del Risorgimento* XXII: 527–594 and Ara, Angelo. 1966. *Lo Statuto fondamentale dello Stato della Chiesa (14 marzo 1848). Contributo ad uno studio delle idee costituzionali nello Stato pontificio nel periodo delle riforme di Pio IX*. Milano: Giuffrè.

[60] Manzi. Irene. 2003. *La Costituzione della Repubblica romana del 1849*. Ancona: affinità elettive.

the constituent assembly and approved on 3rd July 1849. At article 1 it affirmed that «la sovranità è per diritto eterno nel popolo. Il popolo dello Stato Romano è costituito in repubblica democratica» (sovereignty is by eternal right within the people. The people of the State of Rome is constituted in a democratic republic).

2.3 The Sovereign Power between Dictionaries, Political Catechisms and Newspapers

Above and beyond any explicit literal reference to the concepts of sovereignty and to the origins of legitimate power, in the period following the granting of the Albertine Statute, lexical alchemies proper of the Italian constitutional tradition were created. It is on the level of an evolutionary interpretation of the Statute that the cares of the most enlightened minds of the Kingdom concentrated.

Sovereignty is a changeable concept: it changes physiognomy and was the subject of theoretic fleeting treatments, as Cesare Balbo recalled:

> «la parola sovranità è gravida di dubbi ed ambagi non è definita per anche unanimemente dalle scuole politiche, filosofiche né teologiche; volendo alcune (dette storiche a' nostri dì) che ogni sovranità, quelle dei principi come delle repubbliche, abbia sua legittimità e suo diritto, o dal governo anteriore risalendo fino al primitivo, ovvero dal tempo, cioè da un lungo, consentito possesso; e volendo l'altra (detta filosofica) che ogni sovranità abbia legittimità e diritto da un presupposto contratto tra sovrano ed il popolo. Né mi porrò a disputare quale delle due scuole parte da un principio più giusto; o se i due non possan forse confondersi in quel possesso consentito. Bensì farò osservare che, in tutte queste scuole, qualunque di questi principi implica il diritto che ha il sovrano di mutare epperciò di diminuire il governo, cioè la somma potenza, col consenso del popolo»[61]

Eighteen Forty-eight is the *annus mirabilis* in that it will impose new sentences and a redefinition of the vocabulary caused by, above all, lexicographic initiatives, important in the history of political language.[62] What with the ambiguities and the difficulties Balbo noted, a tidying up will be attempted, trying to retie the old and the new, keeping the ghosts of the French Revolution at bay. The effort is to present

[61] *Il Risorgimento* 15 Febbraio 1848, N° 42, 1848: «the word 'sovereignty' is filled with doubts and ambiguities, it is neither defined unanimously by the schools of politics, philosophy nor by those of theology; certain ones wishing (so-called historical schools, nowadays) that every sovereignty, those sovereign-ties of princes as well as those of republics, has its legitimacy and its right, either from the previous government going back to the original one, or rather from time, that is from a long and permitted possess; and willing the other (so-called philosophical) that every sovereignty has legitimacy and right from a presupposed con-tract between sovereign and people. Neither will I put myself in the position of disputing which of the two schools starts off from a more right principle; or if the two cannot per-haps be intertwined in that permitted possess. Rather, I will bring it to everyone's attention that, in all these schools, whichever of these principles implies the right that the sovereign has to change and therefore diminish the government, that is the supreme power, with the consent of the people».

[62] Leso, Erasmo. 1994. Momenti di storia del linguaggio politico. In *Storia della lingua italiana. II. Scritto e parlato*, eds. Luca Serianni and Pietro Trifone. Torino: Einaudi.

change as continuity. These attempts are very evident in the language transformations, as it is possible to note through the analysis of dictionaries, catechisms and newspapers. As we will see, at the centre of the debate, there will be the precise definition of the representative government as sole form of legitimate government.

2.3.1 Dictionaries

Public debate in 1848 went on at various levels. The need to discuss public matters created a real 'community of the word' and of print media. Public discussions wished to influence the choices of the rulers, they recalled the previous tradition and they invented a constitutional maturity which did not exist and was not supported by adequate theoretical elaboration.[63]

The need to spread new political content and make constitutional language simple and familiar is, first of all, faced by editorial businesses who will give birth to new dictionaries.

In the *Dizionario politico popolare*, published by Pomba in 1851, we read that sovereignty

> «è la somma dei poteri concentrati nell'autorità suprema di uno Stato indipendente. V'ha sovranità di fatto, ve n'ha di diritto. La prima equivale all'usurpazione, la seconda emana dalla vera sua fonte. La vera fonte della sovranità è il popolo, mentre, nascendo gli uomini liberi ed eguali, ed avendo pur bisogno di un'autorità suprema a cui siano affidati i poteri governativi per reggerli nella società civile, appartiene ad essi l'elezione di tale autorità. Ogni sovranità che non scaturisce dunque dal suffragio del popolo è razionalmente illegittima. Eppure i pilastri del despotismo dicono, alla rovescia, essere anzi il legittimismo qualità della sovranità che non nacque dal popolo, ma dal diritto divino»[64]

With regard to the political and constitutional vocabulary, sovereignty refers to the concept of legitimacy. This connection is recorded in the *Dizionario politico-giovanile*, published in Turin in 1849, which recognised how

> «in politica, legittimità ha un senso affatto suo e comparativamente moderno. Pretendersi che nel Congresso di Vienna il Principe di Talleyrand mettesse in campo e facesse prevalere la dottrina della legittimità nel significato di diritto al potere sovrano, conferito da Dio stesso ereditariamente ad alcune famiglie».[65]

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[63] Pöttgen, Kerstin. 2001. Il discorso pubblico sulle costituzioni del 1848. *Rassegna storica del Risorgimento* 88: 43–64.

[64] *Dizionario politico popolare*. 1851. Torino: Tip. L. Alnardi (new edition Paolo Trifone, Roma: Salerno Editrice, 1984: «it is the sum of powers, concentrated in the supreme authority of an independent State. There is de facto sovereignty, and legal sovereignty. The former equals usurpation, the latter comes from its true source. The true source of sovereignty is the people, while, men being born free and equal and even though needing a supreme authority to which the ruling powers are entrusted in order to hold them through-out civil society, election of such authority belongs to them. Every sovereignty that does not spring forth from the suffrage of the people is rationally illegitimate. And yet the pillars of despotism say, contrarily, that legitimism is a quality of sovereignty which was not born of the people, but of divine right».

[65] *Dizionario politico nuovamente compilato ad uso della gioventù italiana*. 1849. Torino: Pomba: «In politics, legitimacy has a sense of its own and one that is comparatively modern. Expecting

More interesting is the definition of legitimacy contained in the *Dizionario politico parlamentare*:

> «La teoria politica della legittimità è quella che ammette il diritto ereditario di regnare in alcune famiglie come emanate direttamente da Dio. È un dogma relioso politico, affatto contrario al principio della sovranità popolare»[66]

These examples taken from the principal dictionaries of the time show how the conceptual intertwining is delicate and is destined to ambiguous overlapping between sovereignty of the people and monarchical principle, constituent organ and royal prerogatives. The materials utilised are not coherent. The dictionaries include neologisms and record concepts and new ideas, but we know that the technical terms of which they avail themselves is very limited. Dictionaries, often, tend to present lemmas in a not-very problematic way, rather to provide for exemplifying and elementary notions.

2.3.2 Political Catechisms

The Nineteenth century is also the century where the question of education of the people is strongly perceived and the entire liberal movement is aware of the need to have its propaganda penetrate within the ranks of the popular classes. The propaganda often goes hand in hand with popularisation, the printed page becoming instrument of persuasion and struggle. Political catechisms, too, contribute to the spreading of the representative monarchical regime inaugurated by the constitutional charter. We are dealing with a literary genre in a dialogue form circulating in Europe from France. Political catechisms aimed principally at circulating political institutions and new constitutional ideas.[67]

The most important example in the Kingdom of Sardinia is the very famous *Piccolo catechismo costituzionale ad uso del Popolo*, published by Michelangelo Castelli and Giorgio Briano following the Proclamation of 8th February with the aim of circulating knowledge of the fundamental Statute. With regard to the nature of representative government and on sovereign power as supreme power, it affirmed that «the representative government is that in which the supreme judiciary, instead of possessing absolute power, is subject to the control of one or more assemblies of notable citizens, who contribute to the formulation of the Laws of the land together

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that in the Congress of Vienna, the Prince of Talleyrand put forward and made the doctrine of legitimacy, in the meaning of the right to sovereign power given hereditarily down to certain families by God himself, prevail».

[66] Carrera, Arnaldo. 1887. *Dizionario politico parlamentare. Milano*: Sonsogno. «Political theory of legitimacy is that which permits hereditary rights to reign in certain families in that given directly by God. It is a political religious dogma, totally opposed to the principle of popular sovereignty».

[67] Cocchiara, M. Antonella. 2014. *Catechismi politici nella Sicilia costituente (1812–1848)*. Milano: Giuffrè.

with it»,[68] pointing out that in the monarchical constitutional form the government rules by virtue of a pact and «the difference between a constitutional Monarch and an absolute Monarch is, therefore, in this: that the former possess the supreme power only on certain conditions allowed by his people».[69]

The ideas contained in the catechism bearing the names of Castelli and Briano were corroborated by and were readily discussed in the press. Particularly, Pietro Luigi Albini highlighted from the pages of *Il Costituzionale Subalpino* the main errors contained therein. The famous professor remarked on the lexical inaccuracies contained in the popular work of Castelli and Briano. The definition of 'representative government' was first of all criticised. The inexact idea of supreme authority was criticised noting that

> «se nelle monarchie costituzionali la sovranità, o come il nostro autore si esprime, la suprema magistratura, non si possiede e non si esercita che in virtù di un patto, di un contratto con il popolo, e solo a certe condizioni, la conseguenza che inevitabilmente e direttamente ne deriva, si è che, non adempiendo il monarca dal canto suo il contratto, mancando ad alcune delle condizioni del medesimo, egli decade dalla sovranità, dalla suprema magistratura. (…) Posto ciò la sovranità del Re è distrutta, il principio dell'inviolabilità della sua persona, della sua responsabilità è un'illusione»[70]

Albini specified that the idea that the sovereignty of the King is exercised by virtue of a contract is an old idea which has its matrix in the thought of Rousseau and which is not matched by the constitutional experience of Piedmont, also because the contract is not the only source from where to make obligations descend down to the Crown. Albini took up again the idea that sovereignty comes down from the Constitution itself:

> «una nuova legge fondamentale che stabilisce una nuova forma di governo, che regola l'esercizio della sovranità, il modo di essere della medesima com'è richiesto dalle condizioni della civiltà, che determini i diritti e i doveri del sovrano e del popolo, obbliga per

[68] «il governo rappresentativo è quello nel quale la suprema magistratura, invece di possedere un potere assoluto, è soggetta al controllo d'una o di più assemblee di notabili, che concorrono con esso alla confezione delle Leggi del paese». Cf. Castelli, Michelangelo and Briano, Giorgio. 1848. *Piccolo catechismo costituzionale ad uso del popolo col programma dello statuto fondamentale dell'8 febbraio 1848*. Torino: Gianini e Fiore, 13–14. Both authors collaborated with the Il *Risorgimento* and belonged to the circle of Cavour. For biographical references, please see: Talamo, Giuseppe. 1978. Castelli, Michelangelo. In *Dizionario biografico degli italiani* 21 (http://www.treccani.it/enciclopedia/michelangelo-castelli_%28Dizionario_Biografico%29/) and Farone, Anna. 1972. Briano, Giorgio. In *Dizionario biografico degli italiani* 14 (http://www.treccani.it/enciclopedia/giorgio-briano_%28Dizionario_Biografico%29/)

[69] *Ibidem*: «la differenza tra un Monarca costituzionale e un Monarca assoluto sta dunque in ciò: che il primo non possiede il potere supremo che a certe condizioni consentite col suo popolo».

[70] Albini, Pietro Luigi. 1848. Errori del piccolo catechismo costituzionale ad uso del popolo. *Il Costituzionale Subalpino* 8, Thursday 9th March.: «if, in constitutional monarchies, sovereignty, or else as our author says, the supreme judiciary, is possessed and is exercised only by virtue of a pact, of a contract with the people, and only on certain conditions, the consequence, that inevitably and directly come from it, is that if the monarch, for his part, does not fulfil the contract, not complying with some of its clauses, he forfeits sovereignty, supreme judiciary. (…) Given this, the sovereignty of the King is destroyed, the principle of the inviolability of his person, of his responsibility is an illusion».

> se stessa irrevocabilmente il sovrano che l'ha fatta e i suoi successori senza bisogna di ricorrere ad un contratto che non esiste, e che legalmente non sarebbe guari concepibile, od a un'ipotesi ripugnante alla realtà del fatto».[71]

2.3.3 Newspapers

Particularly, the newspapers will constitute the place where a modern public opinion which will be critical and alert will develop. In Piedmont, the edict on the press of 30th October 1847 favoured the birth of new periodical newspapers.[72] Previous to 1848, the only political newspaper was the *Gazzetta Piemontese*, faithful expression of the government. From 1848, journalism affirmed itself as a privileged place of political discussion, gradually abandoning the merely informative, denotative and referential function, in order to open up to thoughts of a theoretical nature, to reforming propositions and to critical reports of political discussions. It is in this context that newspapers autonomous of the government are published among which, for example, *Il Risorgimento*[73] and *La Concordia*[74] but also *L'Opinione,*[75] *Il Costituzionale Subalpino.*[76]

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[71] *Ibidem*. «A new fundamental law which establishes a new form of government, which regulates the exercise of sovereignty, the way of being of the same sovereignty as is required by the conditions of civilisation, which determines the rights and the duties of the sovereign and the people, which, by itself, irrevocably binds the sovereign who made it and his successors without the need to resort to a contract that does not exist and that legally would not be almost conceivable, or to a hypothesis repugnant to the realty of the fact».

[72] For an evaluation of the press, please see: Della Peruta, Franco. 1979. Il giornalismo dal 1847 all'Unità. In *La stampa italiana del Risorgimento*, eds. Valerio Castronovo and Nicola Tranfaglia. Roma-Bari: Laterza. Talamo, Giuseppe. 1999. Il giornalismo. In *Il Piemonte alle soglie del 1848*, ed. Umberto Levra. Torino: Carocci, 413–429.

[73] Published by Camillo Cavour from 15th December 1847. Some of his collaborators are: Cesare Balbo, Michelangelo Castelli, Massimo D'Azeglio, Angelo Brofferio, Giuseppe Torelli, Riccardo Sineo. The programme foresees «motivate the governors, moderate the governed» [synthesis of Cesare Balbo, Il Risorgimento 3rd February 1848, N° 31]. About this newspaper and La Concordia, besides the bibliography recalled, see specifically Colombo, Adolfo. 1910. I due giornali torinesi "Il Risorgimento" e "La Concordia" negli albori della libertà. *Il Risorgimento italiano* III: 28–65.

[74] Published on 1st January 1848 by Lorenzo Valerio. Among the collaborators are: Prof. Domenico Berti, Prof. Giuseppe Bertoldi, Domenico Carutti, Domenico Marco, Francesco Galgano. Among the objectives stated in the programme, there is: «to move the population closer in harmony around the Prince and to support the government».

[75] Published on 26th January 1848 by Giacomo Durando and, then, by Antonio Bianchi Giovani. Among the collaborators are: Massimo di Montezzemolo, Giuseppe Torelli, Carlo Pellati, Giovanni Lanza, Giuseppe Cornero, Nicolò Vineis. In its programme, reference to Nationality, Monarchy, Legality and Progress is made.

[76] Published on 1st March 1848 by the lawyer Luigi Vigna. In the first issue, among the collaborators we find: V. Aliberti, Prof. D. Biorci, G.M. Cargnino, Leonardo Fea, Doctor E. Leone; G. Pasquale, Prof. and the lawyer Antonio Scialoja, Senator P.O. Vigliani. In the programme, we read: To discuss all interests concerning the Country, paying particular attention to the study and development of administrative problems.

In the weeks that followed the promulgation of the constitutions and preceded the opening of Parliament, in the columns of the newspapers the attempt to popularise the new representative regime was never neglected. Within this framework, we can highlight that printed journalism shows an impetuous innovative tension, accepting neologisms, words of a foreign hue, bureaucratic and regional usages, and forcing itself to elaborate a more agile style than the traditional one.[77] An example are the *Lezioni popolari sullo Statuto* which appear in six issues of the newspaper *L'Opinione*. During the fifth lesson, the two main theories on sovereignty are reviewed: popular sovereignty and legitimism. As regards the first theory, the article writer noted that

> «la sovranità esercitata direttamente dal popolo, esiste come principio teorico in alcune repubbliche, nel fatto non fu mai se non una finzione: imperocchè la moltitudine è una massa bruta che si lascia costantemente guidare dagli intrighi di pochi ambiziosi che sono effettivamente i suoi sovrani. Nelle piccole repubbliche svizzere, massime dove il governo democratico è assoluto, la sovranità del popolo si limita al diritto di darsi una volta all'anno delle bastonate, nell'occasione che elegge i suoi Landamanni, o per dire meglio, nell'occasione che i candidati gli sono imposti dai caporioni del paese che si contrastano il potere»[78]

The consequence was that to reduce, in practice, popular sovereignty meant anarchy and disorder. Opposite to popular sovereignty was the co-called theory of divine right founded upon the presupposition that the dignity and power of Kings came from God. The author tries to neutralise the sovereignty as power concentrated in one, sole organ: the most lasting political societies are those where

> «l'autorità sovrana si trovasse condivisa in modo da tenere egualmente lontano e il dispotismo dell'uno e il dispotismo dei troppi».[79]

The idea which is affirmed is that of the sharing and balancing of the powers where sovereignty shall never be concentrated into one, single place:

> «quando uno stato è in rivoluzione, e che ha bisogno di fare molte cose al di dentro ed al di fuori, e di agire con vigore ed impeto, è necessario un potere unico che si arroghi le attribuzioni legislative, esecutive e giudiziarie, come era la Convenzione, potere che in altri termini è il dispotismo trasferito da uno a molti individui, o dagli eccessi di una corte

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[77] Masini, Andrea. 1994. La lingua dei giornali dell'Ottocento. In *Storia della lingua italiana. II. Scritto e parlato*, eds. Luca Serianni and Pietro Trifone, cit., 635–665.

[78] Lezioni popolari sullo Statuto V. *L'Opinione*, 17th November 1850, N° 317: «sovereignty exercised directly by the people, exists as a theoretical principle in certain republics, de facto it was only a fiction: given that the multitude is a brute mass which continually lets itself be guided by the intrigues of a few ambitious ones who are effectively their sovereigns. In the small Swiss republics, especially where democratic government is absolute, sovereignty of the people is limited to the right of giving oneself beatings once a year, on the occasion of the election of their Country Counsellors, or rather to put it better, on the occasion of the imposition of the candidates by the country ringleaders who dispute power between themselves».

[79] *Ibidem*: «sovereign authority should find itself shared in such a way as to equally keep the despotism of one and the despotism of the too many far apart».

> all'arena di un partito. Ma quando un paese si trova in condizioni normali, e che desidera conservare le sue libertà, ha d'uopo che i poteri siano controbilanciati»[80]

Still having the goal of making the concepts and new language understandable in the newspaper Concordia, Giuseppe Bertinetti, a lawyer, concerned himself with making the theory of parliamentary omnipotence familiar, in virtue of the fact that he learned from the columns of the same newspaper that the Government had recognised this principle to itself. From here was the meaning of the principle of parliamentary omnipotence in the legal order of Piedmont clarified:

> «se dietro lo statuto non vi sono altri poteri tranne quelli creati e definiti dallo statuto medesimo, ne risulta che qualunque atto pari oltrepassare essi poteri sarà tassato di incostituzionalità epperciò di nullità radicale provocherà la dissoluzione delle Camere e si avrà ricorso ad un'assemblea nazionale».[81]

Indeed, the Italian constitutional charters (those of Tuscany, Naples and Piedmont), noted Bertinetti, did not foresee, even knowing of the Belgian model, any article for constitutional revision neither the necessary recourse to a constituent assembly. A consequence of all this, for proper practical reasons, was that, in Italy, the principle elaborated in England was implemented.

Throughout the long nineteenth century, indeed, the constituent power was marginalised due to cultural reasons: the liberals identified in it the causes of the political instability which France was going through.[82] Finally, in Italy the question debated was if the constituent power should consider itself a separate power or whether internal to legislative power. Filipponeri Spanò noted that according to the traditional theoretical layout, the exercise of the constituent power laid either in the persona of the sovereign who grants the Charter, or in a national assembly of representatives chosen by the people charged with a special ad hoc power and independent from the legislative power. This, gave rise to the following questions in Italy: did modifications to the articles of the Statute have to come about via an

[80] *Ibidem*: «when a state is in the throes of revolution, and needs to do many things on the inside and outside, and to act vigorously and with force, a single power is needed that claims legislative, executive and judicial competences, as was the Convention, power which in other terms is despotism transferred from one to many individuals, or from the excesses of one court to the arena of a political party. However when a country finds itself in a normal state of affairs, and wishes to maintain its liberties, it is necessary that the powers are counterbalanced».

[81] Bertinetti, Giuseppe. 1848. Dell'onnipotenza del parlamento. *La Concordia* 31th March 1848, N° 79: «if behind the statute there are no other powers except those created and defined by the statute itself, it results that whatever act which seems to supersede these powers will be taxed with unconstitutionality, i.e. with radical nullity, will cause the dissolution of Parliament and recourse to a national assembly will be needed».

[82] For this reconstruction, see Fioravanti, Maurizio. 1992. Potere costituente e diritto pubblico. Il caso. In *Potere costituente e riforme costituzionali*, cit., 55–77. The author noted that denying the existence of an autonomous constituent power guaranteed that the public powers are not instituted from the bottom, rather, they form on a historical basis without the need for a *suprema potestas* that claims special legislative powers. The Constitution was an objective order of things and, from Cavour to Orlando, the widespread idea that the Albertine Statute was a medium point between the monarchical principle of the Prussian Constitution of 1848/50 and parliamentarization of powers as foreseen by the Constitution of Belgium developed (64–65).

extraordinary power different from the ordinary legislative one or else via the same constituted power? Is the constituent power a power or a function? According to the author, the answers to these queries was:

> «il Parlamento è una perpetua Costituente. Col sistema dell'onnipotenza parlamentare si ha appunto una sola sovranità ordinaria, e si evita il grave inconveniente delle due sovranità, che volere o non volere, non puossi sfuggire col potere costituente».[83]

Simply, the Statute did absolutely not pose itself the problem of modifiability and procedures for its revision, because in the original intention it was non-negotiable. However, as happens for normative texts, as regards interpretations, wishes for its reform were not lacking. The constituent assembly being terms that reminded of revolutionary events, the mellower road of a sovereign power shared by various parties: King and Houses was chosen.[84]

3 The Represented "Nation": A Pact Between Sovereign and People, the Force of the Constitution and Political Representation

We said that the granted charter of Piedmont is based upon the monarchical principle, anyway lacking a constituent power which is anchored to the nation. From the very beginning, however, the theory of parliamentary omnipotence circulated in Italy even though, as Maurizio Fioravanti has noted, the English principle of the King in Parliament never fully took root on the continent,[85] rather, we may say that the theory of parliamentary omnipotence acted as a shield to keep the ghost of constituent power away.

In Piedmont, the parliament was certainly not representative of popular sovereignty being constituted by the Senate of royal nomination and a chamber elected on the basis of census. Article 7 of the Proclamation made it clear that the Chamber of Deputies will be elected on the basis of the census to be determined. While, the Statute defined the deputies representatives of the nation. Article 41 stated: «deputies represent the Nation in general, and not only the provinces which elected them.

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[83] Spanò, Filipponeri 1882. Lo Statuto e il Parlamento in Italia. *Rivista europea: rivista internazionale* 28: 248–264. «Parliament is a continual Constituent Assembly. By way of the system of parliamentary omnipotence, we have, precisely, a sole ordinary sovereignty, and we avoid the serious inconvenience of two sovereignties, which like it or like it not, cannot be escaped by way of the constituent power».

[84] Concerning the debate on constituent power, see as well Costa. Pietro. 2012. Il problema del potere costituente in Italia fra Risorgimento e repubblica. In *Un secolo per la costituzione (1848–1948). Concetti e parole nello svolgersi del lessico costituzionale italiano*, Federigo Bambi (ed.), cit., 109–137.

[85] Fioravanti, Maurizio. 1998. *Costituzione e popolo sovrano*, cit., 63.

No imperative and representative mandate can be given by Voters».[86] It is not possible to reconstruct the genesis of this article, which appears in analogous way also in the Constitution of the Kingdom of the Two Sicilies and in the Electoral Law of Tuscany of 1848. For certain people, the constitutional principle which sees deputies representing the nation dated back to the revolutionary period with the law of 22nd December 1789: «The representatives nominated to the national assembly of the departments cannot be considered as representatives of one, particular department, but as the representatives of the totality of departments, that is, of the whole nation».[87] Such a principle was reaffirmed by the French Constitution of 1791 and by that of 1795, while it was not in the Constitutions of 1814 and 1830. We could also hazard the hypothesis that the compilers of the Statute found the rule also in article 32 of the Belgian Constitution, even if the principle of national sovereignty of the latter was not adopted.[88]

The Statute, because of its nature of *Charte octroyée* (granted Charter), was weak as regards legitimisation. The first observers of the constitution immediately noted the lack of a democratic element which expressed itself via the constituent power and sovereignty. In this context, even though trying to neutralise the supreme power into the hands of the people, the attempts to bridge this gap were numerous.

Among the various ideas that were gaining ground, there was that which saw a pact or an agreement between Sovereign and people in the Statute. On the dawn of the promulgation of the constitution, Elia Benza noted that

> «la Costituzione dunque puramente donata o conceduta avrebbe sempre in sé un mal germe, un vizio d'origine che potrebbe condurre a pericoli e conseguenze funeste al principe e alla nazione»[89]

If the constitution was a gift, the royal will remained the supreme power and the only foundation of the political regime. Oppositely, if the Statute was a pact, a convention between Sovereign and people, it would generate obligations and rights for both parties.

> «Sì veramente, la Costituzione, anche nel senso strettamente monarchico, significa una convenzione o non significa nulla. Dico nel senso monarchico, perché nel senso filosofico Costituzione significa il complesso delle leggi politiche sotto le quali un popolo si costituisce in nazione».[90]

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[86] «I deputati rappresentano la Nazione in generale, e non le sole provincie in cui furono eletti. Nessun mandato rappresentativo imperativo può darsi dagli Elettori» (art. 41).

[87] Maranini, Giuseppe. 1926. *Le origini dello Statuto albertino*, cit. 209.

[88] Furlani, Silvio. 1989. L'influenza della Costituzione e dell'ordinamento costituzionale belga del 1831 sulla stesura dello statuto e di altri testi istituzionali fondamentali del Regno di Sardegna nel 1848. *Bollettino di informazione costituzionali e parlamentari* 2: 111–201.

[89] *La Concordia*, 3rd March 1848, N° 55: «the Constitution, therefore, purely donated or conceded, would always bear within an evil germ, an original flaw which may lead to dangers and consequences fatal for the Prince and the nation».

[90] *Ibidem:* «Yes really, the Constitution, also in its strictest monarchical sense, means a convention or it means nothing. I say in the monarchical sense of the word, because in the philosophical sense of the word, 'Constitution' means the whole of the political laws under which a people constitutes itself into a nation».

The idea that the representative government bases its legitimacy upon a pact between sovereign and people was also present in *Catechismo* by Castelli and Briano. Of the opposite opinion was, however, Pier Luigi Albini who noted that the Statute, from a juridical point of view, was neither a convention nor a donation, but it was an «act of justice and political wisdom and magnanimity».[91] According to the eminent professor it would, technically, have been a mistake to speak of a pact between sovereign and people:

> «la legge con cui un re trasforma una monarchia assoluta in monarchia costituzionale è il più grande atto di sovranità».[92]

For Albini, the salient element consisted in the fact that the sovereign, through the Constitution, decided to share his authority with the people. From this moment on, the people concurred to exercising sovereignty.

It is within the force of the Constitution itself, that we have to find the same legitimisation of the representative government and from there begins the normalisation and the codification of civic life, so much so, that the exercise of supreme power would have to be employed according to the juridical rules contained therein. However, having considered that the Statute is a political act of the King, the liberals concentrated their attention on the representation while realising that with regard to this, one of the most important games will be played.

Since, on the basis of the census, in collective thinking the elective presence qualified the whole legal order making it finally "national". On this layout, once again the comments of the Orléanist doctrinarians from Guizot to Hello – who saw a convergence point of the exercise of sovereignty in the theory of representation – carried weight. Indeed, the French liberals, wishing to limit the effects of popular sovereignty, forcefully established that the people could not exercise, by itself, sovereign power but it had to delegate it to representatives who took care of the general interest. The idea of national representation on the basis of individual and census where the selection of the most capable to govern occurred in accordance with the census criterion became manifest.[93]

Representation was a topic which was continually placed in front of public opinion. The Italian debate on this topic was characterised by the circulation of a plurality

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[91] Albini, Pierlugi. 1848. Errori del piccolo catechismo costituzionale – Seconda Parte. *Il Costituzionale Subalpino*, 10th March, N° 9: «Lo Statuto pertanto non è, almeno per noi, né una donazione, nel senso letterale e legale di questa parola, che pure sarebbe una convenzione. È un atto di giustizia politica e di sapienza politica e di magnanimità. È un atto di giustizia politica, perché la sovranità è il complesso dei poteri necessari a dirigere la società al suo fine, e il modo di essere di essa e di esercitarla dee necessariamente variare nel progredire della civiltà».

[92] *Ibidem:* «the law with which a king transforms an absolute monarchy into a constitutional monarchy is the greatest act of sovereignty».

[93] On the theoretical constructions in France, it is very useful to begin reading from Rasanvallon, Pierre. 2005. *Il popolo introvabile. Storia della rappresentanza democratica in Francia*. Bologna: Il Mulino. Lacchè, Luigi. La garanzia della Costituzione. Riflessioni sul caso francese. In *Parlamento e Costituzione nei sistemi costituzionali europei ottocenteschi/Parlament und Verfassung in den konstitutionellen Verfassungssystemen Europas*, eds. Anna G. Manca and Luigi Lacchè, cit., 49–94 (spec. 61–69).

of models which adapted the archetypes elaborated by the doctrine to political necessities imposed by circumstances.[94] The chance to discuss national representation was given by the promulgation of the electoral law. Following the granting of the constitution, King Charles Albert constituted three different com-missions to intervene, respectively on the topic of freedom of the press, on electoral law and municipal militia. The commission for electoral law, was presided over by Cesare Balbo and among the members there appear also Camillo Cavour and Ettore Ricotti, the latter was the author of a pamphlet dedicated to national representation.[95] The electoral law was published on 17th March 1848 and was based upon the criteria of census and on capability.[96] Voters were whoever paid 40 lire of tax or an annual rent ranging from 200 to 600 lire. Effective members of royal academies were also voters because of capability, so too were teachers of secondary schools, irremovable magistrates, members of the Chambers or Committees of commerce and agriculture, retired state officials and functionaries of the state who enjoyed a pension greater than 1200 lire. The right to be voted was recognised, with the payment of half of the census, to graduates, notaries public, legal representatives for colleges, retired state officials and state functionaries with a pension going from 600 to 1200 lire.

The connection between representative system and electoral law was destined to last in the thoughts of political journalism to such an extent that the electoral law was seen as the key of a change of direction of the whole representative sys-tem. In the abovementioned article of 10th March 1848, bearing Cavour's signature, it is affirmed that the electoral law was one of those fundamental laws which characterised the new constitutional regime. This article was preceded by another four with the specific subject of electoral law. Cavour, after having shown his contrariness to the municipal model,[97] paused respectively over the number of the members of the

[94] Chiavistelli, Antonio. 2011. Rappresentanza. In *Atlante culturale del Risorgimento. Lessico del linguaggio politico dal Settecento all'Unità*, eds. Alberto Mario Banti, Antonio Chiavistelli, Luca Mannori and Marco Meriggi. Roma-Bari: Laterza, 343–358. On more general aspects relating to representation, see Ballini, Pier Luigi. 1997. Idee di rappresentanza e sistemi elettorali in Italia tra Otto e Novecento. Venezia: Istituto veneto di scienze lettere ed arti. Ghisalberti, Carlo. 1972. Il sistema rappresentativo nella pubblicistica subalpina del'48. In *Stato e costituzione nel Risorgimento*, ed. Carlo Ghisalberti. Milano: Giuffrè, p. 189–217. Pombeni, Paolo. 1995. La rappresentanza politica. In *Storia dello Stato italiano dall'Unità ad oggi*, ed. Ramanelli. Roma: Donzelli editore, 73 SS.

[95] I refer to Ricotti, Ettore. 1848. *Della rappresentanza nazionale in Piemonte*. Pensieri di Ettore Ricotti. Torino: Dalla stamperia reale

[96] Cuciniello, Edoardo. 1910. *La legge elettorale politica 17 marzo 1848*. Milano: Bocca. For a general overview on the system of electoral law, see Carlo Piscedda. 1998. *Il vecchio Piemonte liberale alle urne.* Torino: Centro studi piemontesi.

[97] *Il Risorgimento* N° 40, 12th February 1848. Specifically, it affirmed: «La nomina dei deputati per mezzo dei Consigli municipali, contraria agli interessi generali dello Stato, non sarebbe meno dannosa ai veri interessi dei comuni. Le parti e le passioni politiche eserciterebbero una dannosa influenza sulla scelta dei loro magistrati, e nuocerebbero alla loro retta e regolare amministrazione; e sarebbe quasi impossibile che in questo sistema le elezioni municipali non fossero interamente politiche, non uscissero da esse uomini devoti in tutto alle opinioni dominanti» (the nomination of

elective assembly,[98] over the electoral constituencies,[99] the active electorate and the conditions of eligibility.[100] Cavour insisted upon political representation in that it was a fundamental institution of the new constitutional construction:

> «costituire un'assemblea, che rappresenti quanto più esattamente e sinceramente sia possibile, gli interessi veri, le opinioni ed i sentimenti della nazione: e che però sia composta di cittadini atti al difficile incarico e nello stesso tempo dotati di sufficiente scienza e moralità per cooperare utilmente alla confezione delle leggi e al governo del paese»[101]

We may deduce from the words of the subalpine statesman, the idea that representative assemblies are the only ones that are able to give a voice to and represent the nation. We can also note that the public debates regarding electoral law and representation permitted filling the reflections on the 'nation' with practical connotations which, even if they were not lacking in Italian political thought, till 1848, remained still to an anthropological meaning, indeterminate and, anyway, devoid of an effective corroboration on an institutional level.[102] While, for a clearer formulation of 'nation' as homogeneous entity able to place itself as sovereign subject on the international scene we have to wait for the well-known inaugural lecture by Pasquale Stanislao Mancini.[103]

As Allegretti noted, during the liberal period the monarchical principle and the representative principle lived side by side.[104] First of all, this is possible because, unanimously, the monarchical principle was not understood as having an absolutist meaning, as in the French *Charte* of 1814 which enclosed supreme authority in the

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the deputies by municipal Councils, contrary to the general interests of the State, would be no less dangerous to the true interests of the municipalities. The parties and the political passions would exercise a harmful influence on the choice of their magistrates and would damage their straight and regular administration; and it would be almost impossible that, in this system, the municipal elections were not entirely political, and that, from these, men not completely devoted to the dominant opinions came).

