

Sovereignty, Civic Participation, and Constitutional Law: The People versus the Nation in Belgium

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Chapter 3

Benjamin Constant and the limits of popular sovereignty

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3 Benjamin Constant and the limits of popular sovereignty

Nora Timmermans

The first French theorist of liberal democracy

Over the past few decades, scholars of both political theory and intellectual history – and from both sides of the Atlantic – have managed to carve a position for Benjamin Constant (1767–1830) as a canonical political theorist, if not in his own right, at least as a crucial rung in the evolution of Western modern political thought. Helena Rosenblatt (2009) has shown that the ideas of Constant, who was active as a writer, philosopher, journalist, and politician, have been influential from the moment they were first formulated, albeit in different ways and directions. Yet, nowadays, it is especially Constant's keen eye for constitutional mechanics that is appreciated in the secondary scholarship. The scholarly interest in Constant's constitutional and political thought reflects the sense of crisis that has been haunting liberal democracy ever since the 1960s and that has taken different forms. Today, it is the worldwide success of populism and the growing number of authoritarian regimes that feed both the belief that liberal democracy is in urgent need of saving and the interest in Constant's political thought.

The first wave of Constant-interpretation was immersed within so-called 'Cold War liberalism'. Isaiah Berlin's 1958 essay 'Two Concepts of Liberty' (1969) is probably the most famous example of this approach. Keeping totalitarianism at bay was the central tenet of Western political thought after the Second World War, especially when the vivid memory of fascism was amplified by growing communist regimes in the East (Rosenblatt, 2009, pp. 369–373; Timmermans, 2019, pp. 184–188). In this context, interpreters tended to overemphasise Constant's distrust of politics, thereby reducing his political theory to a single argument for the primacy of 'negative liberty', i.e. of an area of individual existence where political interference is absent altogether (Berlin, 1969; Dodge, 1980).

Post-1968, the attention shifted towards the positive elements in Constant's political thought. Hofmann's publication of the manuscript *Les principes de politique applicable à tous les gouvernements* (1980) facilitated the shift by making one of Constant's most sophisticated political treatises, written between 1806 and 1810 but unpublished, for the first time widely accessible to scholars. The text develops much of the theoretical foundations that Constant draws on in his later

works. The year 1980 also marked the start of the ambitious and ongoing project to publish Constant's *Oeuvres complètes*¹ and the publication of the influential interpretations of Constant's political theory by Stephen Holmes and Marcel Gauchet. Grange's publication of the *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays* (1991) added another fundamental, hitherto unpublished political treatise to the available body of Constant's work. The manuscript was written at about the same time as the 1806 *Principles* and elaborates for the first time – and in a republican framework – Constant's famous notion of '*le pouvoir neutre*' (Cf. Rolland, 2008).

The thus-expanded primary material was enthusiastically interpreted in the late 1990s and early 2000s. Biancamaria Fontana (1991), George Armstrong Kelly (1992), Lucien Jaume (1997), Tzvetan Todorov (1999), and Helena Rosenblatt (2008), among others, have made key contributions to the present understanding of Constant's political thought. Today, the contours of that understanding are well in place (e.g. Chopin, 2002, pp. 35–40; Delbouille, 2006, p. 260; Garsten, 2009, p. 92; Vincent, 2011, p. 110): Constant, together with his intellectual inspiration Germaine de Stael and the better known and widely read Alexis de Tocqueville, is considered to be at the origins of a French branch of political liberalism that brought about the first (French) theorists of 'liberal democracy' (cf. Geenens and Rosenblatt, 2012). The approach is eloquently summarised by Tzvetan Todorov:

Constant invents neither the democratic (or republican) principle of the sovereignty of the people nor the liberal principle of the limitation of power. Nonetheless it is he who articulates them, who holds them up against the real-life experience of the Revolution, the Empire, and the Restoration, who thus gives flesh to abstractions. It is he who reveals their consequences and sometimes their dangers. Constant is one of the first, and one of the most brilliant, authors who chose, among all the options that arose at the time, the one that appears to us today to be obvious (even if we are far from fulfilling it in all its perfection) – Revolution without Terror, popular sovereignty with respect for personal freedoms. In this, he is the first French theorist of liberal democracy.