[98] *Il Risorgimento* N° 46, 19th February 1848.

[99] *Il Risorgimento* N° 48, 22nd February 1848.

[100] *Il Risorgimento* N° 49, 23rd February 1848.

[101] This quotation is taken from *Il Risorgimento* N° 46, 19th February 1848: «constituting an assembly, which represents, as exactly and sincerely as possible, the true interests, the opinions and feelings of the nation: and one which, however, is made up of citizens fit for the difficult charge and, at the same time, equipped with sufficient knowledge and morality to usefully cooperate in law-making and in ruling the country».

[102] Romanelli, Raffaele. 1999. Nazione e costituzione nell'opinione liberale italiana prima del'48. *Passato e presente* 46: 157–171. Concerning the nation during the Risorgimento ideology I refer to Banti, Alberto Mario. 2002. *La nazione del Risorgimento. Parentela, santità e onore alle origini dell'Italia unita*. Einaudi: Torino. Floriana, Colao. 2001. L'idea di nazione nei giuristi italiani tra Otto e Novecento. *Quaderni fiorentini per la storia del pensiero giuridico moderno* 30: 255–360.

[103] Mancini, Pasquale Stanislao. 1851. *Della nazionalità come fondamento del diritto delle genti. Prelezione al corso di diritto internazionale e marittimo pronunciata nella Regia università di Torino dal Prof. Stanislao Mancini*. Torino: Tip. Botta.

[104] Allegretti, Umberto. 2012. Forme costituzionali della storia unitaria: monarchia e repubblica. *Rivista telematica dell'associazione dei costituzionalisti italiani* 2 (http://www.rivistaaic.it/forme-costituzionali-della-storia-unitaria-monarchia-e-repubblica.html).

person of the King, but in the more modern meaning of a monarchy which through the granting of the constitution constrained itself fully and irrevocably to it. On the other hand, representation was considered a genetic element of the new legal order which was qualified as 'representative monarchical government' in virtue of the formula contained in article 2 of the Statute. Via this principle of living together, it established that the basis of sovereignty lived in the Crown as well as in the politically represented Nation.[105]

4 From Words to Practice. Initial Steps of the 'Representative Government'

In Italy, a parliamentary government– if by this we mean the institutional mechanism which binds the Government to the elected Chamber via the confidence and the principle that the Parliament (in that it is representative of the nation) is capable, by way of its own majority, of orientating government policies – had difficulty in affirming itself. The question of the form of government occupied jurists ever since the promulgation of the constitutional text.[106] At the same time, dealing with the form of government, especially in its practical development, meant observing the way in which sovereignty was shared out and organised.

[105] Cf. Boncompagni, Carlo. 1880. *Lo Statuto italiano annotato dal Professor Carlo Bon-Compagni.* Torino, Stamperia dell'Unione Tipografica editrice, 11: «Il Governo definito dallo Statuto non è soltanto monarchico, esso è pure rappresentativo. Cioè si hanno delle istituzioni per cui la Nazione è rappresentata ed essa esprime liberamente i suoi giudizi su tutti gli atti del Governo. Dunque questa libertà di esprimere l'opinione nazionale è sinceramente mantenuta, essa acquista una tale influenza che i reggimenti dello Stato non possono sottrarvisi. In tutti gli Stati, qualunque siansi i loro reggimenti, l'andamento della cosa pubblica è determinato dalle opinioni comunemente ammesse».

[106] Besides the literature till here mentioned, for a synthesis and a review of the debate on the forms of government during the Statuto Albertino: Bonfiglio, Salvatore. 1990. Il dibattito sulle forme di governo nel periodo statutario. *Il politico. Rivista italiana di scienze giuridiche* 153: 93–115. Lucatelli, Luigi. 1996. Sulla forma del governo monarchico costituzionale previsto dallo Statuto albertino. *Diritto e società* 4: 583–599. Merlini, Stefano. 2000. Il Parlamento e la forma di governo parlamentare nel periodo statutario. In *L'istituzione parlamentare nel XIX secolo. Una prospettiva comparata,* eds. Anna Gianna Manca and Wilhelm Brauneder. Bologna: Il Mulino, 79–94. Barbera, Augusto. 2001. Fra governo parlamentare e governo assembleare. Dallo Statuto albertino alla Costituzione repubblicana. *Quaderni costituzionali* 31, 9–37. Antonetti, Nicola. 2003. *La forma di governo in Italia. Dibattiti politici e giuridici tra Otto e Novecento.* Bologna: il Mulino. More generally on forms of government and its classifications: Colombo, Paolo. 2003. *Governo.* Bologna: il Mulino, 2003; Tommasi, Claudio. 1990. Parlamentarismo e governo di gabinetto nella scienza politica e giuridica del secondo Ottocento: Inghilterra, Germania e Italia. *Società e storia* 49: 583–652; Bobbio, Norberto. 1976. *La teoria delle forme di governo nella storia del pensiero politico.* Torino: Giappichelli; Elia, Leopoldo. 1970. Governo (forme di). In *Enciclopedia del Diritto*. Milano: Giuffrè, XIX, 634–675.

As we have already said, the formula used by the Statute to describe the new constitutional regime is representative government.[107] This lexical expression is a fluid category which allows us to bring together in one formula both the ideas of who, in the statuary timeframe, tends to envisage the form of government of the pure constitutional monarchy where the Monarch maintains executive control and the ideas of who exalts parliamentary influences.[108] For that which regards the exercise of sovereignty in the representative government, one of the first commentators of the Albertine Statute noted:

> «il sistema monarchico rappresentativo è fondato all'incontro sul principio che il monarca abbia a dividere colla nazione una parte della sovranità. Ma, come nella repubblica, la nazione non potrebbe occuparsi direttamente di affari politici. Vengono per ciò da essa nominati nei modi prescritti da apposite leggi individui che godono della fiducia della maggioranza e che si assicurano il mandato di rappresentare quella parte di sovranità o di compartecipazione al potere pubblico che per il maggior bene dello Stato è conferito dallo Statuto fondamentale alla nazione, e per essa ai suoi rappresentanti».[109]

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[107] The preamble to the Proclamation affirmed: «abbiamo risoluto e determinato di adottare le seguenti basi di uno Statuto fondamentale per istabilire nei nostri stati un compiuto sistema di governo rappresentativo» (we have resolved and determined to adopt the following bases of a fundamental Statute to establish a complete system of representative government in our states). Article 2 of the Albertine Statute stated: «lo Stato è retto da un Governo Monarchico Rappresentativo. Il Trono è ereditario secondo la legge salica» (the State is borne by a Representative Monarchial Government The throne is hereditary in keeping with Salic law). On the origins of its formulation, Paolo Colombo, noted that 'representative government' is no invention of Piedmontese constituents rather, it can be found both in the Neapolitan Constitution of 11th February 1848 which uses the expression «temperata monarchia ereditaria costituzionalmente sotto forme rappresentative» (a tempered constitutionally hereditary monarchy in representative forms), as well as in the constitutional project elaborated by France in 1815 following the defeat at Waterloo. Cf. Paolo, Colombo. 2001. La ben calcolata inazione: Corona, Parlamento e ministri nella forma di governo statutaria. In *Il Parlamento. Annali 17*, ed. Luciano Violante, cit., 69. Specifically for the French case, the norm is contained in the Projet d'acte costitutionnel, presented by the Commission to the French Parliament on 29th of June 1815. The project never came into force. Regarding 'representative government', see: Mannori, Luca. 2011. I nomi del "governo rap presentativo" nella dottrina costituzionale italiana dal settecento al fascismo. In *Un secolo per la costituzione*, cit., 129–176.

[108] Luigi Lacchè noted this, with special regard to the French experience. Cf. Lacchè, Luigi. 2009. La razionalizzazione ottocentesca: il problema dell'affermazione del modello parlamentare nell'età delle Chartes. In *La Costituzione francese. La Constitution française. Atti del convegno biennale dell'Associazione di diritto pubblico comparato ed europeo, Bari, Università degli Studi, 22–23 maggio 2008*, ed. Marina Calamo Specchia. Torino: Giappichelli, 125–147. On the distinction between parliamentary principle and representative government, see: Lacchè, Luigi. 2004. Governo rappresentativo e principio parlamentare: le *Chartes francesi del 1814* e 1830. *Giornale di storia costituzionale* 8: 99–120.

[109] Peverelli, Pietro. 1849. *Commenti intorno allo Statuto del regno*. Torino: Tipografia Castellato, 13–14: «the monarchical representative system is founded on the agreement on the principle that the monarch has to share a part of his sovereignty with the nation. But, as in the republic, the nation could not directly take care of political affairs. For this reason, individuals – who enjoy the trust of the majority and who gain the mandate to represent that part of sovereignty or to share the public power which for the greater good of the State is conferred to the nation by the fundamental Statute, and for it to its representatives – are nominated by the nation through ways prescribed by suitable laws».

For Castiglioni, instead,

> «il potere costituente legittimo sta dunque nel popolo, ossia, per una necessità morale che abbiamo dimostrata, nell'intelligente e capace maggioranza di esso. Il consenso dei più vale a rendere obbligatoria la costituzione, non già perché si supponga il tacito consenso anche del numero minore, ma perché, senza dare alla volontà preponderante una forza giuridica ed obbligatoria, la società non potrebbe sussistere. E quanto più la volontà della maggioranza sarà libera e largamente espressa, quanto più si avvicinerà, per progredita educazione nazionale, al suffragio universale, tanto più acquisterà forza morale la costituzione in nome di essa stabilita ed accettata».[110]

The author specified that

> «non sempre il potere costituente è esercitato dal popolo. Avviene nei pacifici rivolgimenti e riordinamenti delle società costituite da secoli, che il potere, quale trovasi investito tradizionalmente della facoltà di far le leggi riconosca spontaneo i naturali diritti, su cui la società vuol essere basata, e si offra egli stesso, o volonterosamente, o aderendo al manifesto desiderio delle popolazioni, a sancire i principii del diritto naturale in una nuova costituzione, facendo parte del potere al popolo, e così riconoscendone la sovranità di diritto. Allora il popolo consente, ed accetta l'opera di questo potere costituente indiretto, che si riconosce rappresentante tacitamente delegato della sovranità nazionale, e ad essa fa ritorno».[111]

The widest reconstruction upon the form of government will remain that one of Cesare Balbo, published posthumously in 1857, written between 1850 and 1851, entitled *La monarchia rappresentativa.*[112] The well-known author, after having

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[110] Castiglioni, Pietro. 1859. *Della monarchia parlamentare e diritti e doveri del cittadino secondo lo Statuto e le leggi piemontesi. Trattato popolare contenente lo Statuto, le ultime leggi organiche e politiche e altri documenti*. Milano: Tipografia Guglielmi. I, 51: «the legitimate constituent power lies, therefore, in the people: or rather, because of a moral need we have demonstrated, in the intelligent and capable majority of it. The consensus of the many is enough to make the constitution obligatory, not because we suppose the tacit consent also of the lesser number, but because without giving juridical and obligatory force to the preponderant wish, society would not be able to subsist. And the freer and more widely expressed the will of the majority will be, the closer to universal suffrage it will draw because of enhanced national education, the more moral force the constitution, in its name established and accepted, will acquire».

[111] *Ibidem*, 53: «not always is the constituent power exercised by the people. It comes about in the pacific upheavals and rearrangements of societies constituted for centuries, that the power, which traditionally finds itself invested with the faculty of making laws, spontaneously recognises natural rights, on which society wants to be founded, and offers, either voluntarily, or agreeing to the manifest wish of the people, to sanction the principles of natural law in a new constitution, making the people part of the power and in such a way recognising its legal sovereignty. Then the people consent and accept the workings of this indirect constituent power, which recognises itself as a tacitly delegated representative of national sovereignty, and which goes back to it».

[112] The figure of Cesare Balbo is surely one of the most important of Savoy Piedmont. Born in Turin in 1789 and there he died in 1853. He was the first Cabinet president in the constitutional era (16th March 1848 to 27th July 1848). Previously, he had distinguished himself for having published *Le speranze d'Italia* (1844), unanimously considered as one of the most important works concerning the political thought of the Risorgimento by all. He also collaborated with Il Risorgimento newspaper. King Vittorio Emanuele II gave him the charge of forming a new government in 1852, though the experiment did not have a happy ending because of the lack of support from Cavour and D'Azeglio. On this famous author, see: Passerin D'Entrèves, Ettore.

established that the only possible forms of government were the republics and the representative monarchies, dedicated a detailed analysis as to the theories of sovereignty with the aim of identifying the «generating principle», the essence of the representative monarchy and the «instruments» via which the constituted powers divide sovereign power.[113] For Balbo, indeed, «sovereignty is the supreme problem of bearing the State in accordance with the laws and of changing these laws according to need» and the question was to pinpoint, through the analysis of the main theories in force, the place where sovereign power resided in the representative government.[114] Balbo concluded that

> «la rappresentanza nazionale non risiede né può risiedere in nessuno dei tre poteri detti ma in tutti e tre; che nessuno di questi solo, ma tutti e tre si debbano chiamare parlamento; e che in questo Parlamento solo può e debba risedere la potenza del fare e disfare le leggi e di mutare la costituzione dello Stato»[115]

For Balbo, the only possible theory on the topic of sovereignty was that of parliamentary omnipotence. From here, it should have been deduced that the constituent power was a «really dangerous theory» which would destroy the omnipotence of Parliament, rather, the idea of an assembly or a constituent power would be opposed to the abovementioned principle.[116] Briefly, sovereignty resided in the State.[117]

These attempts of adapting the differing theories of sovereignty to the Italian case, including specific variations with regard to foreign experiences, can also be seen in Domenico Carutti who noticed how the idea of popular sovereignty was not wrong providing that it was purified of excesses and of false meanings which were attributed to it. Popular sovereignty meant

> «signoria della pubblica opinione operante per mezzo degli uomini più capaci, a ciò deputati dal popolo».[118]

1940. *La giovinezza di Cesare Balbo*. Firenze: Le Monnier. Ceretti, Mauro. 2004. Per una rivisitazione critica di Cesare Balbo: Costituzione, amministrazione e opinione pubblica nel discorso di un aristocratico liberale del Risorgimento. *Rassegna storica del Risorgimento* 94: 483–522.

[113] Balbo, Cesare. 1857. *Della Monarchia rappresentativa in Italia. Saggi politici di Cesare Balbo*. Firenze: Le Monnier, 176. On this work, see Ghisalberti, Carlo. 1995. La monarchia rappresentativa nel pensiero di Cesare Balbo. Rassegna storica del Risorgimento, 291–306.

[114] *Ibidem*, 186: «la sovranità è il problema supremo di reggere lo Stato secondo le leggi, e di mutar le leggi secondo la necessità».

[115] *Ibidem*, 209. «national representation neither resides nor can it reside in any of the three powers mentioned, rather, in all three together; that none of these alone, but all three must be called Parliament; and that in this Parliament only can and must that power of making and un-making laws and changing the constitution of the State reside».

[116] *Ibidem*, 194 and 209.

[117] *Ibidem*, 185

[118] Carutti, Domenico. 1852. *Dei principi del governo libero.* Torino: Tipografia Ferrero e Franco, 147: «dominion of public opinion operating by means of the most capable men, appointed to this by the people».

Representative government is the sole form of perfect political government since «people and government are closely united in virtue of a tacit or explicit pact between he who assumes command and he who confers it or recognises it».[119] Representative government is the government of the best wherein public opinion finds a form of organisation:

> «la sovranità si ripartisce fra popolo e governo, ed è in ambidue inviolabile»[120]

The theoretical reflections that till now, we have recalled, first and foremost, highlight that during the years of insertion of the representative government a thorough public law science develops.[121] The doctrine reflections concentrated both on the exegesis of the individual normative measures, but also on more refined doctrinal constructions. These theorisations were not always unequivocal, neither did they effectively explain the origin of legitimate power. Finally, doctrinal thoughts upon the form of representative government did not find an adequate parallel on the level of institutional praxis which was still confused and in the process of being perfected.

The formation of the first constitutional government was no easy thing. Federico Sclopis recounted that the King entrusted him with the task of conferring with Ministers Cesare Alfieri, Ottavio Thaon di Revel and Des Ambrois, in order to form a government. After the Ministers refused to take on the government office, the look turned to the figures that mostly stood out in the public law science among whom were: Cesare Balbo, Camillo Cavour and Riccardo Sineo. The choice fell upon Cesare Balbo, seeing that the two from Genoa, Lorenzo Pareto and Vincenzo Ricci, showed themselves to be intransigent on certain positions.[122] The first Cabinet was made up of Cesare Balbo (Prime Minister), Lorenzo Pareto (Minister of the Interior), Vincenzo Ricci (Minister for Foreign Affairs), Luigi Des Ambrois (Minister of Public Works), Ottavio Thaon di Revel (Minister of Finance), Antonio Franzini (Minister of War), Carlo Boncompagni (Minister for Education), and the same Federico Sclopis (Minister for Justice).

The subalpine Parliament was convened for the first time on 8th May 1848, in *Palazzo Madama* which was destined to be the seat of the Senate, following the parliamentary elections of 27th April in 204 single-member constituencies. The first parliamentary sitting opened with a speech by the Crown, pronounced on 8th May

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[119] *Ibidem:* «popolo e governo sono uniti intimamente in virtù di un patto o tacito o esplicito fra chi assume il comando e chi lo conferisce o riconosce».

[120] *Ibidem,* 153: «sovereignty is divided between people and government, and is inviolable in both».

[121] On the public law science of these times, see the summaries of Ghisalberti, Carlo. 1972. L.A. Melegrani e i costituzionalisti dell'Unità. In *Stato e costituzione*, ed. Carlo Ghisalberti, cit., 119–248 and Moscati, Laura. 2003. Sulla dottrina costituzionalista piemontese tra la Restaurazione e l'Unità. In *Amicitiae pignus. Studi in ricordo di Adriano Cavanna*, eds. Antonio Padoa Schioppa, Maria Gigliola Di Renzo Villata, Gian Paolo Massetto. Milano: Giuffrè, II, 1591–1608.

[122] News reports of the events is contained in Sclopis, Federico. 1849. Della introduzione del Governo rappresentativo in Piemonte. In *Dalle riforme allo Statuto di Carlo Alberto. Documenti editi ed inediti*, ed. Adolfo Colombo, cit., 190–195.

by the Prince of Carignano, Eugenio Emanuele of Savoy representing King Charles Albert who was engaged in battle. Having put his name forward to cover the office of the member of parliament Camillo Cavour, in the appeal to the voters of Vercelli on 12th April 1848, showed his trust in the constitutional monarchy; the only one to be able to guarantee a rational development and improvements at a moral and economic level. Besides, the illustrious politician declared that

> «lo Statuto sarà il nostro simbolo politico; ma lo Statuto considerato non solo come la consacrazione di molti, grandi e fecondi principi di libertà, ma altresì come il mezzo più efficace ed acconcio per introdurre nell'ordine economico e politico tutte le riforme, tutti i miglioramenti richiesti da provate esperienze o da incontestabili ragioni scientifiche, e tutti quelli ancora che il futuro rivelerà allo spirito indagatore dei popoli moderni».[123]

The Statute was, once more, placed as foundation and legitimisation of the new political regime and constituted the basis for future progress, both as regards political and socio-economic levels. Nevertheless, in the initial years of implementation of the constitutional charter, the representative government had some difficulties in developing and even less could the Parliament consider itself the pivoting point of the system. Piedmont addressed its energies to the war effort and the same attention of the press was catalysed by events of foreign politics with ample reports from the battle fields. Till the first Premiership of Camillo Cavour and the union with the opposition, the true motor of the institutional system will remain the Crown.[124] The most proper category to qualify this first phase of the political regime is, rather, that of 'Government of the King', to emphasise the link and the trust that the Cabinet should receive from the sovereign.

Given that the nature of the often extra-parliamentary crises and the uncertainty in identifying a true majority, the Crown was repeatedly in the condition of having to consider who was better able to guide the Cabinet and make itself accountable to Parliament. From this «the principle that the King's right and duty, in the changes of Ministry, far from being passive and automatic, is an active task» affirmed itself.[125] Therefore, the Crown found itself in the condition of carrying out political

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[123] Lettera di Camillo Cavour agli elettori di Vercelli, 12 Aprile 1848. In Lucchini, Luigi. 1889. *La politica italiana dal 1848 al 1897. Programmi di governo*. Roma: Tipografia Camera dei Deputati. I, 3–4: «the Statute will be our political symbol; but the Statute considered not only as the consecration of many, great and fertile principles of freedom, also as the most effective and suitable means to introduce, into economic and political order, all the reforms, all the improvements required by lived experiences or by incontestable scientific reasons, as well as all those the future will reveal to the investigative spirit of modern peoples».

[124] According to Carlo Ghisalberti Cavour's rise to government marked a turning point in the constitutional history of Italy. Since the government crisis of his predecessor, D'Azeglio, was caused by extra-parliamentary reasons, the choice of the King to entrust the presidency of the government to the head of the political majority of the elective Chamber determined, indeed, a change in institutional praxis (*Storia costituzionale* cit., 68 ff.). Even Allegretti underlined that the parliamentary system had affirmed itself after a certain while, that is from 1852 with Cavour and the union with the left wing of politics, and not in a stable way with about-turns that influenced the strengthening of parliamentarianism (*Profilo di storia costituzionale italiana* cit., 435–453).

[125] Palma, Luigi. 1885. La prerogativa regia nei cambiamenti di ministero in Italia dal 1848 al marzo 1884. In *Questioni costituzionali. Volume complementare del corso di Diritto Costituzionale.*

evaluations: it verified majorities and established if and when it turned to the country. Particularly the Savoy Court maintained its own range of action which went beyond the simple role of the ceremonial handbook and of administration of the royal estates. There was no lack of politicians, functionaries and soldiers who revolved around the King, stood up for the monarchical institution and carried on – independently or on behalf of the sovereign – a precise and ambiguous political activity which was parallel to and often in complete contrast to that of the Government.[126]

The first four legislatures were characterised by political instability with a succession of government changes.[127] During the speech by the Crown for the second legislature, inaugurated on 1st February 1849, Charles Albert affirmed

> «Il Governo costituzionale si aggira sopra due cardini: il Re ed il Popolo. Dal primo nasce l'unità e la forza, dal secondo la libertà e il progresso della Nazione».[128]

An alliance between King and people was therefore restated for the improvement of national conditions.

The image of the nation, born of the alliance between Sovereign and people, was also reiterated on the occasion of the discussion of the law on the forced loan. During parliamentary debate, Senator Albini, in defence of the full powers conceded to the Government, announced the rule that

> «il parlamento pertanto congiuntamente al Re rappresenta la nazione; riunisce in sé la sovranità nazionale; può fare tutto quanto farebbe la nazione stessa se potesse esercitare da sé».[129]

Firenze: Giuseppe Pellas editore, 121: «il principio che il diritto e il dovere del Re, nei cangiamenti di Ministero, lungi di essere passivo ed automatico, è un ufficio attivo».

[126] Gentile, Pierangelo. 2011. L'ombra del Re. Vittorio Emanuele II e le politiche di Corte. Torino: Carocci and Colombo, Paolo. 1999. *Il re d'Italia. Prerogative costituzionali e potere politico della Corona (1848–1922)*, cit.

[127] During the first legislature (8th May 1848-30th December 1848) there were the governments of Balbo, Casati, Alfieri di Sostegno, Perrone Di Sammartino, Gioberti. During the second legislature (from 1st February 1849 to 30th March 1849) the governments of Gioberti, Chiodo, De Launay followed one after the other. In the third legislature (from 30th July to 20th November 1849) the Cabinet was led by Massimo D'Azeglio Tapanelli. For a history of the Parliament from outside which has, as its departure point, the single legislature and the main political events we can consult those works that have already been quoted in footnote 2.

[128] Discorso pronunciato da Re Carlo Alberto per l'apertura della Seconda legislatura del Parlamento, 1° febbraio 1849. In Lucchini, Luigi. 1889. *La politica italiana dal 1848 al 1897. Programmi di governo*, cit., 36–37: «the constitutional Government revolves on two hinges: the King and the People. From the former, unity and force, come and from the latter springs freedom and progress of the Nation».

[129] Cf. *Atti del Parlamento Subalpino – Discussioni della Camera dei Deputati, I Legislatura – Sessione 1848 (08/05/1848 – 30/12/1848*). Torino: Tipografia Eredi Botta, 1856, I, Tornata del 30 Ottobre 1848: «parliament, therefore, in conjunction with the King represents the nation; reunites national sovereignty within itself; it may do whatever the nation itself would do if it could exercise it by itself».

In this first period, the parliamentary institution being welcomed with initial grand enthusiasm, however, had difficulties cutting out spaces for itself with regard to the prerogatives of the Crown. Voices which underlined its limits and flaws were not lacking, rather, criticism of parliamentarianism runs incessantly since the promulgation of the Statute and was a constant of Italian constitutional history.[130] Rosmini, regarding parliamentarianism, expresses the following judgement:

> «La politica astratta e perciò vaga ed indeterminata della Rivoluzione francese, la quale esercitò ed esercita tuttavia una specie di tirannide sulle menti, espresse un concetto confuso del Parlamento nazionale. Lo si concepisce come il più solenne de' poteri, anzi il solo potere nazionale, senza farne alcuna analisi, senza accertarne gli uffici e così conoscere il vero e il preciso scopo. Si sa solamente in generale ch'egli è istituto per concorrere a formare le leggi. Ma quello che non si sa, e piuttosto quello che non si considera, si è, che le leggi da farsi sono di due maniere, altre che dichiarano ciò che è giusto ed ingiusto, altre che promuovono, tendono ad accrescere la pubblica prosperità. Anche queste seconde debbono essere giuste, ma il loro scopo non è la pura giustizia… Per le leggi d'utilità, il Parlamento è indispensabile e però questo è il vero e il proprio suo scopo. Quindi egli deve unire in sé gli elementi di tutta l'utilità, nessun interesse deve rimanere escluso. Non già che i deputati siano là per rappresentare gli interessi particolari, ma poiché l'interesse pubblico non risulta che dalla somma di tutti gli interessi privati, perciò l'interesse pubblico non può essere rappresentato a pieno se tutti gli interessi privati, grandi e piccoli non vi sono ad un tempo rappresentati».[131]

In the words of Rosmini, the difficulty in transforming the Parliament into a national institution, in the sense of an organ able to mirror the interests of the entire community. The essay *La Costituzione secondo la giustizia sociale* wanted to be an alternative to the statute models which have affirmed themselves during the Risorgimento and, more generally, it must be noticed that in the thought of Antonio Rosmini, the revolutionary and Napoleonic charters were, anyway, to be refused for

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[130] For greater detail, see Perticone, Giacomo. 1961. Parlamentarismo e antiparlamentarismo nel Post-risorgimento. In *Nuove questioni di storia del Risorgimento e dell'Unità d'Italia* II. Milano: Morzati, 621–670.

[131] Rosmini, Antonio. 1848. *La costituzione secondo la giustizia sociale con un'appendice sull'Unità d'Italia dell'abate Antonio Rosmini-Serbati roveretano*. Napoli: Stab. Tip. e Calc. di C. Battelli e comp., 43: «Abstract politics and therefore vague and indeterminate of the French Revolution, which exercised and nevertheless exercises a sort of tyranny on minds, expressed a confused concept of national Parliament. It conceives it as the most solemn of powers, rather, as the sole national power, without making any analysis of it, without ascertaining its offices and thus knowing its true and precise aim. It is only generally known that it is instituted to cooperate in formulating the laws. But that which is not known, and rather that which is not considered, is that the laws to be made are of two kinds, some laws that declare what which is right and that which is not right, other laws that promote, tend to increase public wealth. Also the latter must be just, but their goal is not pure justice … For the usefulness laws, Parliament is indispensable and however this is its true and proper aim. Therefore it must, within itself, unite the elements of all the usefulness, no interest should be excluded. It is not that deputies are there in order to represent particular interests, but since public interest results from the sum of all private interests, therefore public interest cannot be fully represented if all the private interests, both big and small, are not at the same time represented».

their inspiration principles and the enlightenment ideals on which they were based.[132]

The *Costituzione secondo la giustizia sociale* was written by Rosmini in 1848, at the same time as the drafting of the Albertine Statute. The writer from Rovereto, however, had the chance of returning to the constitutional topics with a series of interventions entitled *La Costituzione del Regno dell'Alta Italia* which appeared in *Il Risorgimento*. The occasion of the writings was provided by the annexation of the Lombardy-Veneto Kingdom. The author specified that «a Constitution is the greatest work we can do: the most important of work: that which must bring order to all the nation, which providing it with the organism, it also gives it unity, life, existence. A Constitution is promulgated because it is perpetual, because a nation should never die».[133] Rosmini was also cautious on sovereign power in the hands of society, he was wary of empty constitutional formulas that could be easily bypassed and he cautioned against the various forms of government that could turn into despotisms. Such were the forms of government which had no solid basis of representation of interests. Leaving aside the concerns of Rosmini on parliamentarism, most Italian authors recognised the link between public opinion and representative government took shape.[134]

4.1 Massimo D'Azeglio and the Defence of the Representative Government

In 1849 the national scene changed decisively. The events of the war with Austria had various consequences on an institutional level, so much so, that the same constitutional regime was at risk. Massimo D'Azeglio Tapanelli (1789–1866) assumed the leadership of the Cabinet in one of the most dramatic moments of the period

[132] Gray, Carlo. 1952. Introduzione. In Rosmini, Antonio. *Progetti di Costituzione*. Milano: Fratelli Bocca editori and Ghisalbeti, Carlo. 1985. Rosmini e il costituzionalismo risorgimentale. *Clio. Rivista trimestrale di studi storici* 3: 427.

[133] Rosmini, Antonio. 1848. La Costituzione del Regno dell'Alta Italia II. *Il Risorgimento*, 3rd July, N° 159: «è l'opera più grande che si possa fare: l'opera la più importante: quella che deve dare ordine a tutta la nazione, che dandole l'organismo, le dà altresì l'unità, la vita, l'esistenza. Una Costituzione si decreta perché sia perpetua, chè una nazione non dovrebbe morir giammai».

[134] Cf. Lacchè, Luigi. 2015. L'opinione pubblica nazionale e l'appello al popolo: figure e campi di tensione. In *Burocracia, poder político y justicia, Libro-homenaje de amigos del profesor José María García Marín*, eds. Manuel Torres Aguilar and Miguel Pino Abad. Madrid: Dykinson, 462–464. «Il governo con il pubblico è la strada per arrivare al governo con la costituzione. Non sorprende che gli "incunaboli" del costituzionalismo italiano siano incentrati in grandissima misura sul nesso libertà di stampa, opinione pubblica, governo costituzionale/monarchia rappresentativa» and «L'obiettivo degli scrittori moderati degli anni'40 e'50 è dunque quello di "costituzionalizzare" l'opinione pubblica nel governo rappresentativo (e in maniera non certo univoca nella forma del governo parlamentare). L'opinione pubblica è il vapore, è il fluido, la condizione per l'esistenza e il funzionamento di un sistema rappresentativo».

when the Albertine Statute was in force.[135] In the famous *Proposta d'un programma per l'opinione nazionale italiana* (1847), the illustrious protagonist had already expressed the idea that the consent of public opinion is a necessary material force.[136] In other words, the idea that public opinion and consent expressed themselves in the representative government became manifest. According to the author, the people would suffer if the Statute, born out of the ideas of nationality, was going to be abandoned and moreover if the aristocracy's influence was going to be restored. Nor would they like the despotism of King and of demagogy to be renewed.[137]

In the government programme, D'Azeglio could better explicate his own political creed and the trust placed in the Constitutional regime. In a letter to Giovan Battista Giorgini, Massimo D'Azeglio affirmed:

> «Comunque sia son deciso a salvar lo Statuto spinte o sponte, e perciò salvare il Piemonte che è il solo paese rimasto in piedi in Italia. Se ci riuscirò, credo che non sarò stato inutile *super terram*».[138]

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[135] D'Azeglio was the head of Cabinet 7st May 1849 to 21st May 1852 and then for the second time till 4th November 1852, continuing to hold the office during the fourth legislature which was ended by the first government of Count Camillo Benso di Cavour. On this protagonist see: Macchi. Mauro. 1850. *La vita politica di Massimo D'Azeglio. Osservazioni istorico-critiche*. Torino: Magnaghi; Ghisalberti, Alberto Maria. 1960. *Massimo D'Azeglio: moderato realizzatore*. Roma: edizione dell'ateneo; Maturi, Walter. 1962. Azeglio, Massimo Taparelli d'. In *Dizionario Biografico degli italiani* 21; Brignoli, Marziano. 1988. *Massimo d'Azeglio. Una biografia politica.* Milano: Mursia.

[136] Cf. D'Azeglio, Massimo. 1847. *Proposta d'un programma per l'opinione pubblica nazionale*. Firenze: Le Monnier. «L'adottar il principio di cercare miglioramenti pratici e ragionevoli, condotti dalla forza morale; dalla, ragione cioè, appoggiata al giudicio dell'opinione per mezzo della più intera pubblicità: l'adottare, in una parola, le idee d'un progresso moderato, e perciò possibile; che non porti offesa agli interessi de' Principi, e favorisca invece il pieno e libero esercizio della loro potestà» (p. 14). «Nell'età presente, il progresso del senso morale, l'istruzione, la pubblicità, e la frequenza delle comunicazioni, rendono impossibile ormai 1'occultare l'ingiustizia e la slealtà: le quali esposte una volta agli sguardi dell'universale, cadono sotto 1'anatema dell'opinione pubblica, e strascinano nella loro rovina chi se n'era reso colpevole. Questa rovina non è sempre attuale e di fatto, ma è compiuta in principio e virtualmente, quando l'ha sentenziata il consenso universale» (p. 29). C.f. Meriggi, Marco. 2011. Opinione pubblica. In *Atlante culturale del Risorgimento. Lessico del linguaggio politico dal Settecento all'Unità*, cit., 160 and Pichetto, Maria Teresa. 2007. La «congiura al chiarogiorno» di Massimo d'Azeglio. In *Potere e circolazione delle idee. Stampa, accademie e censura nel Risorgimento italiano*, ed. Domenico M. Bruni, Milano: Franco Angeli, 91–108.