(Todorov, 1999, p. 41)

Under the guise of divergent labels such as '*liberalisme du sujet*' (Jaume, 1997), 'political moderation' (Craïutu, 2012), or 'liberal republicanism' (Jainchill, 2008), contemporary interpreters tend to focus on Constant's conception of the *legitimacy* of political rule instead of on his supposed preference for the altogether absence of rule. Underlying this shift is the assumption that Constant "occupies an intriguing middle ground in comparison to other positions of his time" when

¹ See Delbouille (2006, p. 260) and see Université de Lausanne's project webpage: <https://www.unil.ch/ibc/fr/home/menuintst/publications/oeuvres-completes.html>

it comes to “the tension between popular sovereignty and the restraints on sovereignty” (Geenens and Sottiaux, 2015, pp. 305–306). This “intriguing middle ground” is also the purported reason why Constant’s political thought is not merely of historical interest but also of particular relevance for present-day political theory and practice (cf. Hofmann, 1980, p. 380; Holmes, 1980, p. 260; Todorov, 1999, p. 41). Constant represents the commonsensical position that governmental authority can and should be at once popularly grounded and limited by a more fundamental framework (be it normative, political, or constitutional).

This “intuitive” liberal democratic rendition is reflected in the abundant scholarly attention that has been given to Constant’s conception of limited popular sovereignty, as a result of which the following passage has become the most quoted of Constant’s entire oeuvre:

There is, on the contrary, a part of human existence which by necessity remains individual and independent, and which is, by right, outside of any social competence. Sovereignty has only a limited and individual existence. At the point where independence and individual existence begin, the jurisdiction of sovereignty ends. If society oversteps this line, it is as guilty as the despot who has, as his only title, his exterminating sword.

(Constant, 1815/1988, p. 177)

The passage itself is well known by now, but it raises two issues that are rarely addressed in the secondary literature. First, there is the issue that the boundaries of “social competence” need to be defined and justified. This distinct problem is not discussed here (I do not know of a comprehensive analysis of this issue, but Feldman [2008, pp. 682–689] offers some useful reflections). Secondly, Constant’s statements regarding the limited character of sovereignty say very little about how sovereignty should be understood within those limits. This is the issue that this chapter seeks to address. Generally, it has been overlooked by the secondary literature. This negligence is to a certain extent excusable, given that, as we shall see, Constant himself only cursorily developed the positive side of the principle of popular sovereignty. But without a positive account of Constant’s conception of popular sovereignty, the liberal democratic rendition of Constant’s position will always remain something akin to an intuition rather than a full-fledged theorisation. This chapter favours the latter approach and aims to clear a path for it.

One positive reading promoted within the contemporary Constant literature is Bryan Garsten’s analysis of Constant’s theory of representative government (Garsten, 2009).² Garsten argues that Constant’s theory aims to keep open and maximise the opportunities for the popular contestation of governmental representation. Constant’s aim is contrasted with a more unilateral and superficial understanding of representative government, which would be “asking the government

² Similar interpretations have been put forward by Gauchet (1995; 1997; 2005), Manent (1994), and Vincent (2011).

as a whole to represent the popular will as it can be found through any particular vote or poll” or “as it could be imagined to emerge from a process of deliberation or from an independent analysis of the public interest” (ibid., p. 91). Constant sought to “multiply and challenge governmental claims to represent the people” (ibid.) and did so for “fundamentally democratic reasons” (ibid., p. 92):

In asking instead for a government to multiply and challenge representative claims, representative government aims (on this view) to provoke debate about precisely what the popular will is and thereby to prevent any one interpretation of the popular will from claiming final authority. It aims to foster and institutionalize popular impatience with our rulers, to both fuel and channel popular grievances against those in power.

(Ibid., p. 91)

Constant’s conception of representative government thus reflects “a fundamental and unchanging desire to find ways of institutionalizing resistance to centralizing and usurping authority” (ibid., p. 100). Although I fundamentally agree with Garsten’s conclusions, which characterise Constant’s position as ‘liberal democratic’ because it is pluralist and dynamic, I believe they are not sufficiently grounded in Constant’s texts. My analysis serves both as a theoretical foundation and a critical examination of that liberal democratic assessment.

It starts with a reconstruction of Constant’s understanding of the principle of popular sovereignty, starting from his 1815 *Principles of Politics*. Constant never used the term ‘principle’ light-heartedly and neither did he when discussing the principle of popular sovereignty. All of his theoretical endeavours are predicated on the assumption that there are principles to everything that exists. This is not to say that Constant has much patience for abstract theorising or metaphysics; the principles he has in mind are based on (his assessment of) political experience: they can be discovered, explained, and, most importantly, applied (Hofmann, 1980; Fontana, 1991, pp. 13–16). With the discovery of and adherence to principles, Constant seeks to ward off arbitrariness, i.e. “the absence of rules, limits, definitions, in one word, the absence of everything that is precise” (Constant, 1797/2003, p. 38). Arbitrariness, according to Constant, should be avoided at all costs, especially in politics. This is why he has always taken a special interest in debunking the falsities that his opponents have advertised under the guise of principles (cf. Constant, 1806/2003, p. 22). He does so by rigorously dissecting the terms and concepts they use. Even though I do not aim to disparage Constant’s principle of popular sovereignty, I believe that bringing a similar conceptual rigour to bear on his own argumentation concerning this principle is the best way to reconstruct its meaning and its implications. This is what I do in the section ‘Constant’s Principle of Popular Sovereignty’. In the section ‘Assent as Sovereign Power’, I scrutinise two particular elements of the conception of popular sovereignty that results from my reconstruction in the first section: Constant’s understanding of the collective subject of popular sovereignty and his arguments concerning the institutions needed for the exercise of popular sovereignty. As I argue in the concluding section, ‘The

Political Implications of Popular Sovereignty', Constant avoids some of the problems usually associated with constitutionalism by limiting popular sovereignty to its critical dimension and detaching it from its constitutive dimension. But first, a few words about Constant's oeuvre are due.

Constancy in Constant's work?

As Biancamaria Fontana has accurately noted (Fontana, 1991, p. 11), one particular issue that every Constant scholar has to confront is the point of entry into his vast body of work. Constant wrote numerous political treatises (two of his more important ones even remained unpublished during his life) and published several pamphlets and many newspaper articles. He maintained an extensive correspondence with family, friends, and colleagues across Europe and his interventions in parliament are well documented.³ In addition to the sheer size of his oeuvre, Constant enthusiastically copy-pasted within his own texts. It is therefore notoriously difficult to separate the wheat from the chaff in terms of the originality of his ideas.

Moreover, Constant has a reputation for being politically versatile. Active as a political actor from 1796 until 1830, his career spanned more than 30 years – the most turbulent ones of the post-revolutionary era. Other contemporary interpreters have done the work of analysing Constant's positions in light of their shifting political context. As I do not assess Constant's overall political evolution nor the theoretical consistency of his oeuvre as a whole here, it suffices to say that despite some discussion on when precisely Constant reached his mature theoretical position (for a short but useful overview, see Vincent, 2011, p. 18 and footnotes), most contemporary analyses argue for a certain degree of theoretical, if not political coherence in his work, thus rejecting the ad hominem criticism that Constant was an opportunistic turncoat (cf. Deguise, 1966, pp. 3–37; Deguise traces the formerly prevalent hyper-negative assessment of Constant's personality back to Saint-Beuve's detrimental portraits).

My reconstruction of Constant's conception of popular sovereignty starts from the first chapter of the 1815 *Principles of Politics* (*Principes de politique applicables à tous les gouvernements représentatifs et particulièrement à la constitution actuelle de la France*), titled 'On the Sovereignty of the People'. This is the first published text where Constant posited his adherence to "the principle of the sovereignty of the people" in those precise terms. Unfortunately, Constant does not live up to his ambition of providing a "precise and exact definition" (Constant, 1815/1988, p. 175) of the principle of sovereignty. Its meaning needs to be reconstructed based on the subsequent argumentation in the first chapter. My objective is precisely to follow the internal logic of this particular text to reconstruct and interpret its argumentation. Pieced together, this argumentation turns out to be as simple as it is compelling, for it seems to adopt a logical more than a political rationale.

³ Constant was appointed as Tribune from 1799 until 1808 and elected as deputy from 1819 until 1822 and from 1824 until his death in 1830 (Wood, 1993, pp. ix–x).

That I follow the text's internal, conceptual logic also means that I intentionally refrain from the historical contextualisation of Constant's positions. The question of whether my reconstruction is representative of Constant's overall position nevertheless stands, especially since Constant seems to shift to a more conditional endorsement of popular sovereignty after 1815 (Constant, 1818/1872, p. 275). At the beginning of 1830, Constant even appears to have come to the unqualified rejection of popular sovereignty:

Two systems have, throughout history, divided the world: the system of popular sovereignty that I deny and the system of divine right that I detest. [...] Let us ban the word sovereignty, properly speaking, from our vocabulary. There are, in society, needs to fulfil, faculties to exercise, liberties to guarantee. Unlimited sovereignty does not exist anywhere.