[137] Massimo D'Azeglio ai suoi elettori. In D'Azeglio. Massimo. 1931–1938. *Scritti e discorsi politici,* ed. M. De Rubris. Firenze: La Nuova Italia. II, 162–163: «Cardine d'ogni Stato è la forza; tanto la materiale che la morale. Il Governo di parte ci ha fatto perdere ambedue. Scopo del nuovo Governo dev'essere il riacquistarle, tanto negli ordini interni, come nelle relazioni coll' estero. Credo s'otterrà nell'interno col dare al Governo la sola, la vera base su cui possa fondarsi, l' opinione dell' universale, del popolo vero. Questo non patirebbe che si tornasse addietro dallo Statuto, né dalle idee di nazionalità, e soprattutto che si restaurasse l' influenza aristocratica. Non vorrebbe neppure che venisse rinnovato il despotismo della demagogia; il despotismo di piazza».

[138] Letter to Giovan Battista Giorgini, Turin 1st July 1849. In D'Azeglio, Massimo. 2002. *Epistolario*, ed. Georges Virlogeux. Torino: Centro studi piemontesi. V, 115: «However, I am determined to save the Statute by hook or by crook, and therefore to save Piedmont which is the

Also in a letter addressed to his wife Luisa Blondel, the Prime Minister showed his awareness of danger:

> «Del resto è naturale che l'Austria farà di tutto per buttarmi giù. Capisce che non è Valerio che le fa male. Per me personalmente casco in piedi. Ma capisco che il paese cadrebbe in mano di chi rimetterebbe presto il buon tempo antico, e perciò sto a questo maledetto timore e mi sono messo in testa (seccato per seccato), di rimetterci la pelle o salvar quel poco che s'è guadagnato con tante tribolazioni».[139]

In the attempt to defend the representative government, D'Azeglio looked for the approval of the foreign monarchies as well. Particularly, D'Azeglio had the approval of the British Government who encouraged the Italian Prime Minister to keep going along the constitutional path.[140]

On 6th August 1849 the peace treaty with Austria was stipulated, this was quite unfavourable to Piedmont. The agreement was strongly criticised in Parliament. On 20th November, the Prime Minister, Massimo D'Azeglio, dissolved the Houses of parliament and Vittorio Emanuele II turned to the nation with the Moncalieri proclamation in which the most interesting piece was:

> «I primi atti della Camera furono ostili alla Corona (…) Io firmava un trattato coll'Austria, onorevole e non rovinoso (…) I miei Ministri ne chiedevano l'assenso alla Camera, che, apponendovi una condizione, rendeva tale assenso inaccettabile, poiché distruggeva la reciproca indipendenza dei tre Poteri e violava così lo Statuto del Regno. Ho promesso di salvare la nazione dalla tirannia dei partiti, qualunque sia il nome, lo scopo, il grado degli uomini che li compongono. Questa promessa, questo giuramento li adempio disciogliendo una Camera divenuta impossibile, li adempio convocandone un'altra immediatamente».[141]

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only country still standing in Italy. If I succeed, I believe that I will not have been useless on Earth».

[139] Letter to Luisa D'Azeglio Blondel, Turin 24th July 1849. In D'Azeglio, Massimo. 2002. Epistolario, cit., V, 164: «After all, it is natural that Austria will do everything to bring me down. Austria understands that it is not Valerio that hurts it. As for myself, I would land on my feet. However, I understand that the country would fall into the hands of those who will soon restore the good old times, and therefore I stick to this damned worry and have decided (nothing be left to lose) either to lose my life or to save that little bit that we have earned with so many tribulations».

[140] Dépêche du Marquis Ricci au Chev. Maxime D'Azeglio (Londres 1st Jun 1850). In Bianchi, Nicomede. 1884. *La politica di Massimo D'Azeglio dal 1848 al 1859*. Torino: Roux e Favale, 97–98: «Arrivé à Londres le mardi 21 mai, j'ai eu le lendemain l'honneur d'être présenté à Lord Palmerston par le Marquis d'Azeglio. Sa Seigneurie nous reçut avec une politesse exquise et écouta avec beaucoup de bienveillance les demandes que j'avais été changé de lui adresser de la part du Gouvernement du Roi. Puis il nous répondit qu'il voyait avec une grande satisfaction le Piémont marcher d'un pas assuré dans la voie du Gouvernement constitutionnel (…) le Gouvernement Sarde pouvait être convaincu des bonnes dispositions du Cabinet Anglais en sa faveur et de toutes ses sympathies pour la consolidation du régime constitutionnel en Piémont».

[141] D'Azeglio. Massimo. 1931–1938. *Scritti e discorsi politici*, ed. M. De Rubris, cit., II, 195–196: «The first acts of the Chamber were hostile to the Crown (…) I signed a treaty with Austria, honourable and not ruinous (…) My Ministers asked the House to agree with it, the House, placing a condition on it, made such consent unacceptable, since it destroyed the reciprocal independence of the three Powers and so, violated the Statute of the Kingdom. I promised to save the nation from party-political tyranny, whatever its name, its aim, the calibre of the men who make it up. This promise, this oath I fulfil dissolving a Chamber that has become impossible, I fulfil them conven-

With the Moncalieri proclamation and the return to the polls, Massimo D'Azeglio saved the representative government guaranteeing it would be a long and a prosperous one.

5 Towards National Unification

The end of the D'Azeglio Cabinet was extra-parliamentary and its end was essentially caused by the opposition to laws on marriage coming from certain clerical circles and from the sovereign, Vittorio Emanuele II. A new phase of the representative government was signalled by the figure of Camillo Cavour who strongly believed in the parliamentary form.[142] The statesman will, uninterruptedly, hold the office of cabinet chief from 1852 till his death on 6th June 1861.[143] Being in charge of the Cabinet, Cavour tried to contain the influences of the royal court, removing some men who were faithful to the Crown from the institutions. It was a matter of changes in the crucial offices and roles which were not sudden or radical, but followed the path taken by his predecessor.[144]

Following the Second War of Independence, the Kingdom of Sardinia acquired Lombardy and, through the procedure of annexation and plebiscite, Tuscany, Parma, Modena and Emilia Romagna. The unification process ended on the 4th November 1860 with the annexation plebiscites in the Marche and Umbria.[145] The plebiscites assumed a character of *a posteriori* legitimisation and were instrumental in that they had the aim of confirming monarchical choices which were sustained by the liberals. It resorted to universal suffrage in order to give the utmost importance to the consensus, but it returned in a restricted suffrage (based on census) when it came to elect members of the national parliament.[146] It was before a *dual level of legitimation*: the consent of the people was the instrument to justify the unification process, however for the liberal movement, the people could not be the source of legitimation

ing another immediately». On the proclamation, see Ghisalberti, Alberto M. 1952. Il proclama di Moncalieri. *Rassegna storica del Risorgimento*: 566–588.

[142] Mack Smith, Denis. 1957. Cavour and Parliament. *Cambridge Historical Journal* 13/1: 37–57.

[143] Passerin D'Entrèves, Ettore. 1962. L'ascesa di Cavour nel parlamento subalpino (1850–1851). *Vita e pensiero* 36: 160–170. Regarding a bibliography on Cavour we can see at least: Romeo, Rosario. 1969–1984. *Cavour e il suo tempo*. Roma-Bari: Laterza. 3 voll. Passerin D'Entrèves, Ettore. 1956. *L'ultima battaglia politica di Cavour. I problemi dell'unificazione italiana*. Torino: ILTE; Hearder, Harry. 2000. *Cavour. Un europeo piemontese.* Roma-Bari: Laterza. Viarengo, Adriano. 2010. *Cavour*, Roma: Salerno editrice.

[144] Gentile, Pierangelo. 2001. *L'ombra del Re. Vittorio Emanuele II e le politiche di corte*, cit., 114 ff.

[145] Genta, Enrico. 2012. *Dalla Restaurazione al Risorgimento. Diritto, Diplomazia, personaggi*. Torino: Giappichelli, 147–219.

[146] Mongiano, Elisa. 2003. *Il "voto della Nazione". I plebisciti nella formazione del Regno d'Italia (1848–1860).* Torino: Giappichelli editore.

of the ruling class in Parliament.[147] As Alberto Caracciolo perceived, during the process of national unification there was still the will of having the Parliament as foundation of the national edifice.[148] The role of the organ legitimising the new State entity was reserved to Parliament. Once more Cavour's ideas weighed on this. In a letter to the Countess of Circourt, Count Cavour affirmed that the parliamentary way is the longest but the safest way.[149] Parliament remained a place of expression of national public opinion. Against those who highlighted the risk of the parliamentary way, the statesman could say with conviction:

> «Io non me ne spavento, la lotta è una necessità del governo costituzionale; dove non v'è lotta, non v'è vita, non vi è progresso: quando ogni discussione avesse a cessare, io potrei lasciare la politica e ritirarmi in campagna a piantar cavoli».[150]

To choose the parliamentary road meant primarily to want the parliament as a place of discussion, control, censorship and consensus. According to Cavour, only with the concurrence of parliament could Italy retain the sympathy of the European governments and public opinion, and could guarantee freedom in the process of national unification:

> «Il miglior modo di dimostrare quanto il paese sia alieno dal dividere le teorie del Mazzini si è di lasciare al Parlamento liberissima facoltà di censura e di controllo. Al voto favorevole, che sarà sancito dalla grande maggioranza dei deputati, darà al Ministero un'autorità morale di gran lunga superiore ad ogni dittatura». […].
>
> Ora non vi ha altro modo di raggiungere questo scopo, che di attingere dal concorso del Parlamento la sola forza morale capace di vincere le sette, e di conservare le simpatie dell'Europa liberale».[151]

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[147] On this aspect see, diffusely, Lacchè, Luigi. 2015. L'opinione pubblica nazionale e l'appello al popolo: figure e campi di tensione. In *Burocracia, poder político y justicia, Libro-homenaje de amigos del profesor José María García Marín*, cit., 467: «L'uso del suffragio universale maschile, rivelava … il principale campo di tensione interno a quel *doppio movimento o doppio livello di legittimazione*. L'opinione pubblica nazionale era il vapore del processo di unificazione, ma il ricorso al suffragio universale non poteva essere fonte, per i liberali, di legittimazione della classe dirigente italiana».

[148] Caracciolo, Alberto. 1960. *Il Parlamento nella formazione del Regno d'Italia*, cit., 41.

[149] Letter to Countess of Circourt, Turin 29 Dicember 1860. In *Cavour e l'Inghilterra. Carteggio con V.E. D'Azeglio*. Bologna: Zanichelli, 284–285.

[150] The words of Cavour are shown in Bianchi, Nicomede. 1863. *Il Conte Camillo di Cavour. Documenti editi ed inediti*. Torino: Unione tipografica-editrice, 120: «I will not fear, the fight is a necessity of constitutional government; where there is no struggle, there is no life, there is no progress: when discussion ceases, I could leave politics and retire to the countryside to plant cabbages».

[151] *Ibidem*, 121: «The best way to show how much the Country is alien in sharing theories of Mazzini is to leave Parliament the absolute freedom of censorship and control. A favourable vote will be enshrined by a Parliament majority, it will give the Cabinet a moral authority far superior to any dictatorship. […] The only way to achieve this is to draw from the help of Parliament which is the only moral force capable of overthrowing sects and keeping the sympathies of liberal Europe».

Finally, making Parliament the cornerstone of the constitutional order was tantamount to preventing Italy from falling into the hands of monarchical or democratic despotism. However, the longevity of the Statute contributed, if nothing else, to legitimate the representative government. If in the initial phase many underlined the anachronism, the incompleteness, the inadequacy of the text and the lack of democratic nature of the constitutional Charter, in the following period these characters became a strong point which guaranteed its survival over time.

> «Il nostro Statuto al confronto delle mutate leggi fondamentali di tutto il continente europeo è uno dei più antichi monumenti del diritto pubblico interno degli Stati: così che dopo il breve giro di quattro anni può considerarsi sanzionato dal tempo».[152]

The abovementioned affirmations were first of all spurred by the observation of the French experience characterised by political-constitutional instability. Indeed, Italian public law science noted that in France, after the republican experience of 1848, a new constitutional charter with a presidential imprint (14th January 1852) had been promulgated and added itself to the already numerous constitutional texts and drafts. The Albertine Statute was considered well-grounded even if compared with the Italian constitutionalism of 1848–1849 which proved to be ephemeral. Moreover, the same democratic movement could only recognise that the Savoy Monarchy was one of the most long-lived in Europe and could by now boast a sound tradition. Within the left wing of Parliament, voices that hypothesised putting the republican idea to one side for a while in order to follow the path of national unification under the coat of arms of the Savoy dynasty which was the only one of Italian origin in the Peninsula were not lacking.

On the eve of national unification, on the pages of the newspaper the *La Nazione*, it was still affirmed with a certain pride that:

> «intanto noi abbiamo a vantaggio della nostra tesi un atto innegabile: ed è che la costituzione albertina ha fatto buona prova di sè durante dodici anni; che è per essa e per la religiosa osservanza che ne ebbero un re (il quale perciò fu gratificato da' popoli italiani dell'appellativo galantuomo) e i vari parlamenti che si succedettero, che noi siamo giunti al punto in cui ora ci troviamo; che quello Statuto fu per noi l'arca santa della libertà; che contro quello Statuto non sorse mai dubbio ne' popoli nostri».[153]

For the liberal moderate party, tradition and the capacity of survival of the representative government under the protection of the Monarchy were points of strength, a sure thing which should not be left. The unification process of 1859–1861 sharpened, however, old disputes which developed the day after the granting of the

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[152] Ricostruzioni in *Il Parlamento*, 3 gennaio 1853, n. 2: «Our Statute compared to the fundamental changing laws throughout the European continent is one of the oldest monuments of internal public law of States: so that after the brief 4-year period it can be considered sanctioned by time».

[153] *La Nazione 17 aprile 1861,* N° 107: «anyway we have an undeniable act to the advantage of our thesis: and it is that the Albertine constitution proved to be good for 12 years; that it is thanks to it and to the religious observance of it which was kept by a king (who therefore was rewarded by the Italian people with the title of gentleman) and by the various parliaments which followed one another that we reached the point where we now stand; that that Statute was the holy ark of freedom; that a doubt never was raised against that Statute among our people».

Statute, again bringing the questions concerning the constituent power and the necessity to convene a national assembly to the fore. For example, in the pages of democratic newspapers it could be read that

> «il presente parlamento accolto in Torino, non solo dall'impero dei plebisciti, non solo dagli antecedenti democratici creatori del nuovo ordine di cose, ma dalla natura stessa delle questioni sull'ordinamento interno, che pur fa d'uopo risolvere, è fatalmente condotto a dichiarare la sua incompetenza, e dar luogo all'assemblea eletta a voto universale con autorità fondatrice di Statuto. Le questioni dell'ordinamento interno si collegano ai principi costituzionali del Regno, e i principi costituzionali non si possono riformare, se non per esplicita delegazione di sovranità nazionale».[154]

These pages summarise some of the themes of the democratic unitary movement which had its own impulse from the programmes elaborated among the exiles in centres situated outside the Peninsula. To this idea concerning popular legitimisation, Mazzini who forever had expressed the necessity of a constituent assembly contributed much:

> «Chi può rilevare il pensiero nazionale? La Nazione. Come può rilevarlo? Per mezzo de' suoi rappresentanti. Come può la nazione costituire i propri rappresentanti? Delegandoli coll'elezione. Quale deve essere l'elezione? Quella del suffragio universale, uniforme, libero. Il popolo si raccoglie nelle assemblee primarie e vota: il popolo tutto quanto, dacchè altrimenti l'elezione non rileva il pensiero nazionale, ma una frazione di quel pensiero. E i delegati della nazione costituiscono un congresso nazionale, una Costituente. Essa stende il Patto Nazionale: lo sottomette all'approvazione del popolo: poi si riconfonde in seno al paese».[155]

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[154] L'autorità parlamentare e le questioni d'ordinamento. *La Nuova Europa 20 aprile 1861*, N° 7: «the current parliament – which is sitting in Turin not only because of the command of the plebiscites, not only because of the preceding democratic creators of the new order of things, but because of the same nature of the questions on the internal legal order which must though be solved – is fatally led to declare its incompetence, and give way to the assembly elected by universal suffrage with the authority of issuing the Statute. The questions of the internal legal order are connected with constitutional principles can only be reformed by the explicit mandate of national sovereignty» (see Caracciolo, Alberto. 1960. *Il Parlamento nella formazione del Regno d'Italia*, cit., 277).

[155] «Who can bring out the national thought? The Nation. How can it bring it out? By way of its representatives. How can the nation constitute its own representatives? Delegating them by way of election. Which election must there be? That one with universal, uniform, free suffrage. People gather in primary assemblies and vote: all the people, because otherwise the election does not bring out the national thought, but a fraction of that thought. And the representatives of the nation constitute a national congress, a constituent assembly. The latter draws the National Pact: submits it to the people for approval: then it blends again with the country». Cf. Mazzini, Giuseppe. 1909. Necessità d'una costituente. In *Scritti editi ed inediti di Giuseppe Mazzini*. Imola: Paolo Galeati, VI, 51–52. The article appeared for the first time in *La Jeune Suisse* N. 21, 9th September 1835. It was translated into Italian by the same author. On Giuseppe Mazzini and democratic movement: Della Peruta, Franco. 1958. *I democratici e la rivoluzione italiana. Dibattiti ideali e contrasti politici all'indomani del 1848.* Milano: Feltrinello; Mastellone, Salvo. 1960. *Mazzini e la Giovane Italia (1831–1834).* Pisa: Domus Mazziniana; Della Peruta, Franco (ed). 1974. *Scrittori politici dell'Ottocento. G. Mazzini e i democratici*. Milano-Napoli: Ricciardi; Scirocco, Alfonso. 1978. Le correnti dissidenti del mazzinianesimo dal 1853 al 1859. In *Correnti ideali e politiche della sinistra italiana dal 1849 al 1861. Atti del 21° Convegno storico toscano: (Castelvecchio Pascoli, 26–29 maggio 1975).* Firenze: Leo S. Olschki; Lovett, Clara Maria. 1982. *The Democratic*

According to Mazzini, the Constituent assembly was a political tool of legitimisation, the sole act able to transform the nation into a legal entity. Any other way was, instead, usurpation. In compliance with this, he said that every nationality requires a common principle and

> «spetta alla costituzione nazionale il definire questo principio, e regolarne le norme; come è ufficio d'un governo nazionale il promuovere e dirigere le manifestazioni, associando sempre più i cittadini nell'intento comune».[156]

In the end, the Italian Kingdom was born under the weight of ambiguities. Legitimisation went through plebiscites and the parliament which gathered the representatives of the new nation.

6 Conclusion

On 18th February 1861, the first Parliament of Italy sat at Turin and thus the eighth legislature was opened. The Statute was extended to the Kingdom of Italy, which was proclaimed on 17th March and.[157] On 23rd March, the first government was constituted which was headed by Cavour (4th Government).[158] Vittorio Emanuele II was proclaimed king «by the grace of God, by the will of the nation».[159] At the end of the unification process, Pasquale Castagna, in his commentary to the Italian Statute was able to affirm that

> «legittimo è ogni potere liberamente accettato. Legittimo il Sabaudo e il Napoleoide; chè il volere parlato con il plebiscito è forma ottima di volontà popolare».[160]

Movement in Italy 1830–1876. Cambridge-London: Harvard University Press; Montale, Bianca. 1996. La crisi dei democratici. In *Verso l'Unità. 1849–1861. Atti del LVII Congresso di Storia del Risorgimento Italiano (Bari, 26–29 ottobre 1994)*. Roma: Istituto per la storia del Risorgimento Italiano.

[156] Mazzini, Giuseppe. 1909. Nationalité. Quelques idées sur une Constitution nationale. In *Scritti editi ed inediti di Giuseppe Mazzini*, cit., VI, 149: «it is up to the national constitution to define this principle, and regulate its norms; as it is duty of a national government to promote and direct the manifestations, associating the citizens more and more to the common intent».

[157] Furlani, Silvio. 1988. Le elezioni del 27 gennaio 1861 e l'inizio della VIII legislature: la prima del Regno Unito. In *Il Parlamento italiano 1861–1988. Vol. 1: 1861–1865. L'unificazione italiana. Da Cavour a La Marmora*, cit., 135–154

[158] The Cabinet was made up of Ministers: Camillo Benso Cavour (Minister for Foreign Affairs and Minister of the Marine), Giuseppe Natoli (Ministry of Agriculture, Industry and Trade), Ubaldino Peruzzi (Ministry of Public Works), Marco Minghetti (Ministry of the Interior), Francesco De Santis (Ministry for Public Education), Manfredo Fanti (Ministry of War), Giovanni Battista Cassinis (Ministry of Justice), Francesco Saverio Vegezzi, and then, Pietro Bastogi (Ministry of Finance), Vincenzo Niutta (Minister without Portfolio).

[159] «per grazia di Dio, per volontà della nazione». For the debate in parliament and relevant documentation on the title to give to Vittorio Emanuele II, see Caracciolo, Alberto. 1960. *Il Parlamento*, cit., 42–50.

[160] Castagna, Pasquale. 1865. *Commentario statuto italiano*. Firenze: Barbera, 31: «legitimate is every freely accepted power. Legitimate is the government of the House of Savoy and that of

While, the representative monarchical government is that where the people retaining sovereignty for themselves, delegate its exercise to many powers or political bodies, which must be maintained in harmony by a hereditary head who is the king.[161] The debate on legitimisation of power and on the nature and exercise of sovereign power was deeply embedded in public discourse on representative government, which was entrusted to journalists, intellectuals, politicians and jurists. Nevertheless, these debates have to be placed within the process of unification and connected with debates surrounding construction of national identity. All this complicates the framework of our analysis further, the Risorgimento movement being divided into various, different contrasting streams (democrats, republicans, liberals, conservatives) worrying to underline every lacking of the other.[162] The absolute power of the sovereign had been circumscribed by the gracious concession of the Constitution which, as has been seen, was generic on the origin of legitimate power, and was lacking every definition of sovereignty as well. On the other hand, the expression 'representative government' is a formula which assumes different meanings according to the socio-political moment wherein it is considered. Only constant application and public debate will attribute ever more weight to Parliament. Also, the relationship between Monarch and Parliament is not stable, but is in continuous movement. The parliamentary system establishes itself only in the second phase and will never be complete. In the first phase of the Albertine Statute we must speak, rather, of a «King's Government». The theory of the «omnipotence of Parliament» is a corrective between the monarchical principle and the excesses of popular sovereignty. Moreover, the metaphor of the pact between sovereign and people contributed to legitimising the new constitutional regime. There will not be ideal models to determine the organisation and the exercise of the sovereign power. The lesson of Cavour as regards the centrality of parliament was clearly evident, but the legacy of the Risorgimento is unclear, in that it contains both disdain of the parliamentary system and its appreciation.[163]

Napoleon; since the will spoken by the plebiscite is an excellent form of popular will».

[161] *Ibidem*, 42: «governo monarchico rappresentativo è quello in cui il popolo ritenendo a sé la sovranità, ne delega l'esercizio a più poteri o corpi politici, i quali debbono essere mantenuti in armonia da un capo ereditario, che è il re».

[162] On the period of time we are considering, there is a plethora of literature available. Personally, on the Italian Risorgimento movement, I availed myself of the summary by Woof, Stuart J. 1981. *Il Risorgimento italiano*. Torino: Einaudi. Scirocco, Alfonso. 1990. *L'Italia del Risorgimento*. Bologna: Il Mulino. Derek, Edward Dawson and Biagini Eugenio F. 2002. *The Risorgimento and the Unification of Italy*. Harlow-London: Pearson Education Limited. Banti, Alberto Mario. 2006. *La nazione del Risorgimento. Parentela, santità e onore alle origini dell'Italia unita*, cit. Banti, Alberto Mario and Ginsborg, Paul (eds.). 2007. *Il Risorgimento. Annale 22 Storia d'Italia*. Torino: Einaudi.

[163] In these terms speaks Banti, Alberto Mario. 2004. *Il Risorgimento italiano*. Roma-Bari: Laterza, 130.

Finally, sovereignty is not concentrated only in one place and the constituent power lies in the nation represented in Parliament.[164] According to Augusto Pierantoni

> «il potere costituente adunque è fatto per lo svolgimento delle libertà, e non per la loro riduzione. Noi sinora lo abbiamo esaminato senza confonderlo con la sovranità nazionale … Il portare opinione, come fanno moltissimi pubblicisti, che il potere costituente sia la stessa società sovrana operante, condurrebbe a questa conseguenza, che nessuno potrebbe avere il diritto di reclamare contro gli errori e le violazioni che la società avesse commessi nella sua violazione. Invece egli è vero che il potere costituente deve emanare direttamente dalla nazione, ma non può dirsi che sia la nazione stessa, la quale resta sempre inviolabile innanzi di lui con la facoltà di non riconoscerne l'azione, se eccessiva, e con l'autorità di poterlo richiamare al mancato ufficio».[165]

Pierantoni admitted the rational distinction between the legislative and constituent power, but the constituent power survived inside the legislative power and the theory of the omnipotence of parliament consented in authorizing the legislator to amend, modify and correct the provisions contained in the articles. We need to wait for the national school of public law to reach a thorough layout and definition of concepts like 'Government' and 'Sovereignty'. The description of the parliamentary government by Vittorio Emanuele Orlando will be emblematic. He, after having exposed his juridical theory of the Cabinet Government, that is a theory distilled of all political, historical and philosophical contamination, was able affirm that popular sovereignty is rendered concrete within the government. In this sense, the Government, meant in the wider sense of 'State', is considered as an element which integrates the idea of sovereignty».[166]

Certainly, the patrimony of ideas, debates and concepts worked out during the subalpine period will not go lost with national unification. Savoy Monarchy will be one of the political protagonists of the new phase and will act as favourable condition for the development of the new regime on a parliamentary basis. Nevertheless, in a constitutional legal order in continual evolution, the Monarchy will not, and cannot, be the only legal tool to interpret the feelings of public opinion. It is for sure that from Cavour onwards, the conviction that the Parliament was the interpreter of

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[164] Specifically, see: Lacchè, Luigi. 2015. L'opinione pubblica nazionale e l'appello al popolo: figure e campi di tensione, cit., 469–470.

[165] Pierantoni, Augusto. 1873. *Trattato di Diritto costituzionale*. Napoli: Giuseppe Marghieri editore, 231: «the constituent power is therefore made for carrying on the liberties, and not for their reduction. Till now, we examined it without mixing it up with National sovereignty… Holding the opinion, as many public law scientists do, that the constituent power is the same operating sovereign society, will lead to this consequence that nobody could have the right to complain about mistakes and violations that society committed violating it. On the contrary, it is true that the constituent power must emanate directly from the nation, but it cannot be said that it is the nation itself, which remains forever inviolable before it with the faculty of not recognising its action, if excessive, and with the authority of being able to recall it to its failed duty».

[166] «la sovranità popolare si concreta nel governo». Cf. Orlando, Vittorio Emanuele. 1940. Studi giuridici sul governo parlamentare. In *Diritto pubblico generale. Scritti vari (1881–1940) coordinati in sistema*. Milano: Giuffrè. Previously published in the periodical *Archivio Giuridico,* XXXVI, 1886.

public opinion and that it is not possible to govern without its consent, was distinctly manifested. In this context and on these conditions, we recognise that Parliament is «the only and whole and perpetual representation of national sovereignty»,[167] «the authority of the Parliament is absolute, unlimited, undefined; it does not recognise any other boundary to its power but physical and moral laws of nature»,[168] «in Parliament it is sovereignty, in Parliament it is the nation, in Parliament it is the very Constitution of the country».[169] The questions about the "constituent power" and the "Constituent Assembly" are absorbed in the debate on the powers and limits of legislative power. The Parliament was charged with the constituent function and was considered "perpetual Constituent". The history of the rationalisation of the system is however another one, often far away from the expectations of the intellectuals, having to face the effective reality of the country.

7 Summary (Italian)

Il presente contributo vuole indagare la legittimazione del governo rappresentativo nel Piemonte subalpino. Il saggio propone alcune riflessioni che mettono insieme il dato normativo con la prassi costituzionale, il dibattito pubblico e le trattazioni giuridiche. Lo scopo è mostrare alcune rappresentazioni che la collettività ha della Costituzione.

Con l'avvento dei regimi rappresentativi si affermava l'idea che il sistema costituzionale funzionava quanto più c'era sintonia tra le istituzioni e l'opinione pubblica. Il tema del consenso e della legittimazione era questione fondamentale.

Dopo la rivoluzione francese, la Monarchia affrontava il difficile passaggio da una forma di legittimazione dinastica a una nuova di tipo nazional-rappresentativa, ponendo in essere strategie orientate a ripensare i tradizionali fondamenti della sovranità. Spazi, rituali e simboli della politica tradizionale dovevano confrontarsi con l'affermazione delle assemblee rappresentative. Dall'altro lato, i Parlamenti dovevano relazionarsi con il potere regio e dovevano ritagliarsi degli spazi propri di autonomia, trovare formule in grado di legittimarsi come realtà rappresentative d'interessi comuni.

In Italia un lessico politico-costituzionale si forma assai tardi. Uno studio sulle fonti di legittimazione e sulla sovranità deve tener conto della fluidità del linguaggio politico, nonché della difficile e lenta formulazione di concetti giuridici. Il dibattito sulla legittimazione del potere e sulla natura ed esercizio della sovranità si intrecciava col discorso pubblico sul governo rappresentativo.

[167] Broglio, Emilio. 1865. *Delle forme parlamentari*. Brescia: Sentinella Bresciana, 33: «la rappresentanza unica e intera e perpetua della sovranità nazionale».

[168] *Ibidem*, 103: «l'autorità del Parlamento è assoluta, illimitata, indefinita; non riconosce altro confine al suo potere che le leggi fisiche e morali di natura»

[169] *Ibidem*, 98: «nel Parlamento è la sovranità, nel Parlamento è la nazione, nel Parlamento è la stessa Costituzione del paese»

Lo Statuto Albertino sterilizzava la sovranità popolare e il potere costituente, evitandone ogni riferimento. La sovranità regia era la sola fonte della legittimità politica e l'auctoritas risiedeva nella persona del monarca. A circoscrivere il potere assoluto del sovrano era stata la concessione graziosa della Costituzione. Il principio monarchico non fu, però, inteso in senso assolutistico, come nella Charte francese del 1814, che racchiudeva l'autorità suprema nella persona del Re, ma nel significato più moderno di una monarchia che attraverso la concessione della costituzione si vincolava in modo pieno ed irrevocabile ad essa.

Al di là della laconicità dello Statuto, nel periodo successivo alla concessione dello Statuto Albertino si creavano alchimie lessicali proprie della tradizione costituzionale italiana. Nella prima parte dello scritto si analizzano i significati delle espressioni "sovranità" e "governo rappresentativo" attraverso dizionari, il catechismo politico di Michelangelo Castelli e Briano e i giornali. In particolare i giornali furono il principale luogo ove si sviluppava una moderna opinione pubblica critica ed attenta. Dalle colonne dei quotidiani non veniva mai meno il tentativo di popolarizzare il nuovo regime politico.

Lo Statuto, per la sua natura di Charte octroyée, era debole sotto il profilo della legittimazione. I primi osservatori della costituzione notavano immediatamente la mancanza di democraticità che si esprimeva attraverso il potere costituente e la sovranità. In questo contesto, numerosi furono i tentativi per colmare questo vuoto. Tra le varie idee che prendevano piede vi era quella che vedeva nello Statuto un patto o un accordo tra Sovrano e popolo. Inoltre, da subito circolava la teoria dell'onnipotenza parlamentare. Questa teoria era usata per allontanare lo spettro del potere costituente ed era utilizzata come correttivo tra il principio monarchico e gli eccessi della sovranità popolare.

Preso atto che la Statuto è un atto politico del Re, i liberali concentrarono la propria attenzione sulla rappresentanza rendendosi conto che sotto questo profilo si giocava una delle partite più importanti. In Piemonte, il parlamento non era certo rappresentativo della sovranità popolare, essendo costituito dal Senato di nomina regia e una camera eletta su base censitaria. L'articolo 41 dello Statuto Albertino recitava: «I deputati rappresentano la Nazione in generale, e non le sole provincie in cui furono eletti. Nessun mandato rappresentativo imperativo può darsi dagli Elettori». Sebbene su base censitaria, nell'immaginario collettivo la presenza elettiva qualificava l'intero ordinamento rendendolo finalmente "nazionale". La rappresentanza era considerata un elemento genetico del nuovo ordinamento, qualificato come 'governo monarchico-rappresentativo'. Attraverso la convivenza tra principio monarchico e principio rappresentativo si stabiliva che la base della sovranità risiedeva oltre che nella Corona nella Nazione politicamente rappresentata.

Nei primi anni del governo rappresentativo si sviluppava un'accurata pubblicistica sulla forma di governo e l'esercizio della sovranità. Queste teorizzazioni non sempre erano univoche né spiegavano effettivamente l'origine del potere legittimo. In ultimo, le riflessioni dottrinali sulla forma di governo rappresentativo non trovavano un'adeguata corrispondenza sul piano della prassi istituzionale che era ancora confusa e in fase di perfezionamento.

In una prima fase l'istituzione parlamentare, accolta con un grande entusiasmo iniziale, aveva delle difficoltà a ritagliarsi spazi propri rispetto alle prerogative della Corona. Solo l'applicazione costante e il dibattito pubblico attribuirono sempre più peso al Parlamento. Inoltre, i rapporti tra Monarca e Parlamento non furono stabili, ma in continuo movimento.

Una nuova fase del governo rappresentativo fu segnata dalla figura di Camillo Cavour che credeva fortemente nella forma parlamentare. In questa seconda fase la longevità dello Statuto contribuiva a legittimare il governo rappresentativo. Se nella fase iniziale si sottolineava da più parti l'anacronismo, la lacunosità, l'inadeguatezza del testo e l'assenza di democraticità del testo costituzionale, in un secondo periodo questi caratteri diventarono punti di forza che ne avevano garantirono la sopravvivenza nel tempo. L'Unificazione nazionale si concretizzava sotto il peso delle ambiguità. La legittimazione passava attraverso i plebisciti e il nuovo parlamento che raccoglieva i rappresentati della nuova nazione. Di certo il patrimonio d'idee, i dibattiti e i concetti elaborati durante il periodo subalpino non andranno persi con l'unificazione nazionale.

La Monarchia Sabauda era uno dei protagonisti politici della nuova fase e costituiva condizione favorevole per lo sviluppo del nuovo regime su base parlamentare. Tuttavia, in un ordinamento costituzionale in continua evoluzione, la Monarchia non poteva essere l'unico strumento legale per interpretare i sentimenti dell'opinione pubblica. Certo è che da Cavour in poi si manifestava distintamente la convinzione che il Parlamento fosse interprete dell'opinione pubblica e non si poteva governare senza il consenso di questa. Tuttavia, non mancarono voci che individuavano limiti del parlamentarismo, anzi la critica correva ininterrottamente dalla promulgazione dello Statuto e fu una costante della storia costituzionale italiana

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The Sovereignty Issue in the Public Discussion in the Era of the Polish 3rd May Constitution (1788–1792)

Anna Tarnowska

"Nihil sine nobis de nobis"

(nobility parole)

Abstract The following study is a result of the first phase of the ReConFort research on the constitutional debate of late eighteenth century in Poland (the so-called First Republic, the Polish-Lithuanian Commonwealth). Several categories of sources, including not only juridical but also political writers' and politicians' private correspondence, were analysed. An analysis of the issue of sovereignty and an interpretation of this concept in journalistic writings and legal acts of that time lead to the conclusion that sovereignty was defined as an external independence and, in particular, as the 'inner freedom'. On the grounds of journalistic writings and the Great Sejm's (the 4-Year Sejm) legal acts the class of nobility remained the sovereign. The articles of the Constitution of the 3rd of May 1791 changed the role of the nobility (possessors), which became henceforth 'the free nation' in a political sense. Its main task was to represent the whole society composed of the nobility, bourgeoisie and peasantry. The adoption of the law on the free royal cities (1791) also provided an opportunity for a more liberal interpretation of the constitution itself. Another matter was a discussion on the position of the monarch related to the problem of his resignation from 'free royal elections', which was the most controversial regulation. The conservatives clearly interpreted these plans of the patriotic fraction as a 'coup d'etat', an attack against the existing freedom and the first step to the introduction of an absolute model of rules.

Keywords 3rd of May constitution • Sovereignty • Great Parliament 1788–1792 • Stanisław August Poniatowski • Succession of the throne • Nobility • Nation

A. Tarnowska (✉)
Faculty of Law and Administration, Nicolaus Copernicus University, Toruń, Poland
e-mail: anna.tarnowska@uni-passau.de; atarn@law.umk.pl

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1 Introductory Remarks

The ReConFort is an attempt to open a new and very particular perspective. The research conducted under the project essentially focused on the problem of sovereignty. Case studies brought manifold dilemmas. An instance of late eighteenth-century Poland, the oldest analysed one, could not be embedded in a context of the modern idea of sovereignty. A researcher, in order not to succumb to such temptations which may create artificial structures, is obliged to stick to the precise historical context. The analysis leads to the conclusion that the concept of sovereignty had taken on double meanings within the abovementioned period: 'the external independence and internal freedom', as announced in the preamble to the 3rd of May Constitution.[1]

The first aspect can be associated with the American concept of "independence". The term of "independencja" was implemented at that time into the Polish dictionary by the revolutionaries who took part in the American War of Independence (e.g. Tadeusz Kościuszko).[2] This point seems to be less interesting with regard to the comprehensive analysis. On the other hand, it is still significant due to the disastrous situation of Poland surrounded by imperial powers and the direct threat associated with it and manifested in the 1st partition of the Polish territory by the Kingdom of Prussia, the Russian and Austrian Empires. This action was finalized by the treaties signed in St. Petersburg on the 5th of August (the 25th of July), 1772 and subsequently approved by the decision of the Polish Parliament (Sejm) forced thereto in 1773.[3] The interest of the neighbouring powers was to retain the weakness, anarchy, destabilized laws and ineffective executive authorities. The participants of reform move-

[1] Text of the Constitution (Polish: Ustawa Rządowa):Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, t. IX, Kraków 1889, p. 220–225; in German edition: Willoweit Dietmar, Seif Ulrike. 2003. *Europäische Verfassungsgeschichte*. Rechtshistorische Texte. München: Verlag C.H.Beck, p. 281–291, in English: a.o. Kasparek Joseph – Obst, 1980. The constitutions of Poland and of the United States. Kinship and genealogy, Miami, Florida: The American Institute of Polish Culture, p. 303–312.

[2] F. Pepłowski for Władysław Konopczyński indicates Stanisław Konarski as the one who first coined this phrase in Latin version. Comp. Pepłowski Franciszek. 1961. *Słownictwo i frazeologia polskiej publicystyki okresu oświecenia i romantyzmu,* Warszawa: Państwowy Instytut Wydawniczy, p. 44.

[3] The direct cause of action of the partitioners was to be a threat allegedly caused by the "spirit of partiality, supporting the anarchy in Poland", which "makes them fear a complete decomposition of the state, which could damage the interests of the neighbours, adhering to the Republic, undermining good relations between them and igniting a general war. Thus, Austria, Prussia and Russia, having pretences to Poland with regard to the laws as old as true, decided to pursue them, to restore the order within Poland and to ensure this country a political status more in line with the interests of its neighbours". ("duchem stronniczym, podtrzymującym anarchię w Polsce", który „każe obawiać się zupełnego rozkładu państwa, co mogłoby zaszkodzić interesom sąsiadów tej rzeczpospolitej, naruszyć dobre stosunki istniejące między nimi i wzniecić ogólną wojnę. Więc Austria, Prusy i Rosja, mając zresztą względem polski pretensję o prawa równie dawne jak słuszne, postanowiły wystąpić z nimi, przywrócić porządek wewnątrz Polski i nadać temu państwu stan polityczny więcej zgodny z interesami jego sąsiadów."). Cit. after Zielińska Zofia. 1986. *Ostatnie lata Pierwszej Rzeczypospolitej*, Warszawa: Krajowa Agencja Wydawnicza, p. 18; texts of treaties between Russia and Prussia, Russia and Austria, Prussia an Russia among others in: Recueil des traités, conventions et actes diplomatiques concernant la Pologne 1762–1862, par le Comte d'Angeberg, Paris MDCCCLXII, p. 97–106.

ments of the second half of the eighteenth century, political writers and lawyers particularly emphasized this aspect and treated it as a reason for internal reforms.

The idea of sovereignty in Poland of that time, through the prism of the State's structures, was connected with the concept of freedom, which eventually was theoretically transferred from the level of human beings as its subjects into the structure of the State. This freedom was understood as the good "*more valuable than the life and personal happiness*" (again the preamble to the 3rd of May Constitution) and it became an argument instrumentally used by debaters throughout the reform period between 1788 and 1792. Thus, sovereignty was also a "thousand-year old" freedom – the value that used to preponderate during discussions.[4] In practise, however, the subject of this freedom, its "guardians"[5] remained solely a political nation, i.e. the noblemen. The catalogue of rights and freedoms dedicated even to the petty nobility, based on the Cardinal Laws adopted in 1791, the 3rd of May Constitution and constitutional bills,[6] was relatively comprehensive. Incidentally, it should be noted that nobility made up an influential and significant group – up to 8 %, or according to other controversial estimates even as much as 10 % of Poland's population.[7]

The debates that took place out of the Polish Parliament, brought forth voices opting for an alliance of the nobility and the bourgeoisie. A tentative expression of these trends was the adoption of the Law on free royal cities in 1791. It was not a very significant step, yet allowed to read the articles of the Constitution in a more liberal perspective. At the same time, the regulations adopted in the analysed period led to the loss of political rights by the poorest group of petty nobility,thus establishing a kind of *sui generis* property qualification.

Finally, the concept of sovereignty appeared in another context, less emphasised in the following parts of the analysis, however still deserving to be highlighted. Zygmunt Izdebski, a Polish publisher of Jean Bodin's 'Six books on the Republic' found that " *a pattern of another sovereignty derives from the tradition of Polish political thought, although it used to be violated by a native anarchy and a foreign tyranny. This is a model of the sovereignty of law*."[8]

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[4] Comp. Grześkowiak-Krwawicz, Anna. 2004. O starożytnej wolności Polaków. Historia wolności polskiej w dyskusjach politycznych i historycznych wieku XVIII. *Teki Historyczne – Cahiers d'Histoire – Historical Papers*, Londyn: Polskie Towarzystwo Historyczne w Wielkiej Brytanii, XXIII: 34–53, also Grześkowiak Krwawicz, Anna. 2006a. Staropolska koncepcja wolności i jej ewolucja w myśli politycznej XVIII w. *Kwartalnik Historyczny*, t. CXIII (1): 57–83. The author concluded previous studies in monographic work: Grześkowiak-Krwawicz, Anna. 2006b. *Regina libertas. Wolność w polskiej myśli politycznej XVIII wieku*, Gdańsk: słowo/obraz terytoria, passim.

[5] Krzywoszyński Przemysław. 2007. Suwerenność w myśli szlachty polskiej. In: *Nad społeczeństwem staropolskim*. T. 1 Kultura- instytucje – gospodarka w XVI – XVIII stuleciu, Łopatecki Karol, Walczak Wojciech (ed.). Białystok: Ośrodek badań Europy Środkowo-Wschodniej Zakład Historii nowożytnej Instytut Historii Uniwersytet w Białymstoku, p. 16.

[6] Dziadzio Andrzej. 2006. O konstytucji 3 maja 1791 roku na tle koncepcji ustrojowych Oświecenia. *Państwo i społeczeństwo,* Rok VI, Nr 4: p. 16 and f.

[7] Comp. however, considerations Rostworowski Emmanuel. 1987. Ilu było w Rzeczypospolitej obywateli szlachty. *Kwartalnik Historyczny*, 94 (3): 3–58.

[8] "Wzór innej suwerenności leży w tradycji polskiej myśli politycznej, choć często bywał gwałcony przez rodzimą anarchię i przez obcą tyranię. Jest to wzór suwerenności prawa". Idebski Zbigniew. 1958. *Bodinus a Polska myśl polityczna*. In: Jan Bodin, Andegaweńczyk, *Sześć ksiąg o*

Let us provide some introductory remarks. The mentioned foreign intervention caused a change of the political course within the progressive wing of petty nobility. These noblemen were aware of the deep institutional reforms and that was why they split up with the magnates, their so-called 'elder brothers'. They were thus far regarded as the enlightened leadership power that could be trusted.[9] This phenomenon took the form of a substantive action in the late years of the reign of Stanisław August Poniatowski. He was a king, who from the role of a cockscomb-cosmopolite, Empress Catherine's lover and a Russian ally, turned into the last great reformer of the First Polish Republic. This process was initiated quite timidly in the 1770s with the administrative and educational reforms in order to explode with the legislation passed by the Great Parliament at the end of the 1780s (1788–1792). At the time of the parliamentary debates' inauguration, three political parties could be indicated: primo the Conservatives, secundo the party that supported the king, tertio the liberal party also called the patriotic party, initially distrustful of Stanisław August but soon in a political alliance with the king. Eventually, two political wings emerged: a reactionary and a progressive one, which had been discussing sovereignty from several perspectives. The reformatory efforts were crowned with the enactment of the 3rd of May Constitution and constitution-related acts of law that significantly rebuilt the existing institutional and political regime and – to a much lesser extent – the social system. Its reform was planned to be carried out in the following months. Unfortunately, external circumstances, in particular, the armed intervention of Russia, as well as internal causes, e.g. the resistance of the conservative petty nobility in fact led to the actual collapse of the Constitution only a year later after its enactment. The Constitution lost its force, which is why the constitutional practice does not exist. And perhaps for that very reason it became a myth cherished for decades of foreign ruling (1795–1918), a myth of an unfulfilled dream, the dream of liberated Poland.

2 Planes of Discussion

There are several planes to which reference should be made while analysing the issue of sovereignty in the final period of the First Republic. A more detailed discussion can refer to the concept of sovereignty itself, the construction of a sovereign as a subject authorized to undertake political actions, in particular, legislative ones, and in this respect, to create laws, including those located highest in the hierarchy of sources of law, cardinal laws, as according to Wielhorski each nation has "*an*

Rzeczypospolitej, ed. Zbigniew Izdebski, Warszawa: Państwowe Wydawnictwo Naukowe, Bodinus…, p. LXX.

[9] Maciejewski, Janusz. 1977. Pojęcie narodu w myśli republikanów 1767–1775. In*: Idee i koncepcje narodu w polskiej myśli politycznej czasów porozbiorowyc*h, Gościkowski Janusz, Walicki Andrzej (ed.), Warszawa: Państwowe Wydaw. Naukowe, p. 22, 33.

elemental law of its government".[10] Franciszek Salezy Jezierski further specifies this issue: "*The freedom of the nation relies on the government constitution, not on the choice of the person to reign, the power of the King described in reasonable laws, the human rights reserved in their completeness, the legislative authority in the hands of the estates composing the nation, the executive power entrusted with magistrates elected by the estates makes up true freedom*."[11]

In practice, such a source of decision, a sovereign power could in Poland be found only in the consent of the Parliament, "*the uniformity of the three estates, and within them the complete power and authority of the inseparable Republic*."[12]

The construction of the notion related to the nation and an attempt to define it will be indispensable. Again, it is worth referring to the words of Wielhorski who fairly consistently applies this concept although he himself did not attempt to create a definition: "*excluding any other authority, particularly, appointed to watch over the order established in the country, the legislative power and the highest independence are vested only in the Nation itself which is decent and right*".[13] It is necessary to refer to the actual discrepancies between the capacious notion of nation used in the literature and the right to represent its interests reserved only to one estate. It was the concept of the nation now substantially liberated from ethnic connotations (thus e.g. the wording *gente Ruthenus, natione Polonus*), however, still the Sarmatian myth made up a part of the political concept of the nation, justifying a particular social and political role of lesser nobility by its descent from the ancient tribe of Sarmatians.[14] Catholicism became another component of the state identity, which brought with it a political result of an exclusion from decision-making of Protestant burghers and Orthodox Christian people as the Russian lesser nobles became

[10] "pierwiastkowa swego rządu ustawa". Wielhorski Michał, O przywróceniu dawnego rządu według pierwiastkowych Rzeczypospolitej ustaw (About the restoration of elemental laws of the former government of the Republic), n.p. 1775, p. 1. The work of Michal Wielhorski still enjoys the great interest of researchers as they consider him to be a writer who tried to introduce the ideals of the new republican gentry with already enlightened language.

[11] "Wolność narodu zasadza się na konstytucyi rządu, nie na wyborze Osoby do panowania, władza Króla rozsądnymi opisana prawami, prawa człowieka zawarowane w swej zupełności, władza prawodawcza złożona w ręku stanów naród składających, władza wykonawcza powierzona magistratom przez stany wybranym, składem jest prawdziwej wolności". NN [Jezierski Franciszek Salezy], O Bez-Królewiach w Polszcze y Wybieraniu Królów, w Warszawie 1791, p. 8.

[12] Three estates defined as noble deputies in Chamber of Deputies, senators and the King: "jednostajność trzech stanów, a w niej zupełna moc i władza nierozdzielnej Rzeczy Pospolitej". Leszczyński Stanisław, Głos wolny wolność ubezpieczający, ed. A. Rembowski, Warszawa 2003; comp. Ekes, Janusz. 2001. Trójpodział władzy i zgoda wszystkich. Naczelne zasady "ustroju mieszanego" w staropolskiej refleksji politycznej, Siedlce: Instytut Historii Akademii Podlaskiej, p. 74–81 (80).

[13] wyłączając wszelkie inne władze, do czuwania szczególnie nad porządkiem Kraju ustanowione, samemu tylko Narodowi Moc Prawodawcza y naywyższa Udzielność są przyzwoite y właściwe". Wielhorski Michał, O przywróceniu…, p. 44–45.

[14] Comp. the reflections of Maciejewski, Janusz. 1977. Pojęcie…, p. 31–32.

converts to Catholicism.[15] On rare occasions the term "citizens" was used directly in respect of the powers of the sovereign. An instance of its application was recorded in the speech of the priest canon Hajewski in 1790.[16]

Finally, it is necessary to refer to the monarch as the subject of the discussion being analysed. The second half of the eighteenth century brought about a certain turn in the discussion lasting almost for centuries, regarding the position of the king in the specific lesser nobility of the Republic, a turn in the long-standing dispute *inter maiestatem ac libertatem*. The echoes of the discussion on sovereignty were to take the form of a very real debate on the model of power i.e. the choice between an elective monarchy and hereditary monarchy, perhaps the biggest controversy in the literature of that time. It should also be immediately noted that in the Polish debate there was never any room for the thesis that only the monarch was the sovereign. The assumption that the monarch may be merely the first among equals, the ruler of free people and possibly a separate parliamentary state, a factor in the deliberations, was absolutely approved of. Nonetheless, in practice, his influence was mainly associated with his personal features and his political alliance with the deputies. Wielhorski, already quoted above, refused the king even the role of one of the three states, which was rather commonly assumed by other authors. The position of the king at the threshold of the reform was so weak that, paradoxically, one of the main postulates of the reformers was the strengthening of the monarch's power by implementation of succession to the throne.

3 Characteristics of Sources

All the issues mentioned are present both in the parliamentary debate and publicist papers created parallel to the legislative process, in the form of free prints, pamphlets and on the pages of main periodicals. To a lesser extent, according to the findings of the author, the sovereignty debate was reflected in the correspondence of the main protagonists (with the exception of the letters of Ignacy Potocki); however, this problem requires more in-depth queries.

[15] Comp. Walicki, Andrzej. 2000. *Idea narodu w polskiej myśli oświeceniowej*, Warszawa: Polska Akademia Nauk. Instytut Filozofii i Socjologii, p. 22–23.However, the characteristic that the number of deputies of the heretical heterodox nobility participation surpassed even the share of nobility heterodox in total number of gentry. Bardach, Juliusz. 1983. Sejm dawnej Rzeczypospolitej jako najwyższy organ reprezentacyjny. *Czasopismo Prawno-Historyczne*, XXXV (1): p. 141–142.

[16] Mowa Dowodząca: że przepisy nauk od Prześwietney Komissyi Edukacyi Narodowey dla Szkół Publicznych podane są nie tylko użyteczne Kraiowi ale też potrzebne w szczególności Obywatelom przez Ja. X. Daniela Haiewskiego Kanonika Kijowskiego Nauczyciela Wymowy w Szkołach Akademickich Warszawskich przy rozpoczęciu rocznych nauk dnia 29 września 1790 Roku miana, Biblioteka PAN Kraków, Rps. 177, k. 26: "…w wolnych narodach republikantskich, gdzie bowiem sprawy dobra publicznego są dziełem obywatelów…" ("in free republican nations, where issues for the public good are the work of citizens …").

A preliminary analysis of parliamentary diaries and journals leads already to the conclusion that the parliamentary debate in the late eighties and early nineties of the eighteenth century, had a specific character – it was an erudite debate, conducted in a baroque rhetoric, full of references to characters and events of the ancient times, classical authors, diplomatic and accommodating, while at the same time, little effective. It is necessary to note that its participants are not professional lawyers but representatives of lesser nobility of varied levels of education; however, their rhetorical skills were always high in price. Speakers were supposed to speak freely, without notes, and provide accurate punchlines to the words expressed by previous speakers. The practice shows, however, that such legislative work stretched beyond measure and fairly easily strayed from the starting point. In the parliamentary discussions, almost theatrical, dramatic techniques were used, with a particular example of this visible on the 3rd of May, 1791, the date of Constitution enactment.

Up to now only fragments of *The Parliament Diary*[17] and *The Parliament Minutes* (*Records of Operation*)[18] have been analysed. The publications do not document the entire period of duration of the Great Parliament. A substantial part of parliamentary sessions was recorded only in the form of handwritten minutes (Records of Operations) stored in the Central Archives of Historical Records in Warsaw (Archiwum Główne Akt Dawnych, further cit. as AGAD), whereto were attached e.g. printed speeches of adversaries, which makes the query somewhat difficult.[19] This category of sources should also include collections of royal speeches, manuscript versions drawn up by royal secretaries and prints from the Printing House of His Royal Majesty.[20] Difficulties in the categorisation are concerned with the quasi-official sources, such as proclamations to the army, especially in the era of competition between the Targowica Confederation (proclamations issued by the Marshal of the Confederation Szczęsny Potocki) and the weakening patriotic centre. It might be added that even formally adopted legal acts were often characterized by journalistic language with instances of attempts to explain the legislature's intention instead of being limited solely to the texts of regulations.[21]

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[17] Printed: Dyaryusz seymu ordynaryinego pod związkiem Konfederacyi Generalney Oboyga Narodow w Warszawie rozpoczętego roku… 1788/[wyd. Jan Paweł Łuszczewski] Diariusz Sejmowy – 1788–1789 Drukarnia Nadworna, Warszawa w Warszawie: w drukarni Nadwornej J.K.Mci i… Kommissyi Eduk[acyi] Narodowej [po 3 XI 1788]–1790, Dyaryusz seymu ordynaryjnego pod związkiem Konfederacyi Generalney Oboyga Narodow w podwoynym posłow składzie zgromadzonego w Warszawie od dnia 16 grudnia 1791 [właść. 1790]/[wyd. Antoni Siarczyński], w drukarni… Michała Gröllа… [1791].

[18] Dziennik Czynności Seymu Głównego Ordynaryinego Warszawskiego pod związkiem Konfederacji Oboyga Narodów agitującego się, partly printed, partly in the form of handwritten protocols.

[19] Comp. AGAD, Archiwum Sejmu Czteroletniego.

[20] AGAD, Archiwum Królestwa Polskiego, sygn. 207 Mowy Jego Kr Mci w ciągu Sejmów 1761–1793, further as: AGAD, AKP, sygn. 207.

[21] Grześkowiak-Krwawicz, Anna. 2000a. *O formę rządu czy o rząd dusz? Publicystyka polityczna Sejmu Czteroletniego,* Łódź: Instytut Badań Literackich Polskiej Akademii Nauk, p. 7.

Another source of expression, available not only to parliamentary members but, among others, to the whole lesser noble community, were free publicist papers and pamphlets. The period of the late eighties and early nineties brought an unmatched explosion of free prints and pamphlets. The correspondent of Ignacy (?) Potocki expressed himself as follows: "*so great is the Rush of writing various things*" and asked for protection on the admission of his anonymous letter to one of the leading newspapers.[22] Anna Grześkowiak-Krwawicz, in recent years the most important interpreter of the eighteenth-century journalism, clearly reflects this common trend: "*every writer, grasping a pen, even if in the opinion of their opponents eligible to stay with the Brothers Hospitallers, felt he was a citizen fulfilling his patriotic duty, benefiting from his citizen rights. And as such, they demanded respect for themselves and their views from the other participants of the debate*".[23] Moreover, the possibility of publishing was perceived not only in terms of civil rights but also as such a duty. As an anonymous author wrote, "*as a free citizen (…) you do not have anything shameful over the latency of your thoughts about the Republic to please someone or to not daunt someone*".[24] That was a real forum for the exchange of thoughts and ideas, the most vivid and meeting with an instant response. As mentioned, epistolary forms were also applied, for instance, as anonymous letters "of a friend" to "friends", commenting on the diplomatic and political events.[25] Such letters, reflections and comments were published as free prints or on separate pages of magazines. The main protagonists of political discussion often disclosed their correspondence in the form of prints, using it as a useful propaganda tool. The abundantly published correspondence of Szczęsny Potocki creates an immediate impression of having been addressed to a collective rather than an individual recipient.[26]

There were numerous cases of responses to the "Letters" and "Comments". There were many debating pairs: for instance a discussion between Seweryn Rzewuski and Stanisław Szczęsny Potocki and Ignacy Potocki, between Rzewuski and the Bishop Krasiński, between Tomasz Dłuski and Potocki, rejoinders by

[22] "tak wielka Gorączka pisania rozmaitych rzeczy panuie". Letter to Ignacy (?) Potocki of 25 May 1791, AGAD, APP, sygn. 279b: Listy do I. (Ignacego Potockiego, Stanisława i Aleksandra Potockiego… oraz do innych osób, 1791, t. VI, k. [chart]104-105.

[23] "każdy chwytający za pióro, nawet jeśli w opinii swych przeciwników kwalifikował się do pobytu u Bonifratrów, czuł się spełniającym swój obowiązek patriotą, korzystającym ze swego prawa obywatelem. I jako taki domagał się szacunku dla siebie i swoich poglądów od innych uczestników debaty". Grześkowiak-Krwawicz, Anna. 2000a. *O formę…,* p. 19.Comp. also broadly p. 39–68.

[24] "w wolnym obywatelu (…) nie masz nic haniebniejszego nad utajenie swoich myśli o Rzeczypospolitej dla przypodobania się komuś, albo dla niezrażenia kogoś". NN, Myśli patriotyczno-polityczne do stanow Rzeczypospolitey Polskiey, na seym 1788. roku zgromadzonych, przez obywatela o wolność i samowładztwo Rzeczypospolitey swoiey gorliwego, spisane, n.p., 1788, p. 4.

[25] Cf. As an example: Reflexye nad Listem Króla Pruskiego od Przyjaciela Przyjacielom przesłane, AGAD, AKP, sygn.. 352, k. 388.

[26] Grześkowiak-Krwawicz, Anna. 2000a. *O formę*…, p. 54.

Czacki and Wolski to the paper "On the Third of May 1791 Constitution to Zaleski and Matuszewic Esq. Lithuanian parliamentary members" ("O Konstytucji Trzeciego Maja 1791 do JWW Zaleskiego trockiego i Matuszewica brzeskiego, litewskich posłów"),[27] and finally between Antoni Trębicki and Dyzma Bończa Tomaszewski.[28] A more radical letter would frequently elicit an avalanche of responses. A serious reply to the popular work by Stanisław Staszic "Notes on the life of Jan Zamoyski" is a selection of eight letters published as a collective book in 1790.[29]

Among the journals, on the other hand, in the first place it is necessary to mention the "Gazeta Narodowa Y Obca" ("National and Foreign Newspaper") and "Pamiętnik Historyczno-Polityczny Przypadków, Ustaw, Osób, Miejsc i Pism wiek nasz szczególnie interesujących" ("Historical and Political Cases, Laws, People, Places, and Diary Writings of particular interest to our age"). "Gazeta Narodowa Y Obca" contained reports of parliamentary sessions, the texts of key legislative acts and political news from abroad, infrequent rare journalistic articles published usually in the form of letters to the editor. The "Historical-Political Diary" certainly played the most significant role, due to its editor breaking the purely informative convention of the press at that time, an ex-Jesuit priest, propagator of reforms, Piotr Świtkowski. In particular the articles published since 1788 reflected the political views of the editor. Moreover, there were papers published in French, the "Gazette de Varsovie" and the "Journal Hebdomadaire de la Diète". "Gazeta Warszawska" ("The Warsaw Newspaper") published since 1774, limited itself to the role of a passive informer reporting in particular foreign events and serving as a rather poor stimulant for the discussion.[30]

As can be seen *prima facie,* the public media discourse includes voices which are much more interesting, more radical towards the centrist position, both on behalf of progressive and conservative parties. The parliamentary debate had a rather conservative, courteous nature, however, suddenly in early May 1791, it abruptly changed its character, becoming radically reformatory. In those days, opponents to the Constitution would often avoid speaking in the Parliament just due to the explicitly

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[27] Grześkowiak-Krwawicz, Anna. 1992. Za czy przeciw ustawie rządowej? Historia pewnej polemiki. *Wiek Oświecenia, 8: Wokół Rewolucji Francuskiej i Sejmu Czteroletniego*: 169–184.

[28] Comp. broadly Żbikowski Piotr. 1992. Potępienie i obrona ustawy rządowej z 3 maja 1791 roku. Wokół sporu Antoniego Trębickiego z Dyzmą Bończą Tomaszewskim, In: *Ku reformie państwa i odrodzeniu moralnemu człowieka. Zbiór rozpraw i artykułów poświęconych dwusetnej rocznicy ustanowienia Konstytucji 3 Maja 1791 roku*, Żbikowski Piotr (ed.), p. 97–118. Rzeszów: Wydawnictwo Wyższej Szkoły Pedagogicznej.

[29] Comp. also Szczepaniec Józef. 1991. Sejm Wielki wobec zagadnień cenzury i wolności słowa, In: *Antynomie Oświecenia. Tom specjalny w 200 rocznicę Konstytucji 3 maja,* Acta Universitatis Wratislaviensis, Prace Literackie XXXI, Matuszewska Przemysława, Zakrzewski Bogdan (ed.). Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego,p. 155–184, particularly p. 164–168.

[30] Comp. broadly Łojek Jerzy, 1988. Prasa dawnej Rzeczypospolitej. In: *Dzieje prasy polskiej*. Łojek Jerzy, Myśliński Jerzy, Władyka Wiesław (ed.), 18–22. Warszawa: Interpress, Homola-Dzikowska Irena. 1960. Pamiętnik Historyczno-Polityczny Piotra Świtkowskiego 1782–1792, Kraków: Rozprawy i Studia – Uniwersytet Jagielloński.

expressed unity of parliamentarians, declaring themselves as those who voice the will of the nation, and the nation was to be represented directly by "arbitrators" present at the gallery as guests, eager to utter loud words of praise or condemnation. The constitution was adopted in this very climate. Forcible voices against the Constitution, coming from parliamentary circles, later were to take the nature of separate journalist writings, however they would not actually exist in the parliamentary debate itself as it one was to reflect *sui generis* political correctness, praising the constitution. Incidentally, a few prominent opponents of the Constitution, under the pressure of the public opinion changed their position and published pamphlets expressing their support for the new Constitution and the regulation of the succession to the throne (Adam Rzewuski, Wojciech Turski, Tomasz Dłuski).[31]

Ewa Borkowska-Bagieńska did not hesitate to put forward the thesis that the writing and practical activities of outstanding individuals – the inspirers of change – had a significant, and perhaps even the greatest influence on the transformation of the legal awareness of the lesser nobility of the Stanisław Poniatowski period.[32]

4 Some Aspects of the Discourse on Sovereignty in the Poland of Enlightenment

4.1 Sovereignty as a Theoretical Problem

4.1.1 Introduction

The concept of sovereignty rarely appears in the debate in this very wording. Adequate clues used in the analysis also refer to the concept of "*free will*", and "*national will*". The terms of "*independence*" and "*self-governing*" can be considered synonymous with the concept of sovereignty, similarly to the "majesty" used in the earlier period of time. ("*The majesty is thus the highness and dignity of the Republic*"[33]). Sovereignty is identified with the highest authority. Already at the

[31] Comp. at least Lis Rafał, 2012. Między Konstytucją 3 maja a Targowicą. Poglądy polskich republikantów w latach 1791–1793, *Czasopismo Prawno-Historyczne*, LXIV (2): 161–191 or the discourse around Tomasz Dłuski writing: JW. JP. Tomasza Dłuskiego podkomorzego Generalnego Usprawiedliwienie się przed Publicznością z Manifestu przeciwko Ustawie dnia 3 Maia Ru teraźnieyszego.

[32] Borkowska-Bagieńska Ewa. 2009. O świadomości prawnej szlachty w czasach stanisławowskich i potrzebie jej badania. *Studia z dziejów państwa i prawa polskiego*, XII, Kraków-Lublin-Łódź: p. 158.

[33] "Majestat tedy jest wielmożność a dostojność rzeczypospolitej". Andrzej Frycz-Modrzewski, cited after: Wachlowski, Zbigniew. 1927. Pojęcie suwerenności w literaturze politycznej polskiej XV i XVI wieku. In: *Pamiętnik trzydziestolecia pracy naukowej prof. dr. Przemysława Dąbkowskiego wydany staraniem Kółka Historyczno-Prawnego Słuchaczów Uniwersytetu Jana Kazimierza 1897–1927,*. Lwów: skł. gł. Księgarnia Gubrynowicza i Syna, p. 240.

beginning of the sixteenth century, Stanisław Zaborowski invoked the Latin terms "*principatus*", and "*superioritas*" as the power in the hands of the nation.[34]

The second of the early theories (16th c.), expressed primarily in the papers by Stanisław Orzechowski and Andrzej Frycz Modrzewski and repeatedly invoked in subsequent periods, was the theory of sovereignty of the law, of course not entirely original, but stressing the element of subordination to the law, not necessarily to the entities which enacted it.[35] This phenomenon appeared in Polish literature at the beginning of the sixteenth century along with the interpretation of the so called Nihil Novi Constitution (1505, 1538) and the 1530 Constitution on the election of King. This theory, contrasted to the traditional sovereignty of the monarch, served the movement for the restriction of royal rights.[36] The freedom in the free country of Poland was the freedom "*under the law*" ("*there is no freedom without law*", as Michał Karpowicz[37] claimed in the spirit of Locke), which was to bind not only the citizens, but primarily the king. This interdependence was already emphasized in the sixteenth century: "*The Republic is to be governed not according to the king's will but pursuant to the written law*".[38] The principle of sovereignty of the law, so characteristic of the Polish tradition, in the legislation of the 4-Years-Sejm (as cardinal laws) took form of a modern at that time rule of law, which in thought of many European countries will not appear until the constitutionalism of "the Spring of Nations" (the executive power operates on the basis of law and to exercise the law).[39]

The noble political writing since the sixteenth century considered the Republic itself as an entity of sovereign power, however over time the nature of this political community changed (the political body). From the sixteenth century until the May Constitution this community was created exclusively by nobles (deputies and senators) and the King, which was the construction of three states acting as Seym ("*stany sejmujące*"). The sovereignty of the Republic was therefore in some measure divided between the nobles and the King. The King although chosen through free elections, was formally the King of the grace of God, and theoretically the enforcement of a new law that bound the two sovereigns, the nobles and the king, depended on his own will. Hence the popular identification of the sovereign Republic with

[34] Wachlowski, Zbigniew. 1927. Pojęcie …, p. 235–236.

[35] Ibidem, p. 237.

[36] Relevant literature cites at least Makiłła Dariusz. 2010. Idea jedności a koncepcja rozdziału władz w teorii i praktyce ustrojowej Rzeczypospolitej na przełomie XVI – XVII w. In: *W kręgu nowożytnej i najnowszej historii ustroju Polski. Księga dedykowana Profesorowi Marianowi Kallasowi*. Godek Sławomir, Makiłła Dariusz, Wilczek-Karczewska Magdalena (ed.), 1–20. Warszawa: InterLeones Halina Dyczkowska.

[37] "nie masz wolności bez prawa". Karpowicz Michał, Kazanie o miłości ojczyzny, Wilno, n.d. [1781], no pagination; cited after Grześkowiak-Krwawicz Anna, 2006a. Staropolska koncepcja…, p. 71.

[38] Andrzej Frycz-Modrzewski, cite Wachlowski, Zbigniew. 1927. Pojęcie…, p. 241.