(Harpaz, 1989, p. 176)

Kalyvas and Katznelson (1999) have argued that there was a fundamental evolution in Constant's views on political legitimacy, although they have identified a different tendency on the basis of different texts ("As Constant's thought matured, he moved from a primarily republican position, then to a purely liberal orientation, culminating in a more synthetic hybrid we call immanent liberalism, encompassing three apparently opposed principles of legitimacy: democratic, liberal, and traditional", Kalyvas and Katznelson, 1999, p. 514). According to their categorisation, the 1815 *Principles of Politics* that is my focal point is situated within the last stage of Constant's intellectual development. I, however, contend that there is more consistency in Constant's views on political legitimacy and that the later stage is fully compatible with the earlier ones (for this reason, I will occasionally draw on both earlier and later texts as well). Constant's understanding of sovereignty has always been at once popular and limited. Even in his very first pamphlets, published in 1796 and 1797 in support of the Directory, Constant argues against arbitrary power and in favour of constitutional limitations (e.g. Constant, 1796/2003). He thus consistently rejects a particular, unlimited understanding of popular sovereignty. Consequently, the shift indicated above exists only in the formulation of his position, not in its essence. As I show in this chapter, Constant endorses a similarly consistent positive conception of popular sovereignty, although it is a particular one.

Constant's principle of popular sovereignty

The opening paragraph of Constant's 1815 *Principles of Politics* reads as follows:

Our present constitution formally recognizes the principle of the sovereignty of the people⁴ that is the supremacy of the general will over any particular will.

4 Constant refers to the (in)famous *Acte additionnel aux Constitutions de l'Empire du 22 avril 1815*, also known as 'la Benjamine', written by Constant himself, at the request and under the supervision of Napoleon Bonaparte during the Hundred Days. In fact, the *Acte additionnel*

Indeed this principle cannot be contested. In our days many have attempted to obscure it; the evils which were caused and the crimes which were committed on the pretext of enforcing the general will lend apparent strength to the reasonings of those who would like to assign a different source to the authority of governments. Nevertheless those reasonings cannot stand against the simple definition of the words they use. The law must be either the expression of the will of all, or that of the will of some.

(Constant, 1815/1988, p. 175)

Constant identifies “the principle of the sovereignty of the people” with “the supremacy of the general will over any particular will”. This identification needs to be understood in light of Constant’s contention that “[t]here exist only two kinds of power in the world. The one, illegitimate, is force. The other, legitimate, is the general will” (ibid.). Constant argues that if power serves a particular will, it is always illegitimate because it must be based on force [*la force*] (ibid., note that Fontana’s translation of both ‘*force*’ and ‘*pouvoir*’ into ‘power’ is imprecise at this point). If power serving a particular will would not be based on force, it would be “sanctioned by the assent of all” [*l’assentissement de tous*] (ibid.). In other words, it would no longer serve a particular will, but the general will. A particular will can thus only prevail on the basis of force. And because “force belongs to whoever takes it”, it is senseless to call power that is based on force “legitimate” (ibid.).⁵

It follows that the principle of popular sovereignty or “the supremacy of the general will over any particular will” for Constant simply means that legitimate power should prevail over illegitimate power. And being “sanctioned by the assent of all” is a necessary condition for power to be legitimate. It is, of course, not a sufficient condition; in the 1815 *Principles of Politics* as well as in other texts, Constant stresses that the legitimacy of political power also depends on its limited extension (e.g. ibid., p. 177). Here, as I am only addressing the positive meaning of popular sovereignty, it is important to note that even if political power stays within its proper limits, it requires the sanction of the assent of all to be legitimate. Any kind of power that is not sanctioned by general assent simply amounts to force and is therefore illegitimate. Power sanctioned by the assent of all should prevail over power that is not sanctioned by the assent of all. Constant asserts that this basic provision holds true for every type of political system:⁶

makes no explicit mention of ‘popular sovereignty’, nor for that matter do the other constitutions of the Empire that the *Acte additionnel* is meant to supplement and modify. It merely states in the preamble: “In consequence, the following articles, forming an act supplementary to the constitutions of the Empire, shall be submitted for the free and solemn acceptance of all citizens throughout the whole extent of France” (https://www.napoleon-series.org/research/government/legislation/c_additional.html).