[39] Dziadzio, Andrzej. 2010. Polnische Version des Rechtsstaates vom Ende des 18 Jahrhunderts (System des Verfassungsrechts 1791). In: *Parliaments: the law, the practice and the representations. From the Middle Ages to the Present Day*. Lisbon 2010, p. 117 and ff.

sovereignty of the law. This situation changed with the moment of the adoption of the Constitution of the 3rd of May. The King ceased to be the third Seym-estate, it became only an organ of the executive power, no longer having such a share in the legislation as before. He remained the King of God's grace and the will of the people, ceased to be a sovereign ruler. Now, formally, the whole nation constituting the Republic as a political community of all states, was entitled to the attribute of sovereignty.

As mentioned above, the issue of external security was emphasized in the second half of the seventeenth century to a greater extent as compared with western definitions. The justifications for the genesis of the social contract also went exactly in this direction.[40] A special connection with the fear that the freedom could be converted into a "*yoke of serfdom*" in the absolutist states also occurs here.[41]

In the seventeenth century, the understanding of the internal sovereignty became permanently bound with the Parliament of the Republic ("*the Republic is founded on the Parliament*"), which was expressed both by theory and by political practice.[42] There was a common conviction that the parliamentary states were the sovereign – simply saying – the parliamentary chambers were the carriers of the supreme authority. "*This is the realisation of the essence of our freedom. We may enact All Political and Civil Rights, following our will and thus the fortunes of the whole Fatherland, in particular, of each natural person, his assets and life are in our power. We pour this power onto the deputies. Together with the Senate, they enact the Laws in the Parliament*".[43] Members of the Chamber of Deputies were elected by the terrestrial district assemblies (Dietines), officially unanimously, although in the absence of a general agreement the majority choice was accepted. The sources of the Polish representation theory lie naturally in the canon law.[44] The key role of systemic parliament also reflects the fact that many of the eighteenth-century reform programmes came out from the repair and improvement of the functioning of parliaments. The composition of the Senate, the aristocratic chamber, will be reduced by the future constitution to approx. 130 members: provincial governors, castellans (lesser castellans were frequently also members elected to the lower chamber), diocesan bishops and ministers. The system of the 3rd of May enacting the law on

[40] Grześkowiak-Krwawicz, Anna. 2000b. O recepcji umowy społecznej w Polsce w czasach stanisławowskich, *Czasopismo Prawno-Historyczne*. LII (1–2): 115–116.

[41] Grześkowiak-Krwawicz Anna, 2006a. Staropolska koncepcja…, p. 67.

[42] Borkowska-Bagieńska Ewa. 1992. Nowożytna myśl polityczna w Polsce 1740–1780, *Studia z Dziejów Polskiej Myśli Politycznej, Vol. IV. Od reformy państwa szlacheckiego do myśli o nowoczesnym państwie*, Toruń: p. 34–35.Comp. also Bardach Juliusz. 1983. Sejm…, p. 134–147.

[43] "Tu jest całey wolności naszey użycie. Wszystkie Polityczne i Cywilne Prawa możemy podług naszey woli stanowić, a tak całey Oyczyzny losy, każdego w szczególności Obywatela majątek i życie, są w mocy naszey. Tę moc zlewamy na posłów, Posłowie z Senatem stanowią Prawa na Seymie". NN, Zbiór pism do których były powodem uwagi nad życiem Jana Zamoyskiego. Ósme Pismo. Myśl względem poprawy formy rządu, b.m.w., Roku 1790, p. 31.

[44] Grzybowski Konstanty. 1959. *Teoria reprezentacji w Polsce epoki Odrodzenia*, Warszawa: Państwowe Wydawnictwo Naukowe, p. 22.

the Parliament[45] would also affect the decline in the role of this body, limiting the powers of the monarch connected with legislative power – the successor Stanisław August would have to appoint lay senators just amongst twice the number of candidates proposed by regional assemblies.

It is also required to invoke another theoretical problem – the local assemblies (Dietines) vested a specific role by the existing legal system. Between the mid-seventeenth and mid-eighteenth century their importance in the political practice grew, when, due to interruption of central parliaments, Dietines took over many of the executive tasks of the Parliament, even the enlisting of troops. Thus, there was a kind of "*sovereignty decentralization*".[46] By expressing instructions for parliamentary members, Dietines formed real boundaries for their parliamentary activity. Members of Parliament feared exceeding assumptions and breaking the sworn instructions – a kind of a "*general will*" tool; feared going beyond these boundaries, being aware of their obligation to report and justify themselves at the so-called *reporting* Dietines where they had "to account before the nation" for the actions of the Parliament. These were the local assemblies (Dietines) that Rousseau understood as a link between the inalienability of sovereignty with the representative system, as the lesser nobles did not renounce their sovereignty in favour of their representatives, providing them with a sort of a *mandat impératif*.[47] Finally, the local assemblies (Dietines) as the final nexus were to accept the Constitution of the 3rd of May along with the comprehensive reform, which they did with the majority of 82 % in February 1792, proving the invalidity of the stereotype of an exclusively conservative nature of local lesser nobles' assemblies.[48] This may have been the reason for the mentioned Wojciech Turski[49] to change his attitude towards the Constitution so radically. The derivative of this important function of Dietines (and understanding the role of Members only as "*the lips of the provincial confreres*"[50]) is the thesis sporadically put forward in the literature in relation to the sovereign role

[45] Art. IV, Seymy (Prawo o Sejmach), Actum in Curia Regia Varsaviensi Die Vigesima Octava Mensis Maij, Anno Domini Millesimo Septingentessimo Nonagesimo Primo, Zbiór Ustaw Seymowych w Warszawie; also published: Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, t. (Vol.) IX, Kraków 1889, p. 250–266.

[46] Bardach Juliusz. 2002. *Historia ustroju i prawa polskiego*, Warszawa: Państwowe Wydaw. Naukowe, p. 248.

[47] In fact in contrast to the position of the court which appealed in letters to councils to equip deputies in plena potestas, the free mandate guarantees freedom of decision in the Parliament. Naturally, closely linking local councils with the preferred allowance, limitata potesta. Bardach Juliusz. 1983. Sejm…, p. 146. Comp. also:Michalski Jerzy. 1983. Z problematyki republikańskiego nurtu w polskiej reformatorskiej myśli politycznej w XVIII w. *Kwartalnik Historyczny*, 90: 331–332; Uruszczak Wacław. 2010. Poselstwo sejmowe w dawnej Polsce. In: *Drogi i bezdroża nauk historyczno-prawnych*, Małecki Marian (ed.), 52–56. Bielsko-Biała: Wyższa Szkoła Administracji.

[48] Szczygielski Wojciech, 1994. *Referendum trzeciomajowe. Sejmiki lutowe 1792 roku*, Łódź: Wydawnictwo Uniwersytetu Łódzkiego, passim.

[49] Lis Rafał, 2012. Między Konstytucją…, p. 173.

[50] Bardach, Juliusz. 1983. Sejm…, p. 146.

of the provinces or a quasi-federal system of the Republic (for instance by Stanisław Płaza).[51]

Generally, a strictly theoretical discussion over the issue of sovereignty is not too extensive; Anna Grześkowiak-Krwawicz stresses that this may have arisen from the practical orientation; "*Polish authors were less interested in philosophical considerations on the origins of human societies and more on the conclusions stemming from them. Hence, they stressed hardest the fact that power was entrusted with the monarch – somehow positioning the nation over the monarch – and showing the sovereignty of the nation itself*". The latter was not a consequence of the reception of foreign theories, but of "*Polish practice, in which the sovereignty of the nation (lesser nobility) was the reality*".[52] Hence, the right of the nation to resist the monarch in the event of a breach of his obligations was never questioned. The choice of the monarch ensued through "*viritim*" election, direct selection, and additionally, admittedly theoretically, there existed the possibility of convening equestrian parliament to protect the rights, which could bring together the mass of the nobility.[53] Mutual agreement was in Poland not a theoretical construction, but a purely living practice, since a visible contract was concluded with each elected ruler as *pacta conventa*.[54] Therefore, to the Frenchman's accusation: "*vos non habetis regem*", the Pole might have answered: "*sed vox rex habet*".[55] At the same time, the *sui generis* paradox is that the Poles needed an elective king, because this phenomenon raised their own prestige, "*they needed a king just to elect him*", what emphasized the sovereignty of the nation.[56]

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[51] Lityński Adam. 1985. O reformach sejmikowania 1764–1793. *Czasopismo-Prawno-Historyczne*, XXXVII (2): p. 260–262.

[52] "autorów polskich mniej interesowały filozoficzne rozważania nad początkami społeczeństw ludzkich, a bardziej wnioski z nich wypływające. Stąd najsilniej podkreślali oni fakt powierzenia władzy monarsze – stawiający niejako społeczeństwo ponad monarchą i ukazujący suwerenność tegoż społeczeństwa (…) [będącej skutkiem],,praktyki polskiej, w której zwierzchnictwo narodu (sc. szlacheckiego) było rzeczywistością". Grześkowiak-Krwawicz, Anna. 1987. Polska myśl polityczna lat 1772–1792 o systemie władzy monarchii absolutnej. *Kwartalnik Historyczny*, z. 3: p. 45. Similarly, in other work: Grześkowiak-Krwawicz, Anna. 2010. Polskie poglądy na monarchie europejskie. In: *Rozkwit i upadek I Rzeczypospolitej*, Butterwick Richard (ed.), Warszawa: Bellona, p. 151: "*Poles treated political topics in a very pragmatic way*", hence they were less interested in the Republican model, which – they believed – they knew from experience, drawing the attention of monarchical governments. Comp. also Lis Rafał, 2012. Między Konstytucją…, p. 173–174.

[53] Olszewski Henryk. 1985. Sejm konny. Rzecz o funkcjonowaniu ideologii demokracji szlacheckiej w dawnej Polsce. *Czasopismo Prawno-Historyczne*, XXXVII (2): 225–242.

[54] Grześkowiak-Krwawicz, Anna. 1987. Polska myśl…, p. 46. Grześkowiak-Krwawicz, Anna. 2000b. O recepcji…, p. 109–125.

[55] Grześkowiak-Krwawicz, Anna. 1987. Polska myśl…, p. 57.

[56] Grześkowiak-Krwawicz, Anna. 2003. Czy król jest potrzebny w republice? Polscy pisarze polityczni wieku XVIII o miejscu i roli monarchy w Rzeczypospolitej. Zarys problematyki. In: *Dwór a kraj między centrum a peryferiami władzy. Materiały konferencji naukowej zorganizowanej przez Zamek Królewski na Wawelu Instytut Historii Uniwersytetu Jagiellońskiego, Instytut Historii Akademii Pedagogicznej w Krakowie w dniach 2–5 kwietnia 2001*, Skowron Ryszard (ed.), Kraków: Zamek Królewski na Wawelu. Państwowe Zbiory Sztuki, p. 475.

4.1.2 'Sovereignty' in Media and Free Prints Debate

One of the most distinguished voices in the public debate belonged undoubtedly to Hugo Kołłątaj, the "Polish Robespierre." He did not use the notion of sovereignty in his writings, but formulated his recommendations for the creation of a system with Parliament as "*the highest authority*", authorized not only to enact the law, but also to the executive power, the Seym debating in "*a parliamentary way*". Undermining the existence of a free government in a country where some people remain in feudal captivity, Kołłątaj differentiated "*human freedom*" from "*governmental freedom*", political one,[57] the latter he awarded to nobles and burghers, what will be discussed more extensively in the following parts.

Later discussions, from the time following the adoption of the Constitution of May, would be in relation to the issues of freedom, full of paradoxes. On the one hand, the protagonists would raise that the Constitution allowed freedom to be maintained (an important aspect is this direct reference of reformers to external threats, which was an important factor in the process of the adoption of the Constitution; it is worth reminding that reading foreign news dispatches on the 3rd of May, 1791 helped to build the atmosphere of terror and a sense of a need for reform). Its antagonists would stress that it was a "monarchical" constitution which had taken the freedom away from the Nation.[58] Sovereignty in the debate thus far would be identified with freedom.

4.1.3 'Sovereignty' in Parliamentary Debate

Similarly, the term of "sovereignty" is not used in the parliamentary debate. Occasionally, it refers directly to the supreme authority ("*Two Nations Majesty preserved itself the supreme authority in the Parliaments*"[59]). The terms of "self-governance" (e.g. "*The laws of the Polish Republic self-governance*")[60] or "independence" or else "highest independence" can be recognized as equivalent notions.

There are, in turn, many references to the element, which the author considers to be complementary to the sovereignty, i.e. freedom. Such formulations had been present in the discussion since the first sessions of the Parliament, as for instance in the acceptance by members of the confederation formula. This prevented

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[57] Grześkowiak Krwawicz, Anna. 2006a. Staropolska koncepcja…, p. 80.

[58] Copies of the letters of Stanisław Szczęsny Potocki, AGAD, AKP, pudło (box) 90.

[59] "Maiestat Oboyga Narodów zachowawszy sobie najwyższą władzę w Seymach". Głos Jaśnie Wielmożnego Imci Pana Raczynskiego Marszałka Nadwornego Koronnego i Generała Wielko-Polskiego, Roku 1788, Dnia 24 Października Na Sessyi Seymowey miany, Zbiór mow i pism niektórych w czasie Seymu Stanów Skonfederowanych Roku 1788, Tom I, w Wilnie w Drukarni J.k. Mci przy Akademii, p. 285.

[60] Głos Jego Kr. Mości na Sessyi Seymowey dnia 20. Lipca 1789. Miany, AGAD, AKP, sygn. 207, k. [chart] 813 (443).

renouncement of the Parliament by single members and resulted in the procedure of adopting resolutions by a majority. Although this was a kind of a denial of the already existing '*freedom*' of the deputies, the members were aware of the seriousness of the moment and agreed to this restriction, seeing it as an act of expression of the Republic's self-governance and of a mutual trust between the king and the nation. The court chamberlain of the king, Marcin Slaski, said: "*With freedom and liberty born, let's be independent, to any prejudice not being bound to hand the spirit of Patriotism listening only to inspiration, so we direct our actions to that what is always appropriate for the Common good*".[61] Troop enlargement enacted in autumn 1788 is also to serve as a protection of the "*free constitution*" and the '*free Government*".[62] Military power cannot be used "*for the suppression of Liberty. This is indeed Freedom, which has elements of the Republican Government in Our Nation, and has always been the goal of common solicitude*".[63]

Then for the Throne it is glorious "*to govern the free people, even as it would blemish wanting to be despotic. Prevail Your Royal Majesty over the hearts of citizens arbitrarily, leaving the mind of each free from any influence and of any foreign subordination"*, as a Livonian member Kublicki appealed to the monarch.[64] Member Czetwertyński outlined, that equality introduced "*in the Republican state*" under the reign of King Stanisław August "*established the crucial freedom in that Republican State*", the King is the one who "*effectively opened freedom for the Nation*".[65]

[61] "Z wolności i do wolności zrodzeni bądźmy niepodległemi, do żadney z uprzedzeniem nie wiążąc się strony, ducha tylko Patryotyzmu słuchaiąc natchnienie, tak nasze kieruymy czyny, aby zawsze stosowne dobra Powszechnego były". Mowa Jaśnie Wielmożnego Imi Pan Ślaskiego Podkomorzego Nadwornego J. K. Mci, Posła z Województwa Krakowskiego na Sessyi przed Stanami Skonfederowanemi Rzeczypospolitey, Dnia 16 Października Miana, Zbiór mow i pism niektórych w czasie Seymu Stanów Skonfederowanych Roku 1788, Tom I, w Wilnie w Drukarni J.k. Mci przy Akademii, p. 68–69.

[62] Głos Jaśnie Wielmożnego Ignacego Potockiego M.N. W.X.L. na Sessyi Seymowey dnia 24. Października 1788-Roku o Rządzie nad Woyskiem, Zbiór mow i pism niektórych w czasie Seymu Stanów Skonfederowanych Roku 1788, Tom I, w Wilnie w Drukarni J.k. Mci przy Akademii, p. 152.

[63] "na potłumienie Wolności. Ta to iest zaiste Wolność, która od pierwiastków Rządu Republikantskiego w Narodzie Naszym, była zawsze celem troskliwości powszechney". Głos Jaśnie Wielmożnego Imci Pana Raczynskiego Marszałka Nadwornego Koronnego i Generała Wielko-Polskiego, Roku 1788, Dnia 24 Października Na Sessyi Seymowey miany, Zbiór mow i pism niektórych w czasie Seymu Stanów Skonfederowanych Roku 1788, Tom I, w Wilnie w Drukarni J.k. Mci przy Akademii, p. 283.

[64] "rządzić wolnym ludem, równie iak byłoby skazą chcieć być samowładnym. Panuy W.K. Mość nad sercami Obywatelów samowładnie, umysł każdego zostaw wolnym, i od wpływu iakiegokolwiek, i od obcey podległości". Przymówienie się Za Proiektem Kommissyi Woyskowey Jaśnie Wielmożnego Kublickiego Posła Inflantskiego, Zbiór mow i pism niektórych w czasie Seymu Stanów Skonfederowanych Roku 1788, Tom I, w Wilnie w Drukarni J.k. Mci przy Akademii, p. 206.

[65] równość wprowadzona "w Stan Republikancki" za panowania Stanisława Augusta "ustanowiła dopiero w tymże Stanie Republikanckim istotną wolność", król jest tym, który "skuteczną Narodowi otworzył wolność". Głos JO Xcia imci Antoniego Czetwertyńskiego Chorążego i Posła Bracławskiego, Na Sessyi Seymowey Dnia 24. Października 1788. Roku miany, Zbiór mow i pism

Finally, freedom as a purpose for the enactment of the Constitution was indicated in the anniversary royal speech held in 1792: "*the real and only objective to establish the new form of Government was nothing else, but (if possible for humans) for all Polish Nationals to share equally in the freedom and the security of their property*."[66] Members expressed their conviction that the Polish system of government guaranteed this freedom, which is now threatened, whereas thus far, after all, it seemed that "*it's enough to be a Pole to be free*".[67]

4.1.4 'Sovereignty' in Legal Acts

"The Rules for improvement of the form of government" (*Zasady do poprawy formy rządu)* of December 1789 indicated key constitutional principles, *"the authorities and the laws of the Republic*". The essential duty of the state included "*the right and power of making acts, not being subject to any other, only this, which itself represents the Republic*." "*The rights and authorities that they have is appropriate*" entrusted by the Republic to the Parliament and to Dietines – regional assemblies; "*The will of the Republic as to the legislative and parliamentary power by a matter of unanimity or a different majority shall demonstrate*"; absolute unanimity was required in matters concerned with the cardinal laws. The Republic entrusted the execution of power to the King and the highest guard. Officials were responsible for their duties to the Republic. "*The Republic in a free and republican composition is empowered*"[68] to execute its authorisations.

The inviolable cardinal rights (*Prawa kardynalne niewzruszone*, 1791) of the 8th of January, 1791 declared the Republic of Poland "*free and independent of anyone*". The Republic creates a single indivisible body exercising its tasks specified in art. VI "*in a state of nobility*" through it. Any foreign intervention "*opposing independence of the Republic and its derogatory self-inertia*" was considered invalid.

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niektórych w czasie Seymu Stanów Skonfederowanych Roku 1788, Tom I, w Wilnie w Drukarni J.k. Mci przy Akademii, p. 301, p. 303.

[66] "prawdziwy i jedyny cel utworzenia tey nowey Formy Rządu nie był inny, tylko (ile po ludzku być może) wszyscy Narodu Polskiego Współ-Ziomkowie równie byli uczestnikami udziału wolności i ubezpieczenia własności swoich". Mowa Jego Królewskiey Mci Dnia 3go Maia Roku 1792 w Kościele Świętego Krzyża miana, AGAD, AKP, sygn. 207, k. [chart] 1337 (683).

[67] "dość bydź Polakiem, by bydź wolnym". Przymówienie się Jaśnie Wielmożnego Stanisława Mieroszewskiego Posła Krakowskiego na Sessyi Seymowey Dnia 21. Lutego Roku 1791 Sessya 38 dnia 21 Lutego 1791 Roku, AGAD, ASCz, sygn. 19, k. [chart] 652od.

[68] "prawo i władzę czynienia ustaw, niepodlegania żadnym innym, ieno tym, które sama Rzeczpospolita stanowi". "Prawa i władze sobie właściwe" powierzyła Rzeczpospolita sejmom i sejmikom; "wola Rzeczypospolitey, co do prawodactwa, władzy seymuiącey poruczona, podług gatunku materii iednomyślnością, lub różną większością okazywać się będzie"; jednomyślność bezwzględnie wymagana była przy materiach z zakresu praw kardynalnych. Wykonanie praw powierzyła Rzeczpospolita królowi i najwyższej straży. Urzędnicy za swe obowiązki odpowiadali przed Rzecząpospolitą. Uprawnienia swe "Reczpospolita w składzie wolnym i republikanckim czynić mocna iest". Zasady do poprawy formy rządu, Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, t. IX, Kraków 1889, p. 157–159.

Finally, nothing "*in the Republican state for law and authority reckoned not to be, that would not flow from the expressed will of the Republic on the parliaments: no formal authority orders nobody to carry out orders to coerce it will be, do they not order right: it will not be able to allow itself and anyone what the law prohibits*".[69] Therefore there exists a visible link between sovereignty and state independence. Thus the "Cardinal Rights" also constitute another post figurative wording of the idea of "*the will of the Republic*".

Based on the text of the Government Act of the 3rd of May, the issues of the sovereignty of the State and of the nation can be distinguished. Nothing surprising can be found in the understanding of sovereignty of the State; however, attention shall be drawn to the fact that those provisions were adopted in a specific intention to manifest the independence from foreign powers – read: the Russian Empire – hence the emphasis in the preamble to the Constitution that the nation wants to free itself "*from foreign oppression*" to recover "*its political existence, internal and external independence of the nation*." The sovereignty of the Republic was the result of sovereignty of the nation, the entity which was entitled to the highest authority in the State. The Constitution did not contain direct references to the State, however the "countries of the Commonwealth" are referred to in articles III and IV.

In turn, the principle of sovereignty of the nation was proclaimed in art. V which read: "*All authority in a human society takes its origin in the will of the nation*" ("*Wszelka władza społeczności ludzkiej początek swój bierze z woli narodu*"). The Preamble to the Constitution defined sovereignty as "*the external independence and internal freedom*."

Although the inspiration, coming from the relevant article II of the French *Declaration of Rights of Man and Citizen* of 1789 is clearly visible in the regulations, Polish solutions are far from any radicalism. After all, the Constitution maintained the division into social states, the monopoly of the lesser nobles in the field of political rights, not undermined to a greater extent by the appointment of plenipotentiaries of towns and cities to the Parliament with an advisory vote. This confirmed and put into life the principles already present in the fundamental cardinal laws of January 1791.

[69] "w państwach Rzeczypospolitey za prawo i władzę poczytane bydź nie ma, coby nie wypływało z wyraźney woli Rzeczypospolitey na seymach: żadna urzędowa władza nikomu rozkazywać i do wykonania rozkazów zniewalać nie będzie mogła, czego nie rozkazuią prawa: nie będzie mogła pozwalać sobie i nikomu tego, czego zakazuią prawa". Prawa kardynalne niewzruszone, Volumina Legum, t. IX, p. 203–204.

4.2 The Nation

4.2.1 Introduction

As already mentioned, in the political practice, the expression of beloved liberty is the right to decide freely on one's matters through the best representatives of the nation, as lesser nobility perceived themselves; the right to articulate the needs of the whole community through the lips of nobles.

At that time it was the quest for freedom, originating from lesser nobles, that was to shape the system of balance between the state of lesser nobility (not the state of aristocracy; it should be emphasized that the Polish nobility did not carry separate princely titles, those could only come from foreign monarchs and it was believed that "*the nobleman on his farm is equal to the governor*", although, of course, political practice turned masses of impoverished gentry into ideal clients of magnates) and the king, who gradually gave away his prerogatives by granting privileges to the estate of lesser nobility. In the seventeenth and mid-eighteenth centuries, the state of equilibrium was in practice utterly destroyed, leading to such pathological situations as notorious breaking off of the Parliament by corrupt members without any decisions being taken, buying royal election results by foreign courts, which resulted in the weakness of the monarch and an empty treasury, corruption of those holding high public functions, for instance the case of prince Adam Poniński, a gambler maintained by Moscow. This system in the conservative papers is referred to as *republican,*[70] the republic with an elected monarch – often just a figurehead. Modern scholars write in agreement about the system of government at a later stage of development of the First Republic as a "*monarchia mixta*".

It is a paradox that the authors of the Polish Enlightenment already well familiar with Montesquieu and Rousseau papers easily employed the concept of *the nation*, while their majority accepted that the actual exercising of the rights of the sovereign was in the hands of one social class, which made up approximately 8 % of the population. Some political activists of the 60s and 70s, and then of the period of the Great Parliament, already represent another generation, educated in a different manner (the role of Piarist schools), conscious of cameralistic and mercantilist processes, taking place in Europe, as well as, the transformation of law, especially of criminal law.[71] However, the struggle for the change of the convictions on a specific role of the nobility, deeply established in the literature – in the free prints and sources related to the functioning of the Parliament – was to be extremely difficult. This referred not only to the social issues, but rather to the overall way of thinking of an average lesser nobleman, rather reactive and slow, which is reflected, for instance,

[70] This concept was subject to evolution. While Janusz Maciejewski in his studies (e.g. Maciejewski, Janusz. 1977. Pojęcie…, p. 21–41) uses them to determine the so-called Bar Confederation nobilitygroup, contesting the baronial established order, so much so that in the day of the Great Parliament, and therefore approx. 20 years later, republicans are customary supporters for retaining elections and supporters of traditional, conservative political solutions.

[71] Borkowska-Bagieńska Ewa. 1992. Nowożytna myśl…, p. 40.

in the debate over the draft of "the Collection of Laws".[72] At the same time, very special demands of the reforms, different than those in France or German countries were not directed against absolutism or the "omnipotence of the State which gave them [the reformatory thoughts] an individualistic coloration", but exactly against the Sarmatian individualism, hence their deep social or even pro-"etatism" character.

Even though the selected authors are aware of the need to reform the nation towards " turning the people into citizens", as for instance Adam Rzewuski,[73] they accept the necessity to carry out a slow, not revolutionary reform. The legislation takes time, "*it cannot proceed to effecting these great intentions yet* [the abolition of social classes]."[74]

Around 1790, voices to improve the legal status of townspeople gained in force. An alliance was formed between the most radical deputies, such as Ignacy Potocki,[75] and the representation of townspeople. It was not limited to writing papers and drawing up manifestos. One of the more marked events that should be noticed was the so-called "Black procession" under the leadership of Jan Dekert, the Mayor of the City of Warsaw that passed along the streets of the Capital City to the Royal Palace, where the King was handed a petition of the bourgeois state. These actions coincided with the submission of one of the most liberal reform drafts to be discussed later.

While the voices for equal bourgeois empowerment were relatively numerous in this phase of the social and political debate, there were no extensive references to raising the status of peasants to the rank of "citizenship". This does not mean that the peasants' state did not appear in journalism, but these were mainly appeals for a more humanitarian way to demand the fulfilment of peasants' obligations towards the owners of villages, the settlement of mutual obligations in contracts. Piotr Świtkowski painted very visual pictures in "The Diary …".[76] Chancellor Andrzej Zamoyski, a Lithuanian Vice-Chancellor Joachim Chreptowicz and the nephew of King, Stanisław Poniatowski belonged to a small group of reformers.

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[72] Ibidem, p. 41–42.

[73] [A.W. Rzewuski] Adama Wawrzeńca Rzewuskiego Kasztelana Witebskiego o formie rządu republikańskiego myśli, w Warszawie 1790. w szczególności: Rozdział III. O edukacji, p. 25–61. An edition of the work of Rzewuski with an introduction by W. Bernacki and footnotes by M. Sanek were recently published, Kraków 2008.

[74] "jeszcze do dokonania tych wielkich zamiarów [likwidacji klas] przystąpić nie może". [A.W. Rzewuski], Adama Wawrzeńca…, p. 168.Comp. alsoWalicki, Andrzej. 2000. Idea narodu…, p. 36–37.

[75] However he was a Potocki supporter for preserving the essential role of the nobility, while promoting the bourgeoisie. "*Equality is not taken at this point for chimeric and even according to the natural order unlike the equality of fortunes and riches, but only for the equality that every person who lives in the community gives equal right to free and safe use of the property to a person, property and his income"*. Zabawy Przyjemne i Pożyteczne, 1771, t. V, p. 415, t. VI, p. 227. Comp. Janeczek Zdzisław. 2007. Idea wolności w mowach i pismach Ignacego Potockiego. In: *Spory o państwo w dobie nowożytnej: między racją stanu a partykularyzmem*, Anusik Zbigniew (ed.), Łódź: Wydawnictwo Uniwersytetu Łódzkiego, p. 201–214, in particular p. 206–207.

[76] Homola-Dzikowska Irena. 1960. *Pamiętnik*…p. 54–62, p. 69–92.

The most radical demands appealed to do away with the serfdom; however, commentators underline that even those had a very restricted character, pushing for no more than the liberation of peasants, without granting them any land property, which might have been exclusively the right of townspeople.[77] In his well-known brochure even Jan Baudoin de Courtenay suggested the attendance of "*eloquent, reasonable and those familiar with the needs of their state*" peasants' representatives in the Parliament. However, he foresaw a long way for them, before they would save enough money to purchase some "settlement".[78]

The nobility will have a more democratic attitude toward their own social group. Attempts to restrict the rights of the non–property nobility will cause fierce debates. It is also worth mentioning that understanding the nobility as a sovereign was connected with the specificity of the Polish political system, i.e. the activity of the regional councils (the Dietines) consisting in the preparation of instructions for members for the meetings of the next parliament. It was an element of direct democracy invoked even by Rousseau. In practice, perhaps, it less reflected the spirit of local decision-making, as during that part of the parliamentary meeting when the instructions were laid out, it was usually already attended by a small part of the local gentry. Nonetheless, breaking the instructions could be a serious accusation; as we shall see, the issue will appear in the procedure for the adoption of the Constitution of the 3rd of May.

4.2.2 'The Nation' in the Media and Printed Materials

The concept of *the nation* is extremely popular in the analysed debate. However, very rarely did the publicists dare to define the concept, here it is necessary to recall the liberal definition of Franciszek Jezierski, "*the nation is the gathering of people having one language, customs and manners contained in one general legislation for all citizens. The people and the government of the nation are separate things though it seems that a nation cannot be without a country for it is without its habitat, and again that the country cannot be without a government*".[79] Similarly, to Father Hajewski the nation is "*a collection of people within certain limits of settled land, a compound of will, power and riches for the common needs and the help of the united*", but the author adds the estate elements "*in various divisions of the estate*

[77] Borucka-Arctowa Maria. 1957. *Prawo natury jako ideologia antyfeudalna*, Warszawa: Państwowe Wydawnictwo Naukowe, p. 198–200.

[78] Ciąg dalszy uwag ogólnych nad stanem rolniczym i miejskim. Uwaga II, n.p., n.d., quot. after: Woliński Janusz, Michalski Jerzy, Rostworowski Emanuel (ed.). 1955. *Materiały do Sejmu Czteroletniego*, Wrocław, Vol. I, p. 128, 133.

[79] "naród jest zgromadzenie ludzi mających jeden język, zwyczaje i obyczaje zawarte jednym i ogólnym prawodactwem dla wszystkich obywatelów. Naród a rząd narodu są osobne rzeczy lubo zdaje się, że naród nie może być bez kraju, to jest bez swojego siedliska, i znowu że kraj nie może być bez rządu". F.J. Jezierski, *Wybór pism*, Warszawa 1952, p. 217.

under the law and under the care of the highest sovereignty remaining".[80] Therefore, it suggests an enigmatic sovereign to which nation is subject; in an earlier, already cited passage of speech he acknowledged, however, that taking care of public affairs is "the citizens'" matter.

For a vast majority of writers the decision-making force rests in the will of the people. Often the concept of the nation occurs in a phraseological connection with the adjective "free".[81] It is only nation that can decide and choose between a system of "*self-empowered government*" and "*a free government*".[82] The issue of the power of the whole nation with regard to such crucial decisions will be present in the literature critical of the Constitution of the 3rd of May, seizing onto the allegations that in the parliamentary debate, described broadly below, there appeared already on the 3rd of May: Members of the Great Parliament could only be interpreters of the decisions that were made at regional assemblies (Dietines) and had no right to break parliamentary instructions regarding maintenance of elections to the throne. It is nation gathered at regional councils that is the sovereign; these regional councils "*are interpreters of the will of the people and the opinion coming under parliamentary decision*".[83] Members, even in a majority of "several dozen", according to the opponents of the Constitution did not have the right to free the king from the oath of *pacta conventa.*[84] This element, an abuse of members' power, opposing of the Sejm to the nation (as well as a group of Warsaw "madmen" to the worthy of trust nobleman who settled in the provinces), appear relatively frequently in a discussion related to the Constitution. Also, supporters of the constitution did not question the meaning of the instructions, "*but through a different interpretation merely tried to prove that the members did not act against them*".[85] The nation is all the nobility.

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[80] [naród jest] "zbiorem ludzi w pewnych granicach ziemi osiadłych, związkiem woli, sił i dostatków dla wspólnych potrzeb i pomocy zjednoczonych (…) w różnych podziałach Stanów pod prawem i opieką naywyższey udzielney Zwierzchności zostaiących". Mowa Dowodząca: że przepisy nauk od Prześwietney Komissyi Edukacyi Narodowey dla Szkół Publicznych podane są nie tylko użyteczne Kraiowi ale też potrzebne w szczególności Obywatelom przez Ja. X. Daniela Haiewskiego Kanonika Kijowskiego Nauczyciela Wymowy w Szkołach Akademickich Warszawskich przy rozpoczęciu rocznych nauk dnia 29 września 1790 Roku miana, Bibliotek PAN Kraków, Rps. 177, k. 27.

[81] Kołłątaj, Rzewuski, Konarski. Comp. Pepłowski Franciszek. 1961. *Słownictwo*…, p. 108.

[82] M. Wielhorski, O przywróceniu dawnego rządu według pierwiastkowych Rzeczypospolitej ustaw, n.p., 1775, p. XIII – XVII.

[83] "są tłumaczami woli narodu i zdania przychodzącego pod decyzją sejmową". JW. JP. Tomasza Dłuskiego podkomorzego Generalnego województwa lubelskiego i z tegoż Województwa Posła Sejmu Walnego Warszawskiego Usprawiedliwienie się przed Publicznością z Manifestu przeciwko Ustawie dnia 3 Maia Ru teraźnieyszego 1791 nastąpioney w grodzie warszawskim zaniesionego, no pag. A copy has been used from the University Library in Torun., sygn. Pol. 8.III.854, Nr. 22.

[84] Dyzmy Bończy Tomaszewskiego komissarza cywilno-wojskowego wojew. Bracławskiego nad Konstytucją i rewolucją dnia 3 Maja uwagi, n.p., n.d., p. 11.

[85] Grześkowiak-Krwawicz, Anna. 2012. Czy rewolucja może być legalna? 3 maja w oczach współczesnych, Warszawa: Wydawnictwo DiGA. p. 71. Comp. also p. 68–74.

And at the same time solely and exclusively the nobility. As it turns out, also in an open public disccusion the concept of the nation will be reduced to the nobility only. Just a few authors postulate a wider look at the nation. Piotr Świtkowski, the publisher of the "Diary" belongs to this group. He defined the nation as "*the whole universality of the Polish nation, consisting of all the states*," and imposing the task on the legislature of "*giving privileges not just to one state but to the whole nation*".[86] At the beginning of the Great Parliament session, Świtkowski wrote with much hope: "*Now another stage has opened. The nation becomes suddenly independent and grounds its self-government forever*".[87] The "Diary" eagerly rendered its columns available for publications, supporting the reform of the townspeople's legal status.[88]

Stanisław Staszic, of bourgeois origin, expressed his opinion in the matter under consideration clearly in his "Warnings for Poland" …where he concluded: "*If the nobility state in the existing circumstance cannot easily and quickly agree to the abolition of the feudal government, and to the establishment of a true Republic, covering the whole nation, and based on the universal law, at this time, the quickest, the easiest and in the present circumstances the surest manner to preserve the nation: is to establish the omnipotence (..) The nation with the feudal or else lesser nobles' government cannot maintain their power*".[89] An anonymous author of "Thoughts on improvement of the form of Government", said these words: " *the free government is of this importance that no one person, but the nation is the heir to the country. The nation is nearly everywhere divided into three states: peasants, burghers and lesser nobles. This nation either in all three states, or in two of them or else in one state places the superior national power*"[90]; however, in Poland "*the knights' estate with its offices (the Senate and the King) holds the national government*."[91]

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[86] jako "całą powszechność narodu polskiego, składającą się ze wszystkich stanów", i nakładając na prawodawcę zadanie "upomyślnienia nie jednego tylko stanu, ale całego narodu". Pamiętnik Historyczno-Polityczny, 1789, II, p. 955, p. 856.

[87] "Teraz insza otworzyła się scena. Naród zostaje nagle niepodległym i gruntuje samowładztwo swoje na wieki". Pamiętnik Historyczno-Polityczny, 1788, II, p. 1050.

[88] Homola-Dzikowska Irena. 1960. *Pamiętnik*…p. 198–204.

[89] "Jeżeli stan szlachecki w nadarzonej okoliczności nie potrafi się łatwo i prędko zgodzić na zniesienie rządu feudalnego, a na ustanowienie prawdziwey Rzeczypospolitey, cały Naród obeymujący, i na powszechnym prawie zasadzonej, na ten czas sposób najprędszy, nayłatwieysz a w teraźnieyszych okolicznościach dla zachowania Narodu naypewnieyszy: Ustanowić jednowładztwo (..) Naród z rządem feudalnym czyli z szlacheckim dzisiay żadnym sposobem utrzymać się nie może". Staszic Stanisław, Przestrogi dla Polski z teraźnieyszych związkow z praw natury wypadające przez Pisarza "Uwag nad życiem Jana Zamoyskiego, Dnia 4 Stycznia 1790, p. I – II.

[90] "rząd wolny ma te istotę, że nie iedna osoba, ale Naród cały iest kraiu Dziedzicem. Ten prawie powszechnie na trzy stany dzieli się: Wieyski, Mieyski i Szlachecki. Ten Naród albo we wszystkich trzech stanach, albo w dwóch, albo w iednym z tych stanie, zwierzchnią Narodową władzę umieszcza". NN, Zbiór pism… Ósme pismo…, p. 9.

[91] Ibidem, p. 18.

The political assumptions of Hugo Kołłątaj expressed in the "Letters of an Anonymous Writer" have a particular nature. They expressed a project to transfer townspeople into a co-governing state, represented in the Townsmen's Chamber, and setting up a joint lesser nobles and bourgeoisie sovereign. Kołłątaj, a supporter of a far-reaching social revolution, appealed: "*Poles! I challenge you to finally become a nation and a truly free one!*"[92]

The translator of the bitter satirical "Catechism" inquires: "*Who holds the legislative and executive power in the Republic?"* And he obtains the following answer: "*the King, the Senate and the knights, three states but one lesser nobleman. (…)It is a secret never to be conceived by reason that the Republic, having only one noble state for its government, did three states thereof, in such a wonderful way, and moreover, from one person of the king it has also created a complete state*".[93] Another question is: "*After all, this can be seen that all the Polish Government Majesty is only the Republic of lesser Nobles*?" And the answer: "*It is obvious that in the Polish Nation, he who is not a Gentleman, may not even be human. P.* [Question] *Can the natural and property laws be altered by the Constitution of the Polish Government? O.* [Answer] *Where it comes to the dignity of the Nobility Estate in Poland, all such simple and insignificant laws as natural and property laws must give way*."[94] In further part of the Catechism, the author tries to prove that particular honours of the Noble State are freedom and equality: "*As lesser nobles in Poland are humans, some of them are rich, some poor, some are learned and some incompetent, some wise and others foolish. Well, they have the fundamental privilege of their Constitution that despite these distinctions of Providence, they are all equal, and as soon as a Pole is a lesser noble no feature of poor, or silly can be used thereto, as he has the holy equality of rights, which raises him over everything what Providence partly offers to humans*"; the Dietines are a particular expression of this equality.[95]

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[92] "Polacy! Ośmielcie się, aby raz być narodem a narodem prawdziwie wolnym!". Kołłątaj Hugo, Do prześwietnej Deputacji, In: *Listy Anonima i Prawo polityczne narodu polskiego*. Eds. Leśnodorski Bogusław, Wereszycka Helena, Vol. 1. Warszawa 1954.

[93] Król, Senat i Rycerstwo, trzy stany a jeden Szlachcic. (…) To tajemnica nigdy nie poięta rozumem, że Rzeczpospolita nie maiąc tylko ieden Stan Szlachecki do swojego Rządu, przecież z tego stanu zrobiła trzy stany, tak cudownym sposobem, iako i to, że z iednei Króla poiedynczey osoby, ma także ieden stan zupełny". Katechizm o tajemnicach rządu polskiego, jaki był około Roku 1735 napisany przez JP. Sterne w ięzyku Angielskim, potym przełożony po Francuzku, a teraz nakoniec po Polsku, w Samborze, w Drukarni Jego Cesarsko-Królewsko Apostolskiej Mości, Roku 1790, dnia 10 Stycznia, p. 3–4.

[94] Wszakże z tego daie się widzieć, że cały Maiestat Rządu Polskiego iest tylko Rzecząpospolitą Szlachecką?", i odpowiedź: "To iest iawna pewność, że w Narodzie Polskim kto nie iest Szlachcicem, nie może być nawet człowiekiem. Pytanie: Jakże, czyliż Prawa natury i własności mogą się odmieniać przez Konstytucją Rządu Polskiego? Odpowiedź: Gdzie idzie o powagę Stanu Szlacheckiego w Polszcze, tam wszystkie takie proste i drobne prawa, iako Prawa natury i własności ustępować muszą"Ibidem, p. 5.

[95] "Szlachta w Polszce ponieważ są ludźmi, są iedni bogaci i ubodzy, uczeni i nieumieiętni, rozumni i głupi. Otóż maią naygłównieyszy przywiley swoyei Konstytucyi, że mimo te rozróżnienia Opatrzności, są sobie wszyscy równi, i jak prędko w Polsczcze iest kto szlachcic, iuż do niego nie

The peasant-farmer in Poland is not a human, he "*has only qualities of soul and body, but his person is not a human, he is the Nobleman's own thing, who being an omnipotent Lord can sell or buy him, use him to his advantage*."[96] A town resident is "*a being between the human or else the lesser noble and the non-human or else a peasant*", "*substantia incompleta*". He lives like a gentleman, "*the latter bows thereto, when in need to borrow money*," but he does not have "*all the powers which adorn human nature"* because the law does not allow it: the law forbids him to be an abbot or bishop of a diocese, or an army officer, he may not cultivate the land, "*in short, a townsman born in the Republic belongs to no state nor is he a citizen.*"[97]

The author of another Catechism is kinder and treats his educational mission more seriously, thus sketching the political ideal, "*So, do the people constitute the law?" Yes. In the Nation whose people are free, they enact the law, to which they subdue voluntarily and without coercion,"*by which it differs from the people subordinated to an autocrat. Freedom means the ways which" *the man grabs to become happy without harming anybody else*. "Freedom has a natural dimension, it is the state of nature, citizenship, as well as a political dimension:" *the status of the nation, which enacts the law itself on its own either by a common vote by the people themselves or by agreeing thereto by their representatives who express their will*".[98] The author defines the duties of citizens, including the political activity, "*the obligation to work and hire oneself to the interest of the home country*". However, the community is made up of three classes; lesser nobles, burghers, and farmers; the first state "*was granted by the superior sovereignty this title to reward the merits in the service for the community, to reward talents and virtues*". Townspeople are very needed and useful for the industry and work, whereas farmers "*defend the States, feed and clothe all the other inhabitants (…) are the source of all the good and happiness of the nation and contribute to the power of each country*." Both the lower classes are more useful for the nation, hence the need to foster them, "*encourage them without having them in contempt, sweeten their hardships, declare great respect and gratitude, consider them friends and brothers*", a nobleman, who despised them, would deserve a reprimand. "*Such a conduct would mean his scarcity*

należy ani ubóstwo, ani głupstwo, ale święta równość Prawa, wynosi go nad to wszystko, co Opatrzność po części rozdaie ludziom". Ibidem, p. 14–15.

[96] "ma tylko przymioty duszy i ciała, ale zaś osoba iego nie iest człowiekiem, ale rzeczą własną Szlachcica, który będąc Panem iedynowładnym chłopa, może go przedawać i kupować, obracać na swój pożytek". Ibidem, p. 5–6.

[97] pośrzedniczącym iestestwem między człowiekiem Szlachcicem, a nie człowiekiem chłopem", "substantia incompleta". Żyje jak szlachcic, szlachcic "kłania mu się, potrzebując pieniędzy pożyczyć", lecz nie ma "wszystkich władz ozdabiających naturę człowieka", ponieważ prawo mu przeszkadza: prawo zakazuje mu być opatem zakonnym i biskupem diecezji, oficerem, nie może uprawiać roli, "słowem urodzenie Mieszczanina w Rzeczypospolitey nie ma ani stanu, ani iest w rzędzie obywatelstwa". Ibidem, p. 6–7.

[98] "stan Narodu tego, który sam sobie prawa przepisuie, iuż to przez okrzyknienie powszechne samego ludu, iuż to przez zgodzenie się na to iego reprezentantów, którzy wyrażają iego wolę". Katechizm Narodowy w Warszawie, 1791, W Drukarni uprzywileiow. Michała Grolla, Księgarza Nadwormego J.K. Mci., p. 5–6.

of enlightenment, his shortage of morality and politics (…), but unfortunately there still remains a great amount of unpunished superstition".[99]

Supporters of far-reaching social reforms criticized the half-hearted parliamentary solutions, such as the ennoblement programme of townspeople proposed in autumn 1790. On the pages of an anonymous controversial brochure, which was attributed to Franciszek Salezy Jezierski, it was alleged that in this way the nobility wants to deprive the bourgeois class of its finest individuals and drag them insidiously to its side.[100]

As mentioned, the demands associated with the estate of peasants had a very limited character. They were an expression of the physiocratic doctrine, whose assumptions were contrasted with the uncertain legal position of the peasantry in Poland. An exception was Józef Pawlikowski, whose emancipatory writing "On Polish subjects" had a nearly revolutionary character.[101] Appeals addressed to the King and the Parliament took the form of a call to the king to prove to be the father of "all" and make everybody without exception happy under his dominion.[102] The arguments originated rather from the ecclesiastical doctrine or the ancient history, however "*The light in Europe slowly expanding to Poland, had a difficulty in finding its access to the dispersed Polish lesser nobility, whereas all its way to the Peasants Estate was obstructed.*"[103] The opponents of radical action took the voice, "*unenlightened people do not know what freedom means, and which decent freedom is vested in each state*."[104] Many voices commonly realized a danger in the French example: "*the hacks want to vest human equality and the sentence on freedom in the town, intoxicated by the French circumstances. This prejudice is false or rather the French plague moved into the heads of Polish writers; towns! do not believe this*".[105]

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[99] Obie niższe klasy są pożyteczniejsze dla Narodu, stąd wynika potrzeba sprzyjania im, "zachęcania ich, niegardzenia nimi, słodzenia trudów, oświadczania im największego uszanowania i wdzięczności, uważania ich iak przyjaciół i braci", szlachcic, który by nimi gardził, wart by nagany. "Ten postępek ukazałby w nim niedostatek oświecenia, niedostatek moralności i polityki (…), lecz nieszczęściem wielka moc jeszcze pozostaie przesądów bez upodlenia". Ibidem, p. 9–13.

[100] NN [F.S. Jezierski], Głos na prędce do stanu miejskiego, Warszawa 1790. Comp. Grześkowiak-Krwawicz, Anna. 2000a. *O formę rządu*…, p. 177–179.

[101] NN [Pawlikowski, Józef], O poddanych polskich, Roku 1788. Comp. also Rostworowski, Emanuel. 1963. Myśli polityczne Józefa Pawlikowskiego In: Legendy i fakty XVIII w. Rostworowski Emanuel (ed.). Warszawa: Państwowe Wydawnictwo Naukowe, p. 196–264.

[102] NN, Głos poddaństwa do Stanów Sejmujących, n.p., n.d.

[103] "Światło w Europie powoli rozszerzające się z trudnością do Polski znalazło wstęp do rozproszonej szlachty, a wcale zatamowaną miało drogę do stanu wiejskiego". NN, Uwagi o chłopach, w Warszawie, w Drukarni uprzywilejowanej Michała Grölla, Księgarza Nadwornego J.K.Mci, in edition of Woliński Janusz, Michalski Jerzy, Rostworowski Emanuel. 1955. Materiały do Dziejów Sejmu Czteroletniego, Vol. 1, Wrocław: Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, p. 104.

[104] "nie zna lud nieoświecony, co to wolność znaczy, jak każdemu stanowi w towarzystwie inna wolność przyzwoita". Ibidem, p. 106.

[105] "chcą w miasta wrazić pismaki równość człowieka i zdanie o wolności, trafunkiem francuskim upojeni. Fałszywe to jest uprzedzenie, a bardziej zaraza francuska przeniesła się do głów polskich pisarzów; nie wierzcież temu, miasta". Jezierski Jacek, Wszyscy błądzą. Rozmowa Pana z

In the "Historical and Political Diary" (Pamiętnik Historyczno-Polityczny), this difficult issue is raised relatively less frequently and in a rather balanced way.[106] The peasant issue very easily became an instrument of demagogic republican conservative narrative which would notoriously accuse the King and the reformist camp of plans for the peasantry emancipation or their incitement.[107]

Characteristically, after the adoption of the constitution and in the course of struggle for its retention, even at a time when the fate of the constitution was doomed, in view of the allegations of Stanisław Szczęsny Potocki, Marshal Małachowski defends the King against the charges of incitement of the peasantry and the middle class, "*the thoughts of the King have always recognized the priority and superiority of the Nobility over the Burghers and Peasants; His Majesty makes no secret of this, however, that he wishes and thinks the thing needed is to improve the Urban State and agriculture more than the situation remained of the Parliament of 1786*".[108]

4.2.3 'The Nation' in the Parliamentary Debate

There is no doubt that the parliamentary plenum is the main forum in which the exclusive authority of the nobility, the Knights state and the Senators state to take up legislative actions is emphasized, which, at the same time, is just a kind of mystification, as this assumption was practically never challenged. In the first half of the eighteenth century, such opinions as the demands by Antoni Potocki "*to create a state of townspeople equal to the lesser nobles*"[109] were sporadic at the Parliament. Andrzej Zamoyski, the author of the draft of the Codification of Court Laws, spoke more emphatically in his famous speech at the 1764 Convocation. However, even though the journalism of the era of the Great Parliament opened to a larger extent to promoting a broader understanding of the nation, the parliamentary debate had much more conservative overtones.

Rolnikiem. Obaj z błędu wychodzą, W Warszawie u P. Dufour, konsyliarza nadwor. drukarza J.K.Mości i Rzplitej, dyrektora drukarni Korpusu Kadetów, 1790, in edition of Woliński Janusz, Michalski Jerzy, Rostworowski Emanuel. 1955. Materiały do Dziejów Sejmu Czteroletniego, Vol. 1, Wrocław" Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, p. 297.

[106] Homola-Dzikowska Irena. 1960. *Pamiętnik…,* p. 205–208. Comp. in particular: Myśli względem dopełnienia wolności i pomyślności narodowej przez Sejm niniejszy konstytucyjny, *Pamiętnik Historyczno-Polityczny*, 1791 I, p. 371–374.

[107] Michalski Jerzy. 1952. Propaganda konserwatywna w walce z reformą w początkach panowania Stanisława Augusta, *Przegląd Historyczny*, 43 (3–4), p. 560–561.

[108] "myśli Krolewskie były zawsze uznające pierwszość i wyższość Szlachty nad Mieszczan i Chłopów; z tym się jednak Król JMść nie tai, że życzy i myśli rzeczą potrzebną ulepszyć Stan Mieyski i rolniczy nad sytuacyą która iest zostawiona po Seymie 1786". Copy of letter of JW. Małachowski to JW. Szczęsny Potocki Mar. G.Konf. Kor., de 5 Xbris 1792, AGAD, AKP, Pudło (box) 90, k. 692.

[109] Bieniarzówna Janina. 1952. Projekty reform magnackich w połowie XVIII w., *Przegląd Historyczny*, 42: 317.

The nobles, as representatives of the Nation were elected to make the laws, including the specific ones, which was announced by the appointment of the Government Deputation with the task to draw up the "Bill for the New Form of Government". Shortly before finalizing the work, the townspeople representation started to act by submitting memoranda that even in their softened version were considered by the king to be too far-fetched. At the session on the 15th of December 1789, castellan Jacek Jezierski appeared with an unusually sharp criticism of city delegates, whose activities he compared to a revolt against the fixed arrangement of social relations.[110] Jan Dekert and other authors of the manifesto found it reasonable to keep the softened version and courageously stand up to the hetman "*party of zealots*". Krystyna Zienkowska argues that the King himself was opposed to the introduction of the townspeople issue on the agenda of the Parliament (nor did he like the introduction to the Memorial of city delegates referring in his opinion to French revolutionary literature), while Ignacy Potocki acted in a completely different way, introducing a revolutionary passage into the first edition of the "Rules…": "*of the important duties of the nation to secure and bring up the freedom, property and equality of every citizen, derive the following rights and authority appropriate to the nation*".[111] Finally, the disputed fragment was prematurely "denounced" by deputy Suchodolski, who also alleged that the draft was not an agreed upon work of the entire deputation but, as a matter of fact, of one man. Under the influence of Suchodolski's speech, the term "nation" was deleted from all parts of the bill and replaced by the terms of "*State of Lesser Nobility*", "*Republic*", whereas "*every citizen*" was turned into "*every resident*". Thus, the task of the Republic was to guarantee the freedom and equality to the state of lesser nobles.[112] Similarly, "the Draft to the Form of Government" turned out to be too republican. It spoke about sovereignty of the nation but did not refer the nation directly to the nobility, rather using it as an open notion, not quite defined. The Potockis' republicanism became widely too suspected and a similar situation took place as in the case of the "Rules …" – during the discussion on the cardinal laws in September 1790, the word nation was deleted and replaced with the term "Republic" and the conservative deputies further demanded to supplement it to state: "*The Republic made up by lesser nobles*".[113]

[110] Mowa JW. Jacka Jezierskiego na sejmie dnia 15 grudnia 1789 roku powiedziana, n.p. [Warszawa], n.d. In response appeared: Bezstronne uwagi nad mową JW. Jezierskiego… mianą na sejmie dnia 15 grudnia 1789 przeciwko mieszczanom J. Baudouina de Courtenay, Warszawa, Drukarnia M. Grölla, 1790. Jezierski then tried to accuse the author before the Court Marshal, and then called in parliament for legal action. Comp. Szczepaniec Józef. 1991. Sejm Wielki…, p. 168–170.

[111] Z istotnych powinności, które ma naród, zabezpieczenia i wychowania wolności, własności i równości każdego obywatela wypływają następujące prawa i władza narodowi właściwa". Printed amended proposal: AGAD, Archiwum Sejmu Czteroletniego, sygn. 13, k. 66. Comp. Zienkowska Krystyna. 1976. *Sławetni i urodzeni. Ruch polityczny mieszczaństwa w dobie Sejmu Czteroletniego*, Warszawa: Państwowe Wydawnictwo Naukowe, p. 103–106.

[112] Zienkowska Krystyna. 1976. *Sławetni*…, p. 111.

[113] "Rzeczpospolita z stanu szlacheckiego złożona". AGAD, ASCZ, sygn. 9, k. 159. Cf. also Zienkowska Krystyna. 1976. *Sławetni*…, p. 117–119.

The King remained neutral, not taking a voice at this session. Moreover, it was a deliberate policy of preparation for the consecutive phases of the discussion on the cardinal laws that were to apply to the royal prerogatives. Potocki lost this battle as well.[114]

At the same time, the representative dimension of the deputies' parliamentary function in the context of the mandate entrusted with them by the local Dietines was generally regarded by them as very serious, as confirmed by discussions on the prorogation (extension) of the Parliamentary session (e.g. the discussion in September 1790, whether to "ask the nation" through the universal manifestos for the permission to extend the session) and the deputies' doubts about the legality of the regulations of Parliament carried out contrary to the Parliamentary instructions. The King pointed out in his voice of the 24th September, 1790: "*Nobody respects the Rights of the Nation more, nor is anybody more convinced than I that the legislative power is not for life, thus it should return to its source i.e. the nation electing its Representatives*".[115]

On almost every occasion, the deputies were ready for a corresponding argument regarding the position of lesser nobility – an example can be the session No CCL of 20 April 1790,[116] when, in connection with the planned census and vetting of farms, in fact, problems having nothing in common with politics, a discussion arose, whether "Christians" should be further divided into three classes, separate for the lesser nobility, townspeople and peasants; or whether lesser nobles should be included at all, as they are not recruited to the army nor do they pay a poll tax. Characteristically, a deputy of Pińsk, Butrymowicz added that "*this obligation is not provided by any law as in itself that would be contrary to the Republican Spirit*". Member Niemcewicz notes in response that every man belongs to the people and one should not be afraid to place lesser nobility in an appropriate column, as "*woe be to the government that funds itself on inhumanity and terror. Let each citizen, influencing the government be just, let justice be equal to every state – then everyone will be attached to their own country, loving their natal land*" and then he asks to return to substantive issues.[117]

All voices of the parliamentary debate are full of indications that these disputes were led by the "nation". In the parliamentary states the King pointed to the fact that

[114] Janeczek Zdzisław. 2007. Idea wolności w mowach i pismach Ignacego Potockiego. In: *Spory o państwo w dobie nowożytnej: między racją stanu a partykularyzmem*, Anusik Zbigniew (ed.), Łódź: Wydawnictwo Uniwersytetu Łódzkiego, p. 201–214.

[115] "nikt nie poważa więcey Prawa Narodu y nie iest bardziey przeświadczony nade mnie, że Moc Prawodawcza nie dożywotnia, koleynie wracać się powinna do źrzódła swego, to iest do obierającego swych Reprezentantów Narodu". Głos J Kr. Mci Na Sessyi Seymowey dnia 24 Września 1790 Ru miany, AGAD, AKP, sygn. 207, k. 1047 (540).

[116] Dziennik Czynności Seymu Głównego Ordynaryinego Warszawskiego, pod związkiem Konfederacyi Oboyga Narodów agituiącego się 1790, Sessya CCL, Dnia 20 Kwietnia we Wtorek.

[117] "biada takim rządom, które się funduią na nieludzkości i postrachu. Niech każdy Obywatel w Rząd wpływający będzie sprawiedliwym, niech równy każdemu stanowi wymiar sprawiedliwości oddawany będzie, w ten czas każdego przywiązanego do swego Kraiu swoią kochającego Oyczyznę zobaczemy". Ibidem.

he was "*within the National Jurisdiction*", the "*Enlightened Nation*."[118] The laws written by the Parliament are the laws of the Nation,[119] the will of the Nation "*shed into our mouths and our laws*"[120]; and perhaps even more, what the constitutional Deputation does, "*will flow from the will of the Commonwealth*".[121]

Finally, the next stage of debate is an issue that appeared during the deliberations in early 1791, along with the adoption of the work on the law on regional assemblies (Dietines). Here, besides the theme of the rights of military officers in active service to parliamentary mandates, particularly vivid emotions were induced by the matter of deprivation of the rights of the non-property nobility failing to pay the due amount of tax. The repeated argument "in favour of" this solution consisted in the susceptibility of poor nobility to any pathologies associated with the occurrence of clientelism. The invoked counterarguments, on the other hand, focused on the injustice – the once obtained ennoblement for the "knight opus", for the blood shed for the country, whilst when contemporary economic relations and usury led to the impoverishment of this layer, it is proposed to withdraw the rights of the non-property nobility.[122] The division of nobility so strongly emphasising its unity was feared as was the strengthening of the position of the aristocracy. " *Not the rich, but the virtuous are the honour of the Country*", said Józef Olizar.[123] Also, the voices in that debate concerned with military rights recalled the roots of the nobility, the risks of isolating the military corps, as in a Republican Government the army could not be considered ministerial.[124] On the other hand, it is necessary to note the voices in support of the withdrawal of rights of non-possessionists. Members saw this as the only way to free themselves from the magnates and clientelism. "*There are three things which are the scariest for the Republic: the King having too much of a vantage, a powerful neighbour and an overbearing citizen. The law protects us from the first; the army covers the second, but the third would have remained, if parliamentary freedom was allowed for the non-possessionists*" as member Boreyko

[118] Głos Jego Kr. Mości na Sessyi Seymowey dnia 20. Lipca 1789. miany, AGAD, AKP, sygn. 207, k. 813 (443).

[119] Prince Czartoryski in the debate on how to perform tasks by deputations from the Chamber asks: "Kto ieźli można tak myśleć, że to, coby postanowiły Osoby od Seymu, y z pośrzód niego obrane, nie byłoby Prawodactwem Seymowym, że go cały Seym nie stanowi, toby równie powiedzieć można, że Prawa, które Seym pisze, nie są Prawami Narodu, bo ich sam cały Naród nie pisze". Sessya 36, 17 Lutego 1791 r, AGAD, ASCz, sygn. 19, k. 571.

[120] [Wola Narodu] "przelana do ust i prawa naszego"Głos Jaśnie Wielmożnego Marcina Leżeńskiego posła Bracławskiego Względem Proiektu dokączenia Opisów Seymikowych Dnia 18. Lutego Roku 1791. W Izbie Seymowey miany, Sessya 37 dnia 19 Lutego 1791 R., AGAD, ASCz, sygn. 19, k. 634.

[121] "to będzie wypływało z woli Rzplitej". Such reasoning Suchodolski, Castellan of Radom assigns to antagonists.Sessya 37 dnia 19 Lutego 1791 R., AGAD, ASCz, sygn. 19, k. 629od.

[122] Comp. Voice of JW. Suchodolski, Sesja 33 Dnia 11 Lutego 1791 R., AGAD, ASCz, sygn. 19, k. 481, and other voices in this session, especially Józef Kalasanty Olizar, Volyn member, k. 491- 492od.

[123] "Nie bogaci, lecz cnotliwi stanowią honor Kraju". Ibidem, voice of Olizar, k. 491od.

[124] Sessya 34 z 14 lutego 1791, Sessya 35 dnia 15 lutego 1791 R., AGAD, ASCz, sygn. 19, k. 530 – 579od.

perorated.[125] Adam Lityński rightly points out the specific paradox of the Polish political scene – saving democracy by limiting political rights.[126]

At the same time this deadlock in parliamentary work made the members aware of how inefficient the parliamentary procedure was to allow the deliberations over individual provisions of the law on regional assemblies to be delayed for several days, which was to be counteracted by the project proposed by member of Krakow Sołtyk, which entrusted legislative binding transactions to the constitutional deputation elected by the Parliament.[127] Members wished, however, to deliberate on the regulation of assemblies, i.e. those that they were directly related to, in pleno.

The issue of towns appeared in the second half of 1789. An analysis of royal speeches allows to find references to the generosity of Warsaw and special royal favours to Krakow. In his speech of the 15th of December, 1789, the King expressed himself in the following way: "*it is not only my opinion that the grandeur of the Knights State deserves being granted freedoms and liberties, but it is also in its* [Knights Estate's] *interest.*"[128] This confirms the previous notes that the reform measures were to be limited to an "*improvement", "raising*" of the status, extending the rights of townspeople, but absolutely not to contribute to their equality. The words of the king recorded in the spring of 1791 are of a bit more progressive character, i.e. already in the course of works on the *Law on towns* where the king stressed his obligations towards the towns and cities, the duty to defend "*the rights and privileges of people of any condition*."[129] In another comprehensive speech of the 14th of April, 1791, he cited the example of the Danish nobility that, reserving all the rights for themselves and denying them to other estates, "*went towards the fullest government of absolutism*."[130] According to the King, the extension of the rights was to change the attitude of the townspeople, who would be interested in defending their freedom "together" with the nobility [in case of an external emergency]. He was of the opinion that it was insufficient for townspeople to be entitled to send

[125] "Trzy są rzeczy dla Rzeczypospolitey naystrasznieysze: Król nadto przewagi maiący, sąsiad potężny i przemagaiący obywatel. Od pierwszego zabezpiecza nas prawo; od drugiego zasłania wojsko, ale zostałby się trzeci, gdyby wolność sejmikowania, nieposesjonatom dozwolona była". Voices from 28 January 1791., cited in Gazeta Narodowa i Obca, Nr X z 2 lutego 1791, p. 1.

[126] Lityński Adam. 1999. Sejmik jako instytucja demokracji szlacheckiej 1764–1793. Tradycje – mity-nowości –utopie. In: Parlamentaryzm i prawodawstwo przez wieki: prace dedykowane prof. Stanisławowi Płazie w siedemdziesiątą rocznicę urodzin, *Malec, Jerzy*, Uruszczak Wacław (ed.), Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, p. 76, p. 75–86.

[127] Comp. for example Głos Jaśnie Wielmożnego Imci Pana Piusa Kicińskiego, Posła Ziemi Liwskiey, Na Sessyi Seymowey Dnia 17 lutego 1791 R., AGAD, ASCz, sygn. 19, k. 583 – 584v. and the other voices.

[128] "nie tylko iest zdaniem moim, że przystoi wspaniałości Stanu Rycerskiego nadawać im wolności y swobody, ale że to iest y Interessem jego". Głos JKMci na Sessyi Seymowey dnia 15. Grudnia 1789. miany, AGAD, AKP, sygn. 207, k. 897 (460).

[129] Głos Jgo Kr. Mości na Sessyi Seymowey dnia 6. Kwietnia miany [1791], AGAD, AKP, sygn. 207, k. 1193 (612).

[130] Głos J. K. Mci na Sessyi Seymowey dnia 14. Kwietnia 1791 miany, AGAD, AKP, sygn. 207, k. 1198.

a deputation, without the right to vote, "*without freedom of speech, until asked*,"[131] which eventually would be included in the provisions of the future Constitution. The final reform would cover slightly more than 30 % of the townspeople living in free royal cities. Undoubtedly, the very process of selection of deputies to departmental assemblies, construction of desiderations, listening to the reports from the selection of the plenipotentiary all may be seen as a form of political mobilization of the middle class.[132] However, the implementation of the demands of the bourgeois movement should be assessed as extremely restrained.

The peasantry-related topic is rarely present in the parliamentary discussion. A similar tone to that used by free media was applied by Adam Wawrzeniec Rzewuski, who thus spoke in the debate over the starosties: "*I say freedom requires too pure a light, too noble a soul, to honor with it our not-enlightened farmers*".[133]

In the May discussions, doubts regarding the legitimacy of the Great Parliament to adopt the constitution returned. It was emphasized that, since the legislature was with the people, it could only be realized by local assemblies (Dietines), with the Members of Parliament being mere interpreters of the will. "*The will of the Nation does not come from the will of the members, but from the entire composition of citizens having the right of choice of the Representatives of Law who in the name of their tenure at the members' choosing, give the power to do express their will in the legislation.*"[134] A member from Oszmiana, Chomiński, thus lamented by proposing implementation of a despotic government: "*The Parliament has already become the Master of your will, and You the Nation, giving power to the representatives having it so far, have already lost it*" by introducing succession "*despite the majority number of Instructors in favour of the Election*".[135] These voices, already recorded in a heated discussion on the 3rd of May will soon echo in numerous writings critical of the constitution. Anna Grześkowiak-Krwawicz indicates that it was one of the most

[131] Ibidem, k. 1201 (616).

[132] Bałtruszajtys Grażyna. 1996. "Zgromadzenia ludu miejskiego" według projektów i ustaw Sejmu Czteroletniego. In: *Parlament, prawo, ludzie. Studia ofiarowane Profesorowi Juliuszowi Bardachowi w sześćdziesięciolecie pracy twórczej*, Iwanicka Katarzyna, Skowronek Maria, Stembrowicz Kazimierz (ed.), Warszawa: Wydawnictwo Sejmowe, p. 47–54.

[133] "wolność mówię zbyt czystego wymaga światła, zbyt szlachetney duszy, aby się nią nie oświeceni rolnicy nasi zaszczycać już mogli". Adama Wawrzeńca Rzewuskiego kasztelana witebskiego Głos w Stanach Rzeczypospolitey Zgromadzonych dnia 31 Października 1791, AGAD SD III 1.

[134] "Wola Narodu nie pochodzi od woli Posłuiących, ale od całego składu Obywatelów do wyboru Reprezentantów Prawa maiących, którzy w Imieniu swym na Poselskie urzędowanie wybierając, moc czynienia w przepisach woli swey daią." Głos JP Posła Wileńskiego Korsaka, for: NN [Siarczyński], Dzień Trzeci Maja Roku 1791, w Warszawie, Nakładem Drukarni M. Grolla, Księg. JKM, p. 94.

[135] "już Seym stał się Panem Twojey woli, a Ty Narodzie, nadawczą moc Reprezentantom maiąc dotychczas, iuż ją straciłeś", [wprowadzając sukcesję] "mimo większość liczby Instrukcyow za Elekcją" JP Chomiński, poseł Oszmiański, for: NN [Siarczyński], Dzień Trzeci Maja…, p. 147.

serious allegations against the constitution, accusations of breaching one of the fundamental political principles.[136]

4.2.4 'The Nation' in Constitutional Acts

As indicated above, the term "nation" did not appear in earlier constitutional acts. In the "Rules for improvement of the form of government" of December 1789 inspired by Kołłątaj and prepared by Ignacy Potocki, the concept of the nation was deleted and replaced by the concepts of "*lesser nobility estate*", and the "*Republic*", "*who entrusted the proper authorities and rights*". A key duty of the state in the final version of the act was to ensure freedom to the nobles, preservation of their equality, retrenchment of ownership of each inhabitant and extension of governmental protection to "*all in general*".[137]

Eventually, a similar step was made in September 1790 when the cardinal laws were approved and finally published in January 1791. Also here there is absence of a broader reference or modern understanding of the term "nation". What is meant is the establishment of laws by the nobility "*for the nation*", "*and those [laws] that people only owe obedience to*". It is solely the nobility that remain the political nation – "*free speech at regional assemblies*" for every nobleman "*is most solemnly protected*". "*Free speech*", expressed in speech or in writing, shall however be entitled to "*every citizen*".[138]

Finally, the Constitution, adopted on the 3rd of May, contained many paradoxes as far as the issue of "nation" is concerned. As the enacting entity, the monarch was indicated together with the Parliament by these words: "*Stanisław August, by the grace of God and the will of the Nation, Polish King, Grand Duke of Lithuania, Russia, Prussia, Mazovia, Zemajtija, Kyiv, Volyn, Podole, Podlasie, Livonia, Smolensk, Siverskyi and Chernihovsk together with the confederated states in a dual number, representing the Polish nation*." It is clear that, in fact, without the consent of the states, the King could not introduce any constitutional regulation, as it was only the lesser nobility that had the legislative power. Subsequently, the Constitution used the words "*the fate of us all*". The concept of "the nation" appeared wider in two regulations – in the Rousseau-like art. V: "*All the authority in a human society takes its origin in the will of the nation. So to keep the whole States, civil liberties and social order equally important forever, three authorities shall constitute the government of the Polish nation, and always will by force of this law, that is: the legislative authority in the assembled estates, the supreme executive authority of the King and the Guard, and the judicial authority in jurisdictions to that end instituted or to be instituted*," and art. XI, the National Armed Force: "*The nation owes to itself its own defence against an attack and preservation of its integrity. Therefore,*

[136] Grześkowiak-Krwawicz, Anna. 2012. Czy rewolucja może być legalna? 3 maja w oczach współczesnych, Warszawa: Wydawnictwo DiGA, p. 68–70.

[137] Zasady do poprawy formy rządu, Volumina Legum, t. IX, p. 157–159.

[138] Prawa kardynalne niewzruszone, Volumina Legum, t. IX, p. 203–204.

all citizens are defenders of national integrity and liberties. The Army is nothing else, but only a defensive and decent force extracted from the overall strength of the nation. The nation owes its army a reward and esteem for the exclusive devotion to its defence. The army owes the nation protection of borders and maintenance of common peace, in short, it is to be its strongest shield".[139] Interpreters of both regulations come to an agreeable conclusion that the word *nation* referred to in art. V had a limited scope, and practically related only to the nobility authorized by a number of laws to participate in the executive, legislative and judicial powers, whereas art. XI already imposed such an obligation on all citizens, however, of course, the Constitution did not construct the notion of a "*citizen of the Republic*." It was merely a foretaste of the bourgeois revolution but in practice the duty to defend was to refer both to the estate of lesser nobility and peasants, which was later proved by the military action against Russia, both in the war for the defence of the Constitution in 1792, as well as in the Tadeusz Kościuszko Insurrection in 1794.

In summary, in Poland the principle of sovereignty was formulated in such a way that all the authority originates with the will of the people, strictly to emphasize that the function of representation of the people in enacting the law was only fulfilled by a "free nation", that is such that by virtue of tradition and the past should "*prevail in public life*." It can be assumed that the 3rd of May constitution uses the terms "*free nation*" not in the context of national sovereignty but rather to refer to its political representation. This concept also appears in the about-constitutional laws, to precisely define the nobility as a state playing the role of a representative of the nation.

The said nation was still divided into classes, which was reflected in the very structure of the Constitution. Its extensive art. II entitled "Gentry-landlords" left no illusions – profound changes in social issues were missing in the Government Act. Nor did art. III, dedicated to the townspeople, realize the demands expressed by the publicist writings. On the other hand, special attention is deserved to the fact that in parallel to a slight improvement of the situation of the townspeople, it ended up in withdrawing the rights of the non-possessionist nobility. A consistent interpretation is that these measures are likely to open the way to changes in the system of constitutional monarchy based on the bourgeoisie. Also, Article III, dedicated to the townspeople did not realize the demands expressed by the literature. At the same time, however, it should be noted that, in accordance with article VI of the constitution, "*the deputies elected by the Dietines will be recognized in the legislation and*

[139] Art. V: "wszelka władza społeczności ludzkiej początek swój bierze z woli narodu. Aby więc całość państw, wolność obywatelską i porządek społeczności w równej wadze na zawsze zostawały, trzy władze rząd narodu polskiego składać powinny i z woli prawa niniejszego na zawsze składać będą, to jest: władza prawodawcza w Stanach zgromadzonych, władza najwyższa wykonawcza w królu i Straży, i władza sądownicza w jurysdykcjach, na ten koniec ustanowionych, lub ustanowić się mających" and Art. XI: Siła zbrojna narodowa: "Naród winien jest sobie samemu obronę od napaści i dla przestrzegania całości swojej. Wszyscy przeto obywatele są obrońcami całości i swobód narodowych. Wojsko nic innego nie jest, tylko wyciągniętą siłą obronną i porządną z ogólnej siły narodu. Naród winien wojsku swemu nadgrodę i poważanie za to, iż się poświęca jedynie dla jego obrony. Wojsko winno narodowi strzeżenie granic i spokojności powszechnej, słowem winno być jego najsilniejszą tarczą".

the general nation's needs according to this Constitution as the representative of the whole nation in whom the common trust will be vested".[140] The article mentioned the entire nation, not only the nobility. Deputies were supposed to represent the needs of the entire nation, also the peasants and burghers who, although did not elect these Members of Parliament, place in them their hope for the realization of their interests, since deputies were persons of social (public) trust.

The Constitution in fact lifted the instructions although the law passed a month earlier on Dietines[141] – after rejecting the different proposals twice – purposely preserved the binding nature of instructions. The king was also subjected to the will of the people, in accordance with the broadly discussed (see further below) article VII of the highest executive authority entrusted with the king only after ensuring "*the free nation power of establishment of its laws*" and "*the power to guard over all executive authorities and elect officials to magistracies*".[142]

The article of the constitution devoted to the bourgeoisie only declared that the law of the royal towns be part of the constitution, "*as the law of the free Polish nobility ensuring new, genuine and effective force for the security of their liberties and the integrity of common Fatherland.*" ("*jako prawo wolnej szlachcie polskiej, dla bezpieczeństwa ich swobód i całości wspólnej Ojczyzny nową, prawdziwą i skuteczną dające siłę*"). Even the consecutive article devoted to the peasantry was much broader, although in fact it represents only physiocratic praise of the rural state and its responsibilities. The real significance could only be seen in the commitment to draw up detailed contracts with the peasants and the announcement of freedom for the immigrant population.[143] There came a political revolution, neither social nor economic one.

4.3 The Monarch as a Sovereign

4.3.1 Introduction

As noted already in the introduction, no thesis of the exclusive sovereignty of the monarch was ever raised in Poland, because this would have never been approved. Such an understanding of the role of the monarch was established naturally through

[140] "posłowie na sejmikach obrani w prawodawstwie i ogólnych narodu potrzebach podług niniejszej konstytucji uważani być mają jako reprezentanci całego narodu, będąc składem ufności powszechnej". Volumina Legum, t. IX, p. 222.

[141] Seymiki (Prawo o Seymikach), Actum in Curia Regia Varsaviensi Die Vigesima Octava Mensis Maij, Anno Domini Millesimo Septingentessimo Nonagesimo Primo, Zbiór Ustaw Seymowych w Warszawie; also: Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, t. IX, Kraków 1889, p. 289–241.

[142] Zagwarantowanie "wolnemu narodowi władzy praw jego stanowienia" i "mocy baczności nad wszelką wykonawczą władzą, oraz wybierania urzędników do magistratur".

[143] Leśnodorski Bogusław. 1951. *Dzieło Sejmu Czteroletniego (1788–1792). Studium historyczno-prawne*, Wrocław: Wydaw. Zakładu Narodowego im. Ossolińskich, p. 226–230.

the elective experience. Moreover, it is easy to notice the ultimate exclusion of the monarch from the scope of discussion on the shape of law-giving powers. And yet, Kołłątaj precisely concluded: "*never did the nation honestly think that the republican government depended on reducing the king's prerogatives, but on permanent actions of the people representing the will of the nation and exercising it*".[144] In this sense, a proof of maturity of the nation was a parliamentary resolution of September 1790 which restored the monarch's right to grant offices, withdrawn in 1775.[145] Until that time, however, an almost phobic attitude towards monarchs had dominated, as they were constantly accused of absolutist tendencies. Also Stanisław August Poniatowski would frequently be an object of such a propaganda in the earlier period of his reign.[146] At the same time, it was reluctantly admitted that the King was a stabilizing element of the political system.[147] Nonetheless, it was agreed that the King was the embodiment of majesty, the carrier of solemnity and dignity, a representative in external relations.[148]

Hence, the question of the monarch's position was, by far, the most vividly discussed problem of sovereignty and aroused the strongest emotions, in particular – the way of his appointment, that is, the decision whether to continue the election, or rather introduce the hereditary throne. The talk on this issue would burst almost suddenly, often on the occasion of subsidiary questions. In terms of parliamentary discussions, one can clearly distinguish several major stages: discussion on the "Rules for improvement of the form of government" in December 1789, followed by the ongoing debates in autumn 1790 on a draft of the cardinal laws and then on the proclamation to the Nation. Ultimately, the case was settled surprisingly, and contrary to numerous Dietines instructions, by enacting the May Constitution introducing the election by a dynasty and appointing the Saxon Elector Frederick Augustus to the throne after the death of King Stanisław August Poniatowski.

4.3.2 The Monarch in the Debate of Public Media

As indicated earlier, the monarch was no longer perceived as a legislative authority acting on his own. Michał Wielhorski in the already cited dissertation on freedom took a radical position: the King does not even have the role of an estate, he is not even one of the pillars of "independence" – as supported by the fact that even during the *interregnum* the State will be able to function.[149] The Kings became exclusively

[144] "nigdy zaś rzetelnie nie pomyślał naród, iż rząd republikantski nie zależy na odjęciu prerogatyw królowi, lecz na nieprzestannym działaniu osób reprezentujących naród i wolę jego wykonywających". [Kołłataj Hugo],1954. *Listy Anonima i Prawo polityczne narodu polskiego*. Eds. Leśnodorski Bogusław, Wereszycka Helena, Warszawa, Vol. 1.p. 265.

[145] Volumina Legum, t. IX, p. 183.

[146] Michalski Jerzy. 1952. Propaganda…, p. 536–562.

[147] Grześkowiak-Krwawicz, Anna. 2003. Czy król…, p. 472–473.

[148] Ibidem, p. 474–475.

[149] Michał Wielhorski,,op.cit., p. 44–45.

the "first officials of the Republic".[150] The author of the anonymous "Thoughts on improving the Forms of Government" emphasized the subordination of the King to the law, concluding that "*all power, all law-giving rights that earlier served the only authority of Polish Kings, today is the attribute of the Knights' state. The King holds the priority everywhere, he presides everywhere, but he decides nowhere*."[151]

The main stage of discussions in the free media on the role of the monarch was the dispute between the protagonists and antagonists of king's succession.[152] One of the most famous protagonists was an activist of the Republican camp – a hetman, Seweryn Rzewuski. Amazingly, in his key pamphlet,[153] he did not use classic arguments of traditional, historical postulates against hereditary monarchy, but rather referred to current world events. It is the irony of fate that this conservative Sarmatian, a significant politician, a rich magnate opposing any social reforms, with sympathy invoked the revolutionary events in Franceand the United States assuming that the system devoid of a King was better than the hereditary monarchy. It shall be noted, however, that the voices in favour of abolition of the monarchy in the system of government were very rare.[154]

In the debate about the succession, the issue of freedom was also strongly emphasized. It was widely believed that the election "*granted us a lot of freedom*",[155] although the opponents cited historical arguments also in favour of the fact that at the times of hereditary kings, the Polish State was free, and the election contributed to as much freedom as anarchy.[156] The essential argument against the election, the "*pupil of freedom*", was the problem of anarchy during the *interregnum*.

Finally, the topic of the debate should be concluded with a strong accent. *How does the King of Poland hold the throne?* – as inquired by the author of the aforementioned Catechism. "*A King chosen in a free election is conceived in the womb of the Republic, behind the veil of nobility's freedom, owing to a powerful neighbouring State (…) The King is himself a complete estate, although in nature, he is only a single individual." "What is his importance in governing the Nation? During his election, the King means everything, after he takes the Throne, he does not mean much." "How is it that he means a lot during his election?" "The Nation, unwilling*

[150] Ibidem, p. 226.

[151] "wszelka władza, całe prawodawstwo, które przedtym iednowładnym Królom Polskim służyło, dziś iest w Rycerskim Stanie. Król wszędzie trzyma pierwszeństwo, wszędzie prezyduie, lecz nie decyduie nigdzie". NN, Myśli… Myśl Osma. Myśl względem…, p. 28.

[152] These issues have repeatedly been analyzed in Polish literature. It is necessary to recall the work of Zielińska Zofia. 1991. *"O sukcesyi tronu w Polszcze" 1787–1790*. Warszawa: Wydawnictwo Naukowe PWN, recently also some significant voices of the debate recalled the aforementioned Rafał Lis.

[153] Seweryna Rzewuskiego hetmana polnego koronnego o sukcessyi tronu w Polszcze rzecz krótka, n.p., n.d.

[Drezno 1789]. Walicki, Andrzej. 2000. *Idea narodu*…, p. 33–34. The title of brochure also served Z. Zielińska for the title of the aforesaid paper.

[154] Grześkowiak-Krwawicz, Anna. 2003. Czy król…, p. 483.

[155] Myśl z okazji "Uwag nad życiem Jana Zamoyskiego, n.p.. [Warszawa], 1788, p. 43.

[156] Grześkowiak-Krwawicz, Anna. 2004. O starożytnej wolności…, p. 43–45, 50–52.

to do anything for the public good, decides to take over all domestic needs from the King in Pacta Conventa; so at that time the King means as much as should be the task of the entire Nation." After coming to power, he does not mean much, "because the aristocracy, using the nobility differentiation, do not allow him to do anything. The rule over the military, the municipal courts, supervision of the Treasury, even the safety of the Majesty, all is transferred into the hands of Ministers, all that is left to the king's office is "convening Parliament, appointing officers, signing the fairs."[157]

4.3.3 The Monarch in the Parliamentary Debate

As mentioned before, Stanisław August Poniatowski played a prominent role during parliamentary discussions. His parliamentary speeches were characterized by acceptance of the customary rules of debate – which was supposed to be polite and erudite, however, the content had evolved: from his cautious statements from 1788 to 1789 to progressive ideas expressed in 1791.

As a rule, the King would use the parliamentary forum to emphasize his position of subordination to the Nation ("*those obligations which, among others, the Nation placed upon me when they elected me to reign over them*",[158] "*I recognise it is an honour to wear this Crown, which by your will was placed upon my head*",[159] "*my Office*",[160] "*appointed for the Throne by the Nation*"[161]), and his absolute reluctance to interfere with the powers and free discretion of the states, declared at least formally, which was supposed to be illustrated by the repeatedly quoted King's expression: "*The King with the Nation, the Nation with the King"*. A subsequent passage

[157] "Król wolną wybrany Elekcyą, poczyna się w żywocie Rzeczypospolitey, pod zasłoną wolności szlacheckiey, za sprawą iakiego Sąsiedzkiego Mocarstwa (…) Król iest stanem zupełnym, choć iest w naturze tylko poiedynczą osobą". W zarządzeniu Narodu Król co znaczy? Król przy swoiey Elekcyi znaczy wszystko, po obięciu Panowania nie wiele". "jakże to wiele znaczy przy swoiei Elekcyi?" "Naród niechcąc nic czynić dla dobra publicznego, wszystkie potrzeby krajowe wyzbacza zastąpić Królowi w Paktach Konwentach; więc Król w ten czas to znaczy, co powinno być dziełem całego Narodu". Po objęciu władzy znaczy niewiele, "bo możnowładztwo Panów, używając rozróżnienia Szlachty, nie dopuszcza mu nic czynić. Rząd woyska, Sądy Miast, dozór Skarbu, beśpieczeństwo nawet Majestatu, wszystko przeniesione iest w ręce Ministrów, władzy królewskiej pozostało "zwoływanie Seymu, rozdawanie Urzędów, podpisywanie Jarmarków". Katechizm o tajemnicach…, p. 11–12.

[158] "te obowiązki, które przy innych włożył na mnie Naród, gdy mi nad sobą Królować kazał". Mowa Jego Królewskiej Mości na Sessyi Seymowey dnia 9. Stycznia 1789. Roku miana, AGAD, AKP, sygn. 207, k. 807 (415).

[159] "znam chlubę nosić tę Koronę, którą Wola Wasza na Skronie moie włożyła". Mowa Jego Kr. Mości na Sessyi Seymowey dnia 26. Marca 1789 Rku miana, AGAD, AKP, sygn. 207, k. 829 (426).

[160] Głos Jgo Kr. Mci na Sessyi Seymowey dnia 1go kwietnia 1791 Roku. Miany, AGAD, AKP, sygn. 207, k. 1187 (609).

[161] "wezwany do Tronu wolą Narodu". Głos JKr. Mci na Sessyi Seymowey dnia 22 września 1791 r. miany, AGAD, AKP, sygn. 207, k. 1267 (649).

is also of great importance: "*I noticed long ago the advantage that a King reigning over a free Nation has over those Kings who govern in absolutist States, because the King of a free Nation, together with the representatives of free co-citizens, has the daily opportunity to strengthen his determination and have his mind enlightened through the comments made by those who, by engaging in parliamentary discussions with the King, exercise the sovereignty and enact the legislation for the Nation, while an absolutist Parliament has to determine everything on its own*", "*I am nourished by the light of my fellow deputies of the Parliament*", says the King.[162] Similarly, after the constitution had been adopted, he continued to emphasize: "*When the duties of ruling were placed upon me in the Pacta Conventa, I decided to understand always that the King of Poland shall never act without the Parliament, only shall he act, according to the will of the Parliament, which represents the Nation and its will*", and this was a particular feature of the doubled, constitutional Parliament.[163]

As noted, it was very easy for the Parliament to become a place to discuss the duties of the King and the manner of his appointment. The parliamentary sessions of September 1790 were a typical phase of this discourse. In the discussion over an unfinished article concerned with the nobility, who "*were free to create offices and appoint officers to hold them*", a Volhynian member of the Parliament, Świętosławski, demanded that an amendment be made to say that the nobility are "*free to appoint Kings*". The Lithuanian Marshal pointed out in his response that, in his opinion, such an amendment did not protect the interests of members as it was probably the members' intention to exclude the rule of a dynasty, and this option assumed either the election of a family or the election of a King. As regards Świętosławski's suggestion, it was requested that a proclamation be sent to the Nation; in response, member Przyłuski, the castellan of Brzeziny opposed, arguing that a nation who recognized the need for conscription and military taxes, "*would not hesitate to inform their representatives through instructions if it found the succession to the Throne to be its common good*". Member Niemcewicz promptly upheld his pro-succession position arguing that since the law and the Polish people's virtues prohibit it, a succession king would not seize "*the Treasury, the Army and the Tribunals*". The example of England was supposed to prove that although the throne there was hereditary but the rulers did not seek omnipotence, "*the freedom in France increases but nobody in France suggests the dynasty be disposed of*"(sic!). Niemcewicz pro-

[162] "dawno zważałem awantaż Króla panującego w wolnym Narodzie nad temi Królami, którzy rządy absolutne sprawuią, ponieważ Król wolnego Narodu wspólnie z Reprezentantami wolnych Współ-Obywatelów ma codzienną sposobność zasilania determinacyi swoiei, y oświecania swych myśli przez podawane uwagi od tych, którzy seimuiąc wspólnie z Królem, samowładność y prawodawstwo Narodu sprawuią, a absolutny sejm sam na siebie brać musi wszelkie determinacye", "zasilam się światłem współseymuiących". Głos Jego Kr. Mości na Sessyi Seymowey dnia 10. Maia 1791. Roku miany, AGAD, AKP, sygn. 207, k. 1219 (625).

[163] "gdy Mi przepisywane były Królowania powinności w Paktach Konwentach, tak one poiąłem, y w tym nieodzownym zostaię rozumieniu, że Król polski, nic czynić bez Seymu nie powinien, tylko z wolą Seymu, Naród y Wolą Yego reprezentującego". Głos JKr. Mci na Sessyi Seymowey dnia 22 września 1791 r. miany, AGAD, AKP, sygn. 207, k. 1267 (649).

posed to issue a proclamation, describing the calamities that result from an *interregnum*. Lastly, member Suchodolski took the floor, presenting Hungary, Czech, Denmark and Sweden as examples of misery brought about by hereditary thrones. Finally, Suchodolski emphasized that since the objectives of the adopted *Rules (Zasady)* referred "*to an improvement of the form of government*," that meant that they were about improvement, not about creating a new system. To conclude, while the king was still alive, one should not think about his successor.[164] His supporters included member Rzyszczewski, who claimed that the proclamation would suggest the Saxon dynasty to the Polish throne, whereas the Elector had no son, only a daughter, which would cause further problems. He also explicitly said that "*during interregnums, the lesser nobility has always sought to increase their freedoms and expand the boundaries of their privileges, but when Succession is introduced, this will be unthinkable and these privileges will be more and more suppressed*." ("*w czasie bezkrólewiów zawsze przyczyniała sonie wolności Szlachta, i tego Przywileju rozszerzała granice, a gdy stanie Sukcessya już o rozszerzeniu onych myśleć nie będzie wolno, kiedy coraz to bardziey ścieśniane będą*"). In response, a member from Podolia, Morski, presented some predictable arguments, and the bishop from Livonia, Kossakowski, concluded that "*the Nation's liberty rests upon the free election of the king*" ("*wolność Narodu zasadza się na wolney Tronu Elekcyi*"), that this freedom should not be overthrown during the confederated Parliament, and the discussion on the superiority of election over succession should be left to historians. He also called upon the 1607 law, folio 1596, which states: "*He, who dares to suggest succession to the throne shall be tried in court pro hoste Patria & perduelli*." ("*ten pro hoste Patria & perduelli będzie sądzony, ktoby się odważył proponować Sukcessyą Tronu*").[165]

In the debate on the day when the Constitution was adopted, the monarch could not explicitly say that the bill was written under his guidance, and that he had a direct influence on its final shape consulted with the Potockis' reforming wing through the secretary Scipione Piattoli.[166] The King emphasized, having been somewhat distanced from it: "*the draft has been born out of this what was shown to me, and what is in accord with the will of many parliamentarians*".[167] This distance is

[164] Dziennik Czynności Seymu Głównego Ordynaryinego Warszawskiego, pod związkiem Konfederacyi Oboyga Narodów agituiącego się 1790, Sessya CCCXIII, Dnia 16. Września, we Czwartek.

[165] Dziennik Czynności Seymu Głównego Ordynaryinego Warszawskiego, pod związkiem Konfederacyi Oboyga Narodów agituiącego się 1790, Sessya CCCXIV, Dnia 17. Września, w Piątek.

[166] This is unfortunately not the place to discuss the process of creating the final text of the Constitution and mutual chases between the King and Ignacy Potocki. Comp. Dihm Jan. 1930: Przygotowanie Konstytucji 3-go Maja ważnym etapem w urzeczywistnieniu idei niepodległości, Pamiętnik V Powszechnego Zjazdu Historyków Polskich w Warszawie 28 listopada do 4 grudnia 1930 r. T. I Referaty, Tyszkowski Kazimierz (ed.), Lwów: nakładem Polskiego Towarzystwa Historycznego, p. 386–398.

[167] "urodził się z tego projekt, który Mi był pokazany, a który iuż iest zgodny z Wolą wielu Seymuiących". Głos JKr. Mości na Sessyi Seymowey Dnia 3go Maja 1791. Roku miany z okazji proiektowaney nowey Formy Rządu, AGAD, APK, sygn. 207, k. 1209 (620).

further expressed, just in case, in the following words which undoubtedly referred to the succession: "*in the same bill, I found such things, or else one point, which I am myself reluctant to touch and rather should not following the Will of the Nation, therefore, I declare that I had doubts in this one point*".[168] After the bill had been read, Stanisław August Poniatowski requested to be released from the relevant prohibition in *pacta conventa*. The *pacta* were read and the discussion continued. In its course, the reform camp members spoke out, arguing for the succession and trying to palliate the expressed theatrically, yet justified worries of the king. The speeches were, in fact, directed not to Poniatowski but to the hetman's conservative camp.[169] The representative of the latter, member Chomiński from Oszmiana, argued that such a large group of antagonists of the Constitution means that the nation does not free the king from the oath at *pacta conventa.*[170] This issue, as mentioned, was further developed in political journalism on the 3rd of May.

Let us also not forget about another political scene, where an equally emotional discussion on the election was under way. During the meetings of Dietines of November 1790, where, at the request of the King, expressed in the manifesto of the Parliament Marshals, the election proposals related to the Elector of Saxony as an heir to the throne in the *Vivente rege* procedure with the king still living were decided. 55 regional Dietines accepted the nomination suggested, while 36 of them were in favour of maintaining the elective monarchy, and only nine – allowed for hereditary monarchy.[171]

Later voices in the debate generally accept changes made in the constitution. Characteristic is the voice of Tadeusz Kościałkowski, member of Wiłkomierz, raised in September 1791: "*King, it was a futile word, and not a thing important and holy, several Kings shared the executive authority among themselves, and the Nobility was not more free and raised against the Ruler, not that it hated him, but since that was a need of the mightier nobility, the mightier argued with the Throne until they achieved what they demanded*."[172]

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[168] "w tym samym proiekcie znalazłem rzeczy takie, czyli punkt ieden, którego Ja Sam przez się tykać się niechcę, y nie powinienem chyba za Wolą Narodu, dlatego oświadczam, iż w tym iednym punkcie zastanowiłem się." Ibidem, k. [chart] 1210.

[169] NN [Siarczyński], Dzień Trzeci Maja…, as example voice of deputy Zakrzewski, p. 74.

[170] Ibidem, p. 147–148.

[171] Łukowski Jerzy. 2010. Szlachta i monarchia: refleksje nad zmaganiami inter majestatem ac libertatem. In: *Rozkwit i upadek I Rzeczypospolitej*, Butterwick Richard (ed.), Warszawa: Bellona, p. 167.

[172] "Król, było to czcze słowo, a nie rzecz ważna i święta, kilkunastu Królików dzieliło władzę Jego wykonawczą po między siebie, Szlachta z tym wszystkim nie była wolnieyszą, powstawała na swego prawego Rządzcę, nie iżby go nienawidziała, lecz, że tak było potrzeba możnieyszym, a możnieysi póty się z Tronem kłócili, póki tego, czego żądali, nieosiągnęli.". Głos Jaśnie Wielmożnego Imci Pana Tadeusza z Zyndramów Kościałkowskiego, starosty czotyrskiego, posła Wiłkomirskiego, Orderu Ś. Stanisława Kawalera, Na Sessyi Seymowey dnia 20 Miesiąca Września, 1791. Roku Miany, AGAD, ASCz, sygn. 22, k. [chart] 55v.

4.3.4 The Monarch in the Constitutional Acts

"Rules for improvement of the form of government" (*Zasady do poprawy formy rządu*) from December 1789 almost ignored the issues of the legal status of the King. Defining, above all, the powers of the nobility, the stipulated principles dictated the election of the King of the Roman Catholic religion. The Rules entrusted to him "*the highest, uniform and general supervision*"(„*naywyższy, iednostayny i ogólny dozór*"), and exercising of rights. The King and his guard was to serve as "*the primary government protection*" (art. 6to).[173]

Also "*Inviolable cardinal laws*" from September 1790, finally published in January 1791 dictated that the King was Catholic by birth "or vocation". The King "freely chosen" remains the prerogative of the "Republic" in a state of nobility. The King was also required to preserve the rule "*neminem captivabimus nisi iure victum*".[174] No compromise was reached on the manner of succession to the throne (the original version of the rights provided for the election of the Dynasty); due to parliamentary disputes and the inability to reach a compromise, it was decided to move this dilemma to be taken care of at the level of local assemblies. They were also to decide whether to present to the Elector of Saxony, Frederick Augustus Wettin, the proposal to take over the Polish throne after the death of King Stanisław August.[175]

Wider regulations were brought about as late as with the Government Act (Ustawa Rządowa). The King was devoted only to Article VII of the Constitution of the 3rd of May ("*The King, the executive power*"). He was entrusted – however "*in the council*," i.e. the Guardian of Rights – the highest executive authority, which should limit itself to "*the observation of the laws and carrying them out*" and should be active wherever the law permits and even requires enforcement. "*The executive power will not be able to enact or interpret laws*" ("*Władza wykonawcza nie będzie mogła praw stanowić ani tłumaczyć*"), impose taxes, raise public debts, alter the budget, enact war, peace and other treaties, but merely lead temporary negotiations.

The throne was henceforth to be elective in dynasties. This decision was dictated by "*the experienced disasters of interregnum*", thus protecting the fate of each of the residents, shutting down the influence of foreign powers and their ambitions to the throne, calling the "*unanimous cultivation of national liberty*." The issue of inheritance of the throne, as mentioned, was settled in favour of the Elector of Saxony, followed by his daughter and son-in law; significantly, the diplomatic activity in order to consult the person concerned was carried out very inconsistently.

The person of the King was to be "*holy and safe from everything*." "*Doing nothing by himself, cannot respond to the nation in relation to any matter"*. The King "*shall not be an autocrat, but the father and head of the nation, and as such he is*

[173] Zasady do poprawy formy rządu, Volumina Legum, t. IX, p. 157–159.

[174] Prawa kardynalne niewzruszone, Volumina Legum, t. IX, p. 202–203.

[175] Zielińska Zofia. 1991. *"O sukcesyi…"*, p. 137–221.

recognized and declared by the law and this constitution".[176] Legal acts and judgments should be issued in the name of the King, he was entitled to the right of pardon, to supremacy over the army, appointment of ministers, officials, senators and bishops.[177] Ministers, Guard members participated in such powers of the King as convening of the Parliament, exercising of the prerogative of pardon and the right of legislative initiative, but the opinion of the King finally prevailed. Hence, it was being spoken of a creation of "*something like the King's institution within the Guard*", whereas Bogusław Leśnodorski even considered a possible analogy with the presidential system of the United States of America.[178] Royal acts required ministerial countersigning and if any minister refused and the King insisted on a decision, the Parliament was expected to be an instance of conciliation.

5 Summary

The Stanisław Poniatowski era of reform was to constitute merely the beginning of a revolution, announcing a deeper planned social and economic transformation. It was a "*gentle revolution*" held without a profound deconstruction of the status quo. Even its opponents were aware that the projects were not overly progressive, though this was not an obstacle for them to invoke the bloody example of France as a precaution to the public. Stanisław Szczęsny Potocki realistically and prophetically evaluated the plans of the King already post factum, in 1792, "*and as for the French* [way, reform]*, I have no doubt that the King is not interested in disseminating it, but there is a middle way which they want to keep it seems, however in this middle way neither security, nor an end can be found*".[179] The King naturally distanced himself from the events of the French Revolution. The correspondence of the monarch with

[176] "Nic sam przez siebie nie czyniący, za nic w odpowiedzi narodowi być nie może. Nie samowładcą, ale ojcem i głową narodu być powinien i tym go prawo i konstytucja niniejsza być uznaje i deklaruje". Volumina Legum, t. IX, p. 222–223.

[177] Council composed of: primate, the Minister of Police, the Seals, War, Treasury and Foreign Affairs. The right to participate in meetings without voting rights also have adult heirs to the throne and the Marshal of parliament.

[178] Leśnodorski Bogusław. 1951. *Dzieło Sejmu Czteroletniego (1788–1792). Studium historyczno-prawne*, Wrocław: Wydaw. Zakładu Narodowego im. Ossolińskich, p. 309, 319 (certain analogy saw a researcher indicated e.g. in the institution's message to the nation rendering in parliament). Similarity, however, it belies the fact that the introduction of countersignature and lack of proper royal prerogatives (except for acts of supreme command during the war). There are studies showing that changes in the form of work within the Guards came almost at the last moment – in the draft submitted to the King by Piattoli on April 29, after the comment of Stanisław Kostka Potocki was ultimately ruled that the Guard did not vote, and that the king takes the decision. However, they were effective only after the countersignature.Comp. Rostworowski Emanuel. 1966. *Ostatni król, Geneza i upadek Konstytucji 3 Maja*, Warszawa: Wiedza Powszechna, p. 214–216, 224–225, 228–230.

[179] "co zaś do francuszczyzny, nie wątpię, że króla nie iest interesem rozszerzać Ich naukę, lecz iest śrzednia droga, którey się chcą trzymać iak się zdaie, lecz w tey śrzedniey drodze ani

Feliks Oraczewski, an envoy in Paris, perpetuated a negative image of the revolution in the King's perspective.[180]

It can be assumed that, contrary to numerous antagonists, it would not have come to a strong consolidation of royal power at the expense of the noble parliamentary representation. It is difficult to imagine that in a country with entrenched "republican" tradition the pursuit of monarchical absolutism could be accepted. This occurred on the Polish soil only with partitioners, neighbouring powers. The idea of a "middle way" – reformatory rather than revolutionary, also remained on the municipal agenda.

An important element of the "*republican monarchy*" was the key position of the Parliament. In none of the feudal countries did the Parliament "*play such a polymorphous role as in Poland, nor was it as strongly associated with the history of the nation and the state or had such a great impact on the history. It* [the Parliament] *called itself the guardian of the rights of the Republic and its nobility. Its authority was derived from the nature of freedom and the sovereignty of their representatives, which allowed it to think of itself as being synonymous with the Republic and with freedom itself*".[181]

The analysed sources show that modern Western political doctrines were well-known to protagonists of the era of the Great Parliament. At the same time, however, they were subject to a specific reinterpretation, and to some extent also served as a tool of petrification of the existing system. As Bogusław Leśnodorski rightly pointed out, "*natural law", "sovereignty of the nation", "separation of powers" – all these terms had a specific meaning for us (…). After all, they are not concepts and related phenomena that can be considered "beyond time" and beyond a given place. These are historical categories, with an undoubtedly variable content*"[182].

At the same time a certain myth-making role of the political thought of the First Republic should be noted. During the partitions "*noble traditions gradually became general national traditions and the old Sarmatians were found synonymous with Poles. The traditional Polish idea of the "noble nation", and thus the idea of defending the noble freedom transformed into the principle of defence of national independence*".[183] Joachim Lelewel would announce soon that the principle of the noble nation's sovereignty was an embryonic form of the principle of the people's sovereignty. At the same time, however, according to the later theses of numerous

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bezpieczeństwa, ani końca nie znajdzie". Copy of letter: JW. Marszałek Konfederacyi Generalney Koronney do JW. Pana Marszałka W.K. de 12 Xbris 1792, AGAD, AKP, pudło (box) 90, k. 694.

[180] Kocój Henryk. 1988. Misja Feliksa Oraczewskiego w Paryżu podczas Sejmu Wielkiego w świetle jego korespondencji ze Stanisławem Augustem Poniatowskim i Joachimem Chreptiowiczem. In: W dwusetną rocznicę wolnego Sejmu: ludzie – państwo – prawo czasów Sejmu Czteroletniego, Lityński Adam (ed.), Katowice: Prace Naukowe Uniwersytetu Śląskiego w Katowicach, p. 15–40.

[181] Olszewski Henryk. 1983. Funkcjonowanie sejmu w dawnej Rzeczypospolitej. *Czasopismo Prawno-Historyczne*, T. XXXV (1), p. 162.

[182] Leśnodorski Bogusław. 1951. *Dzieło…*, p. 411.

[183] Olszewski Henryk. 2001. Doktryna złotej wolności i spory o jej spuściznę. *Państwo i Prawo*, 60 (2), p. 6.

political scientists, the freedom of the nobles contributed to the "misery" of liberalism in the nineteenth-century Poland – in Andrzej Walicki's opinion it was even an anti-individualistic phenomenon, with the doctrine and practice of such freedom constituting "*more of a participation in the collective sovereignty than protection of individual rights*".[184]

Finally, it is worth giving the floor to the author of the Catechism who underlined the fact that in Poland misfortunes rarely came from the nature – no earthquakes nor famine are known and the plagues are rare. Poland has its own misfortunes, "*separate from other nations*" – these are the *Interregnum*, Confederations, elections, the corruption in the elections, amnesties, and "*by these arrangements of its Government, the Republic shall be so tortured and weakened",* that it is enough to stand for *"all the effects of a disastrous war*."[185] These were extremely prophetic words as soon afterwards Poland lost its sovereignty for over 100 years and the Constitution of the 3rd of May, as well as further plans of the Great Parliament's deputies remained only a paper reform. One can only consider whether it could follow the same path as Britain, moving into the modern era of the rule of law without episodes of absolutist regime.

6 Summary (Polish)

W poszukiwaniu wątków suwerenności w debacie epoki Sejmu Wielkiego (1788–1792) poddano analizie kilka wybranych kategorii źródeł, które wyselekcjonowane zostały w założeniach poświęconego problemowi formowania się nowoczesnych konstytucji projektu badawczego ReConFort, którego ustaleń pierwszą odsłonę stanowi niniejsze studium. W zakresie obowiązujących źródeł prawa w przypadku polskim skupiono się na regulacjach Zasad do Formy Rządu, Prawach kardynalnych opublikowanych w styczniu 1791, Ustawie Rządowej oraz składających się obok niej na system Trzeciego Maja prawach o miastach (z kwietnia 1791) i o sejmikach (z marca 1791). Prześledzono także w ograniczonym jednak zakresie debatę parlamentarną, utrwaloną na łamach diariuszy sejmowych i dziennika czynności sejmu, jak również w postaci opublikowanych "mów", "przymówień", "głosów". Spośród źródeł o mniej czy wcale niejurydycznym charakterze badaniami objęto szeroko rozumiane media, przy czym polski przypadek oczywiście cechuje mniejsza obecność w dyskursie publicznym czasopism politycznych (w istocie rzeczy na to miano zasłużyć w pełni mógłby tylko Pamiętnik Polityczny y Historyczny Piotra Świtkowskiego), przy niebywale obfitej obecności wolnych druków, pamfletów, tworzących nieraz intelektualną dyskusję w przestrzeni publicznej (przeróżne odpowiedzi, przymówienia kierowane do konkretnych prac).

[184] Ibidem, p. 9.

[185] nieszczęścia "oddzielne od innych Narodów", są nimi Bezkrólewia, Konfederacje, Elekcje, poparcie elekcji, amnestie, "temi układami swojego Rządu tak się zmorduie i osłabi Rzeczpospolita", że jej to wystarczy za "wszystkie skutki szkodliwej woyny". Katechizm o tajemnicach…, p. 22–23.

Ograniczoną kwerendą objęto także źródła archiwalne w zakresie notatek i prywatnej korespondencji głównych protagonistów politycznych procesów (jak dotychczas Ignacego Potockiego, Kołłątaja, wybrane zespoły zachowanych akt dotyczących Stanisława Augusta). Otrzymane dotychczas wyniki trudno uznać za satysfakcjonujące i bez wątpienia ta kategoria źródeł wymaga bardziej pogłębionej analizy.

Kategoryzacja źródeł znalazła swe odzwierciedlenie w strukturze niniejszego opracowania. Zdecydowano się na wyróżnienie kilku płaszczyzn analizy. Po uwagach wstępnych zaprezentowano ustalenia w zakresie ogólnie pojmowanej teorii suwerenności w badanej dyskusji. Na uwagę zwraca fakt utożsamiania suwerenności z niezależnością wobec sąsiednich potęg oraz bezpieczeństwem wewnętrznym, co naturalnie jest pokłosiem działania państwa w nadzwyczajnych warunkach – w czasach po I rozbiorze Polskie, w okresie próby uwolnienia spod protektoratu Rosji w przejściowej, korzystnej sytuacji geopolitycznej. Podkreślono tu także długą polską tradycję "suwerenności prawa".

Kolejna obszerna część pracy poświęcona została pojęciu narodu i jego interpretacji w debacie. Piśmiennictwo temu poświęcone wyraźnie pozostaje pod wpływem innowacyjnych idei z zachodu i nie kwestionuje faktu, że "naród" jest suwerenem. Wykonywanie suwerennej władzy powierzono posłom skupionym w sejmie (tego przymiotu nie przypisywano wprost członkom senatu pochodzącym z mianowania, oczywiście zmiana nastąpiłaby, gdyby weszły w życie demokratyzujące nieco tę kwestię procedury wyboru senatorów, dokonywanego przez następców Stanisława Augusta spośród dwóch kandydatów). Nie można zapominać, że poważnie rozumiano węzeł między posłem a lokalną społecznością – poseł związany był formalnie instrukcjami, składał relacje z ustaleń sejmowych na sejmikach i to one ostatecznie zamknęły proces uchwalania konstytucji – sejmiki zebrane jesienią 1792 r. jako wyraz "woli narodu" w ogromnej przewadze dokonały zaprzysiężeń lub laudacji konstytucji. Niekwestionowalne pozostaje zarazem ograniczenie narodu politycznego wyłącznie do szlachty, choć na uwadze trzeba też mieć fakt jej znaczącego procentowego udziału w ogóle społeczeństwa (ok. 8 %), co dawało prawa wyborcze rzeszy wyborców liczniejszej niż niejedna z dziewiętnastowiecznych konstytucji opartych na kryterium majątkowym. Debata publiczna nad poszerzeniem prawa reprezentacji obejmującym warstwę mieszczańską przyniosła ograniczone rezultaty. Posłowie znacznie ostrożniej niż publicyści podchodzili do kwestii, dopatrując się w działaniach ruchu mieszczańskiego i wydarzeniach "czarnej procesji" swoistego szantażu, grożenia rewolucją społeczną i "Francuszczyzną". Uchwalone ostatecznie prawo o miastach obowiązywało tylko w wolnych miastach królewskich, tj. nieco ponad 30 %, i upoważniało zaledwie do wyboru i kierowania do parlamentu plenipotentów z głosem doradczym w sprawach miejskich. Kwestia chłopska pojawiała się z rzadka w piśmiennictwie publicystycznym – jeszcze rzadziej w obradach sejmu.

Opracowanie zamyka część poświęcona monarsze. Choć polski porządek polityczny nie uprawnia do stawiania tezy o suwerennej władzy króla, mimo formuły uchwalenia konstytucji z woli królewskiej, to jednak nader istotne jest uzupełnienie obrazu o zagadnienie budzące ogromne emocje polityczne. Mowa o dyskusji nad

następstwem tronu, w której obóz postępowy podważył kluczową zasadę wolności szlacheckiej, tj. elekcję króla. Przywołując w szczególności takie argumenty, jak anarchia bezkrólewi, próby obsadzenia zagranicznych książąt w drodze przekupstwa szlachty, protagoniści doprowadzili do utrwalenia kwestii w obszarze publicystyki. Są to problemy znakomicie już w literaturze przedmiotu opracowane, stąd celem autorki jest jedynie podkreślenie obecności tych zagadnień w szerzej pojmowanej dyskusji nad suwerennością. W debacie parlamentarnej nie odważono się w zasadzie na podniesienie tej kontrowersyjnej kwestii, samo zaś przyjęcie w Ustawie Rządowej regulacji elekcji dynastii, czyli w istocie sukcesji tronu, stanowiło w oczach "republikantów" jej grzech śmiertelny.

Przedłożone opracowanie stanowi wynik wstępnej części badań prowadzonych w ramach projektu ReConFort. Dalsza analiza koncentrować się będzie zagadnieniach zasady prymatu konstytucji oraz odpowiedzialności ministerialnej i urzędniczej jako przedmiotów dyskusji w przestrzeni publicznej.

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Appendix

English translation by Max Bärnreuther and Ulrike Müßig based on the German translation of Dr. Inge Bily[1]

Our Free Royal Cities[2] in the States of the Rzeczpospolita[3] of April 18, 1791

Article I

On the Cities

1. All Royal Cities in the states of the Rzeczpospolita are acknowledged as free [cities][4] by us.
2. We acknowledge the inhabitants of these cities as free men. Furthermore, we acknowledge their land property in the cities in which they live, their houses, villages and *territoria*[5] which currently legally belong to these cities. All this is acknowledged by us as hereditary property of the inhabitants of these cities.

[1] I cordially thank Prof. Dr. Danuta Janicka (Toruń/Thorn) and Prof. Dr. Zygfryd Rymaszwski (Łódź) for the critical perusal of the translation and the deliberation concerning the question of the Polish and German historical legal terminology.

[2] Annotation of the translator: in a legal sense, these free royal cities are not comparable to the German "Freie Städte" or "Königsstädte". Rather, the free royal cities are cities within the state. From now on, they had new rights by means of which they were able to – amongst other things – free themselves of the feudal corset. What was understood by "free" is explained in Article I, 2.

[3] Foundation of this translation is the edition of J. Kawecki, "*Miasta nasze królewskie wolne w Rzeczypospolitej*", in: "*Konstytucja 3 maja 1791*" PWN, Warszawa 2014, p. 125–136.

[4] Annotations of the translator are put into parentheses [].

[5] In the sense of *land property*, *land belongings*.

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Currently ongoing and not yet terminated [legal] matters are not concerned hereby.

3. Those cities that have lost location privileges are issued *diplomata renovationis*[6] as the undoubtable proof of the [earlier] ownership of these privileges together with the transferal of the land that these cities currently own.
4. Those Royal Cities in which the Assemblies [Polish *sejmiki ziemskie*] take place are issued respective location privileges by the King even if these cities have not yet owned the like.
5. If a thorough city develops on royal land and territory out of a convenient settlement, then we, the King, issue a *diploma erectionis*[7] to this new city together with the dedication of the land and territory.
6. The landlords also were allowed to found cities with free people on their ground and territory and to free farmers as well as to transform their hereditary cities into local cities. The like settlements were not to be deemed free cities but for the case that the landlord had transferred hereditary land to them during the location. Then we, the King, will grant these cities the *diploma confirmationis*[8] and ordain to have the location of the landlord registered if we are being asked to do so.
7. As the law is one for all cities, the citizens of any city as of now enjoy the same privileges.
8. All state citizens, be they of noble or citizen decent, who wish to do commerce with pounds, lengths etc. and who already own or are about to acquire land in the city are obliged to acknowledge the town law and to subject themselves irrespective of what office, job or art they are undertaking. And the other noblemen are allowed to acknowledge the town law.
9. The assumption of the town law will take place as follows: everybody who accepts the town law,[9] who personally or represented by an empowered individual [Polish *plenipotent*] appears before the magistrate and who delivers the following: "I, NN, pledge allegiance to the greatest King and the Rzeczpospolita. I commit myself to the rights and law of the Sejm as the highest duty to be obeyed. I subject myself to the nobility of the city N in which I belong to the citizen class. And I will fulfil my duties. I commit myself as my descendants" shall, as the declaring party – after such a declaration – be entered into the town register.
10. The cities shall offer the admission to the class of citizens and the registration in the town book to all sober foreigners, craftsmen, all free men and Christians, that are not subject to any person by virtue of the law and they shall do so without asking for any consideration.
11. All noblemen as well as the members of the citizen class that have later been admitted to the nobility as well as their descendants shall from now on no lon-

[6] Documents that renew the privilege.

[7] Founding document.

[8] Diploma of confirmation.

[9] Annotation of the translator: in the originial, only referred to as *miejskie* 'city-'.

ger be exposed to any disadvantage resulting from the admission to the citizen class, the participation in it, the holding of office, the exercise of any kind of trade and craftsmenship in relation to their noble class and the rights and privileges associated herewith.

12. The election of an own magistrate, more precisely, of a mayor, by bailiffs as well as all officials by the citizens of the town is a symbol of liberty and this liberty will remain vested in the cities. The cities may furthermore ordain decrees and survey their enforcement. The Police Commission[10] is to be informed in the form of a report.
13. All inhabitants of the cities that are registered in the town book and that own hereditary land may vote and be elected by a majority of the votes cast which applies to all town offices that there are. However, nobody may combine the executory office[11] and the noble office with the office and the function of the town representative [Polish *plenipotent miejski*].[12] The latter would lead to the invalidity of both functions. Moreover, nobody may have a military rank in the active service while being a town official.

Article II

On the Rights of the Town Citizens

1. The fundamental right *neminem captivabimus – nisi iure victum*[13] applies to everybody who lives in the cities. Only thievish bankrupts as well as those who have not left a sufficient bail amount at court and those having been seized when committing the offence are excepted herefrom.
2. The towns in which appellate courts have been set up elect a representative [Polish *plenipotent*] before the Ordinary Sejm [Polish *sejm ordynaryjny*] with a majority of the votes of the citizens who own land in the city, who fulfil the criteria enabling them to hold office, who are *crimine non notatos,*[14] who have not yet been involved in a trial and who have already held office. The cities are at liberty to elect such a representative [Polish *plenipotent*]. These representatives [Polish *plenipotenti*] have to act in the respective city in which the

[10] Annotation of the translator: Police Commission = formerly the Polish Ministry for Interior Affairs.

[11] Annotation of the translator: the office of execution = an office that focuses on the compulsory execution in the field of aristocratic jurisdiction.

[12] Annotation of the translator: Polish *plenipotent miejski* was a representative of a city for the Parliament (*Sejm*). His title (*plenipotent*) referred to his incomplete position in comparison to the noble representative. In the Sejm, there were 204 noble representatives and 24 representatives of the cities [Polish *plenipotenti*]. We will use the English term of empowered representatives for the Polish *plenipotent*.

[13] We will keep nobody imprisoned who has not been legally condemned.

[14] Respectable.

Sejm-Marshal will hand over the confirmation of the election at the day of the opening of the Sejm. The representatives [Polish *plenipotenti*] of the cities for the Police and Finance Commission as well as the assessor college are elected at the assemblies of the provinces. Furthermore, it is provided who shall belong to which commission and which assessorium. Everybody can have a seat in the named commissions and assessoria, however, not more than two representatives from each province in the financial and police commission and not more than three in the assessorium. These commissioners and assessors shall have *vocem activam*[15] in the commissions and the assessors' court [actually assessoria (plural)[16]] in the matters that concern the cities and the commerce and *vocem consultativam*[17] in all other matters. If one or all of these empowered representatives [Polish *plenipotenti*] of the cities that derive the right to elect from empowered representatives are confirmed in their office again, then they may hold office for two further years. For these commissioners and assessors, we will fix a salary when setting up the table of expenditure but only for the fixed number of those empowered representatives [Polish *plenipotenti*] that have the right to participate in the commissions and the assessorium [Polish *plenipotenti*].

3. In order to ensure that the safeguarding of the government and the necessary justice accrued to all cities and their claims, we allow our cities to bring forth *desideria*[18] of the cities in the Sejm by means of the assessors or citizen commissioners in the assessors'court [actually assessoria (plural)[19]] as well as by means of the representatives in the finance and police commissions. And these [assessors and commissioners] are to address – if this is necessary and to their liking – the Sejm-Marshall and ask for an audience which may not be denied. And they shall express themselves in a manner as it is usual for the delegates from the commissions when giving a speech.
4. After two years of public service in the offices of the named commissions or the assessors' court [actually assessoria (plural)[20]] the representatives that are elected by the cities are to be made noblemen at the Sejm without having to pay the *nobilitatis*-fee provided they are not yet noblemen.
5. From now on, every citizen will be allowed to acquire to own and to pass on by hereditary law all noble goods as well as other goods to their descendants as the legitimate heir and to own goods by means of inheritance or *iure potioritatis.*[21] They are to refer to these goods before the Regional Court even if they are citizens.

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[15] An active and decisive voice.

[16] In the Polish text, the plural is found at this place, despite the fact that there is only **one** Royal Assessorial Court.

[17] A consultative vote.

[18] Postulates, claims.

[19] Compare annotation 15.

[20] Compare annotation 15.

[21] Pre-emptive right.

6. Every citizen who acquires an entire village or city in accordance to hereditary law and who pays 200 Złoty of the tenth *Groschen* as taxes will be made a nobleman at the *Sejm* provided he has asked for the same in a written form that has been given to the Sejm-Marshall and forwarded to the estates.
7. Furthermore, 30 people at the *Sejm* coming from the citizens that had hereditary land in the cities were to be made noblemen. The following merits were to be especially acknowledged: accomplishments in the military, the participation in civil-military commissions, new foundations in the field of craftsmanship as well as the commerce with regional agricultural products. This was to take place on the basis of the recommendations of the land messengers as well as the cities.
8. In the entire armed forces (except the national cavalry), in each corps, regiment and pulk there is from now on free citizen access to the officer ranks. And if somebody has reached the rank of a field or banner captain in the infantry or of a cavalry captain in a group, he and his descendants will be made noblemen with all privileges associated herewith. And we, the King, will issue the *diplomata nobilitatis*[22] and free from the stamp tax if the respective certificate is presented.
9. The members of the citizen class are from now onwards allowed to participate in the work of the chambers and palaces of all governmental commissions, in the tribunal offices and other smaller courts. They are further allowed to act as defense lawyers as well as to undertake other kinds of services and to ascend in the respective chamber in accordance with their merits and gifts. And if somebody has reached the level of the board of the chamber in the governmental dicasteries,[23] he shall be made a nobleman at the first Sejm to follow and we, the King, will issue a *diploma nobilitatis*[24] without the obligation of having to pay a fee.
10. In the class of the clergy, members of the citizen class may acquire the position of the prelate and the capitular at the abbey churches or the position of the capitular at the cathedral – provided they fulfil the further requirement of having a doctoral title in the latter case – furthermore all *beneficia saecularia et regularia*[25] with the exception of the foundations explicitly reserved for the nobility.
11. In the civil-military ordering commission of the voivodeships, the countries and counties may elect – from the cities that are found in the territory of the commission – three commissioners into each commission. They may either be of noble birth or of citizen origin provided they possess hereditary land in their city.

[22] Certificate of ennoblement.

[23] Annotation of the translator: dicasteries in the sense of public authorities.

[24] Certificate of ennoblement.

[25] Benefices secular and religious.

12. If our cities[26] Gdańsk [Danzig (German)] and Toruń [Thorn (German)] have requests for the estates, then they will hand them in to the Marshal's baton via the secretary or will directly deliver it via a delegate by virtue of the right to do so if they so please.
13. The punishment for those that falsely inform about their possession is the following: who hands down a hereditary piece of land violating a respective reverse will lose it forever. And the court will attribute the property of such an object encumbered with such a reverse to the person who is capable of proving the reverse. If the person possessing the hereditary piece of land by virtue of a reverse is able to prove the encumbrance, he will be attributed the land forever. The Regional Court will decide on the like matters *praecisa appellatione*.[27]
14. All earlier rights and statutes that contradict the current law on the cities are hereby removed. And the current provisions on the cities are hereby fixed as constitutional rights.

Article III

On the Justice for the Citizens

1. The cities are left to their own town jurisdiction within their territory. The cities with boards are also left to their own town jurisdiction and excepted from all other jurisdictions, namely the following: tribunal, country, voivodeship, starosta and castle courts. Excepted herefrom are the ongoing cases of the commissions that have already been allocated to the tribunals. The court of the Court Marshal that was only competent for the residence city and by virtue of

[26] Annotation of the translator: the geographic names (esp. town names) in the Polish text are partially also names for the geographic objects beyond the territory of the contemporary Poland and are mostly left unaltered as of the Polish text.

In the translation, the geographic names of places or rivers in the contemporary Poland are put into parentheses [] as far as there are *exonyms* and parentheses () are used to indicate the country whose langugage has been used, e.g. *Gdańsk* [*Danzig* (German)], *Kraków* [*Krakau* (German)], *Toruń* [*Thorn* (German)], *Warszawa* [*Warschau* (German)], *Warta* [*Warthe* (German)]. *Exonyms* are names that are used out of the territory in which the respective geographical object is located, e.g. *Krakau* (German) for Polish *Kraków* or *Warthe* (German) for Polish *Warta*. There are not German exonyms for all Polish geographic names.

As to geographic names for places that are located out of the territory of contemporary Poland, apart from the Polish form that is extracted from the Polish template, the respective *endonym* will be put into parentheses [] and the addition of the respective linguistic reference as (Lithuanian), (Ukrainian) and (Belarussian) will be put into round parentheses (). An *endonym* is the official geographic name that is being used in the territory where the respective geographic object is nowadays located, e.g. *Vilnius* (Lithuanian), compare Polish *Wilno* or *Kyjiv* (Ukrainian), compare Polish *Kijów* or *Minsk* (Belarussian), compare Polish *Mińsk*.

This approach respects the current indigenous spelling of the names and allows for a localisation of the places on up-to-date maps. The principle proves especially valuable in regions in which the state-political affiliation changed in the course of history or where territory was renamed.

[27] With the abolition of the appellation.

the King is hereby deprived the competence for all other excessive jurisdiction.

2. Wordly and clerical juridica[28] are hereby abolished. Small towns that have been set up on the property that has originally been attributed to the cities are dissolved in respect of their jurisdiction and police competence as they are now still in possession. Yes, we sign the juridica of the jurisdiction of the citizen magistrates. And we ban all actions as the income of any kind for the owners of this property.
3. However, where the cities have hereditary (country) villages, they can address the competent jurisdiction in the villages concerned with the respective matters.
4. All citizens who are the owners of land in the city or who conduct commerce or a craft are subjected to the citizen jurisdiction and are all obliged to pay the same taxes without the possibility of an exemption.
5. In every city, the elected magistrate has the judicial power in disputed matters. In these magistrates, the litigations are decided in a *in prima instantia*[29] matter. Legal matters that do not exceed the value of 300 Złoty and offences with a prison sentence of up to three days are to be decided by the magistrates without a certification themselves. In greater legal matters, however, the appeal to higher appellate courts shall be allowed.
6. For these Appellate Courts, we hereby define the following cities and in the province of Małopolska [Kleinpolen (German)] the cities of Kraków [Krakau (German)], Lublin, Łuck [Luc'k (Ukrainian)], Żytomierz [Žytomyr (Ukrainian)], Winnica [Vinnyc'ja (Ukrainian)], Kamieniec Podolski [Kam'janec'-Podil's'kyj (Ukrainian)], Drohiczyn [Drahičyn (Belarussian)], in the province of Wielkopolska [Großpolen (German)] the cities of Poznań [Posen (German)], Kalisz [Kalisch (German)], Gniezno [Gnesen (German)], Łęczyca [Lenczyca (German)], Warszawa [Warschau (German)], Sieradz [Schieratz (German)], Płock [Plock (German)], in the province of Lithuania the cities of Wilno [Vilnius (Lithuanian)], Grodno [Hrodna (Belarussian)], Kowno [Kaunas (Lithuanian), Kauen (German)], Nowogródek [Navahrudak (Belarussian)], Mińsk [Minsk (Belarussian)], Brześć Litewski [Brest-Litowsk (German)], Pińsk [Pinsk (Belarussian)]. The cities in the voivodeship Kraków [Krakau (German)] that are located in the county of Sandomierz [Sandomir (German)], Wiślica and Chęciny will belong to the appellate court that is located in Kraków [Krakau (German)]. The cities that are located in the voivodeship of Lublin as well as those of the country of Stężyca as well as those located in the counties of Radom, Opoczno and in the country of Chełm [Cholm

[28] Annotation of the translator: Polish *jurydyka*, Pl. *jurydyki* = settlement with a town like character that has been set up on the ground of or next to a royal city. *Jurydyki* were usual in the *Rzeczpospolita* of the sixteenth to eighteenth century. Such a settlement was noble or clerical property. There was no mandatory membership of a guild and there were no limitations for merchants. This is why the *jurydyki* correspond to the interest of the magnates.

[29] In the first instance.

(Ukrainian)] will belong to the appellate court of Lublin. To the appellate court of Łuck [Luc'k (Ukrainian)] will belong the cities that are located in the voivodeships of Wolhynien [Volyns'ka zemlja (Ukrainian)] and Bełz [Belz (Ukrainian)]. To the appellate court of Żytomierz [Žytomyr (Ukrainian)] will belong the cities located in the voivodeship of Kijów [Kyjiv (Ukrainian)]. To the appellate court located in Kamieniec Podolski [Kam"janec'-Podil's'kyj (Ukrainian)] will belong the cities that are located in the voivodeship of Podolien [Podillja (Ukrainian)]. To the appellate court in Winnica [Vinnyc'ja (Ukrainian)] will belong the cities of the voivodeship of Bracław [Braclav (Ukrainian)]. To the appellate court located in Drohiczyn [Drahičyn (Belarussian)] shall belong the cities of the voivodeship of Podlachien. To the appellate court of Poznań [Posen (German)] will belong the cities of the voivodeship of Poznań [Posen (German)] and of the country of Wschowa [Frauenstadt (German)]. To the appellate court located in Kalisz [Kalisch (German)] will belong the cities of the voivodeship of Kalisz [Kalisch (German)] and of the county of Konin, as well as the cities of the county of Pyzdry [Peisern (German)] on this side of the Warta [Warthe (German)] are to be long to Kalisz [Kalisch (German)]. To the appellate court of Gniezno [Gnesen (German)] shall belong the cities of the voivodeship of Gniezno [Gnesen (German)], of the county of Kcynia [Exin (German)] as well as of the county of Pyzdry [Peisern (German)] the part which is located on the Gnesian [Gniezno: Gnesen (German)] side of the Warta [Warthe (German)]. To the appellate court of Sieradz shall belong the cities of the voivodeship of Sieradz and of the country of Wieluń. To the appellate court of Warszawa [Warschau (German)] shall belong the cities of the earldom of Masowia and of the voivodeship of Rawa. To the appellate court of Łęczyca shall belong the cities of the voivodeships of Łęczyca, Breść Kujawski [Brest (German)] and Inowrocław [Inowraclaw (German)]. To the appellate court of Płock [Plock (German)] shall belong the cities of the voivodeship of Płock [Plock (German)], of the country of Zawskrzyn and of the country of Dobrzyń. To the appellate courts of the cities in the Grandduchy of Lithuania shall belong: to the appellate court of Wilno [Vilnius (Lithuanian)] the cities of the voivodeship of Wilno [Vilnius (Lithuanian)], of the counties of Ašmjany (Belarussian), Lida (Belarussian) [Lityn (Ukrainian)], Wiłkomierz [Vilkmergé (Lithuania, today: Ukmergé (Lithuanian)], Brasław [Braslaŭ (Belarussian)], of the voivodeship of the county of Troki [Trakai (Lithuanian)]. To the appellate court of Grodno [Hrodna (Belarussian)] shall belong the cities of the county of Grodno [Hrodna (Belarussian)], Wołkowysk [Vaŭkavysk (Belarussian)] and Merecz [Merkinė (Lithuanian)]. To the appellate court of the city of Kowno [Kaunas (Lithuanian), Kauen (German)] shall belong the cities of the earldom of Żmudzkie [Žemaitija (Lithuanian), Samogitien (German)], of the counties of Kowno [Kaunas (Lithuanian), Kauen (German)], Preny [Prienai (Lithuanian)] and Upita [Upytė (Lithuanian)]. To the appellate court of the city of Nowogródek [Navahrudak (Belarussian)] shall belong the cities of the voivodeship of Nowogródek [Navahrudak (Belarussian)] and of the county of Słonim [Slonim (Belarussian)] and of the county of Słuč [River Sluč (Belarussian, Ukrainian)]. To the appellate court of Brześć Litewski

[Brest Litowsk (German)] shall belong the cities of the voivodeship of Brześć Litewski [Brest Litowsk (German)] and of the county of Kobryń [Kobryn (Belarussian)]. To the appellate court of the city of Pińsk [Pinsk (Belarussian)] shall belong the cities of the counties of Pińsk [Pinsk (Belarussian)], Pińsk zarzeczny [Pinsk-behind river area], Mozyrz [Mazyr (Belarussian)] and Rzeczyca [Rečyca (Belarussian)]. To the appellate court of the city of Mińsk [Minsk (Belarussian)] shall be the cities of the voivodeships of Mińsk [Minsk (Belarussian)], Połock [Polock (Belarussian)], Witebsk [Vicebsk (Belarussian)] and of the county of Orsza [Orša (Belarussian)].

7. In these appellate cities, every two years, five people are elected to the appelate courts from the nobility and the non-nobility, i.e. those citizens owning land property, as well as persons of the magistrats from these as well as other cities of this department[30] that have been specifically fixed for these appellate courts. And these elected people are to form the Appellate Court. The condition is that those elected to the Appellate Court who are active in the magistrate or the laymen court – as long as they exercise the office in the appellation – may not sit in the courts *primae instantiae*[31] of the magistrates by whom they were elected and that they may also not adjudicate on these magistrates.
8. These courts will adjudicate on the appeals lodged by the magistrate of a value of 3000 Złoty or a penalty of up to three weeks. These decisions are final without the possibility of further appeals. In all legal matters that exceed the value of 3000 Złoty and a prison sentence of three weeks, the appeal of the magistrates *primae instantiae*[32] to the appellate courts of the cities is no longer allowed but the appeal to the assessorial courts and to the relation court, both in the Kingdom of Poland[33] as well as the Grand Duchy of Lithuania according to the law.
9. Criminal law matters may be decided by the magistrates but they may directly send them to the appellate courts who may also adjudicate on criminal matters. However, the attention had to be drawn to the fact that the criminal who has been condemned to a temporary prison sentence has to abide to its enforcement. If, however, there is a condemnation to life imprisonment or to death, the appellate court will send the accusation elaborations as well as the verdict to the assessorial court. At the assessorial and relation courts, we leave the legal matters on the abuse of power to the town offices as well as on the income from citizen property and all other matters that are arranged for by the laws of the Rzeczpospolita.
10. We hereby order that the cities, according to our order, are subjected to police commission[34] in matters of the interior order and the general town income.

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[30] Annotation of the translator: Polish *wydział* = department, it has been the second level of the citizen self-administration since 1791. The Rzeczpospolita was divided into 24 departments, the frontiers of the voivodeships not coinciding with the frontiers of the departments.

[31] First instance.

[32] First instance.

[33] Annotation of the translator: Kingdom of Poland: in Polish referred to as the Crown.

[34] Annotation of the translator: the Police Commission was set up in 1791 as an organ of supervision over the cities.

About the Authors

Brecht Deseure is a historian specializing in the political and constitutional history of the revolutionary era. The focus of his research is on the political culture of the succeeding regimes in Belgium between the last quarter of the eighteenth and the middle of the nineteenth century. He has published a book on the politics of history pursued by the French revolutionary and Napoleonic governments in the Belgian departments. He is currently employed as a postdoctoral researcher at the University of Passau, where he studies the genesis of the Belgian Constitution in a comparative perspective.

Giuseppe Mecca is a lawyer and legal historian. He graduated in 2008 from the Faculty of Law at the University of Macerata and gained his Ph.D. in History of Law in 2012. In 2014 he qualified as a barrister (*Corte d'Appello di Ancona*). The focus of his research is on Judges and Justice during the modern age and the liberal period. Furthermore, he has an interest in constitutional history, legal culture and theory of legal concepts between the nineteenth and twentieth centuries. He has worked as a postdoctoral researcher (Italy) and as a visiting researcher at the *Max Planck Institut für europäische Rechtsgeschichte*, Frankfurt am Main.

Ulrike Müßig, née Seif, studied Law at the Universities of Würzburg and Cambridge, and as a visitor at the Université Paris II, Panthéon-Assas. She is a professor at the University of Passau (Chair of Civil Law, German and European Legal History) and principal investigator of ReConFort. For her postdoctoral qualification (habilitation) in the areas of European and German Legal History, Civil Law, Comparative Law and International Private Law she received the Heisenberg Prize of the DFG (German Research Foundation). In 2013 Ulrike Müßig received an ERC Advanced Grant for her comparative reasearch in European Constitutional History. She is a corresponding member of the Austrian Academy of Sciences and of the National Academy *al Andalus* (*Ilustre Sociedad Andaluza de Estudios Histórico-Jurídicos*).

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Dr. Anna Tarnowska is a holder of a degree in law at the Faculty of Law and Administration of the Nicolaus Copernicus University in Toruń. Employed as an assistant at the Chair of the History of German Law in Poland, she received a degree after defending her doctoral dissertation on the unification of administration of the Second Polish Republic and the role of Prussian regulations. She is the author of several publications in the history of constitutionalism and the history of the system and administration in Poland in the nineteenth and twentieth centuries. She completed scientific internships and scholarships in the scientific institutions of Berlin, Göttingen, Frankfurt am Main, Würzburg.

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