5 Here Constant’s argument echoes Rousseau’s analysis of ‘The Right of the Strongest’ in *The Social Contract* (Rousseau, 1762/2002, p. 158).

6 Constant does not make a distinction between assenting to the regime as a whole (the way it is organised) or its concrete policies. This has to do with the fact that, as I show, Constant’s

This principle applies to all institutions. Theocracy, royalty, aristocracy, whenever they rule men's minds, are simply the general will. When, on the other hand, they fail to rule them, they are nothing but force. In short there are only two sorts of power in the world: one, illegitimate, is force; the other, legitimate, is the general will. But while we recognize the rights of that will, that is, the sovereignty of the people, it is necessary, indeed imperative, to understand its exact nature and to determine its precise extent.

(Ibid., p. 175)

The principle also works the other way around: in theory, given that it does not exceed its limits, every form of power that is properly sanctioned by the assent of all can be legitimate, regardless of how it is organised or exercised. Constant only excludes anarchy and despotism, which, according to him, cannot be the object of assent:

This principle does not deny the legitimacy of any form of government. In some circumstances society may want a monarchy and in others a republic. So these two institutions may therefore be equally legitimate and natural. Those who declare one or the other illegitimate or against nature are either party mouthpieces and do not say what they think, or else they are ideological dupes and do not know what they are saying. There are only two forms of government, if we may even give them that title at all, which are essentially and eternally illegitimate, because no society could want them: anarchy and despotism.

(Constant, 1806/2003, p. 7)

But what does it mean, for power to be sanctioned by the assent of all? In any case, it does not mean that power needs to be exercised through a particular form of government. Constant deems the principle of popular sovereignty to be a universal principle, valid for all governmental regimes. Constant's understanding of popular sovereignty hence does not require governmental power to be exercised by the people at large for it to be legitimate. Governmental power exercised by a small number of rulers (or a single one) can be equally legitimate if the requirements are met. In fact, although Constant spends the larger part of his political theory explaining how *governmental power* should be organised and exercised, this is of little relevance for his understanding of *popular sovereignty*.

I argue that a proper understanding of Constant's conception of popular sovereignty should be based on the implicit distinction that his framework makes between two kinds of political power, i.e. 'governmental power' and 'popular sovereignty'. I am aware that this distinction looks similar to Rousseau's well-known differentiation of 'sovereignty' and 'government' (cf. Tuck, 2016), or

conception of sovereign power does not have a constituent dimension. There is hence no other option than to express one's assent through the existing regime.

to the distinction between constituent power and constituted power that is at the centre of contemporary debates in constitutional and democratic theory (cf. Walker and Loughlin, 2008). But the resemblance is deceptive. It is true that Constant and Rousseau attribute an equally general application to the principle of popular sovereignty, deeming it to be at the basis of all legitimate political systems. But for Rousseau, the decisive feature of popular sovereignty is that the legislative power is exercised by the people as a collective body (Rousseau, 1762/2002, p. 179; Manin, 1997, pp. 74–75). The governmental form is determined by the body that exercises executive power. In a democracy, e.g., the whole or the majority of the people exercise both legislative and executive power and are thus both sovereign and government (Rousseau, 1762/2002, p. 199). Recently, it has been argued that Rousseau's definition of sovereignty thus identifies it with constituent power, i.e. with fundamental decisions about the organisation of society, whereas 'government' concerns everyday politics (Tuck, 2016; Colon-Rios, 2016).

Whether or not one accepts this 'constituent' reading of Rousseau, it does not overlap with the distinction that I identify in Constant's framework. For Constant, legislative power, even of the constituent kind, is situated in the sphere of 'governmental power' and can be exercised by a small minority. In other words, Constant's understanding of governmental power comprises both Rousseau's understanding of 'sovereignty' (legislative/constituent power) and Rousseau's understanding of 'government' (executive power/everyday politics). Constant's principle of popular sovereignty is thus not dependent on the manner of the exercise of executive power or legislative power. For Constant, popular sovereignty concerns a separate form of power that I call *sovereign power*. As I show in the remainder of the chapter, sovereign power is a proper though particular form of political power. Sovereign power means that the sanction of the assent of all establishes *the legitimacy of governmental power*. It does not have a constituent element. The implications of this understanding of popular sovereignty are discussed in the concluding section. First, the particular features of Constant's conception of sovereign power need to be examined.

Assent as sovereign power

The collective subject of sovereign power

The first feature that I examine is the collective, i.e. the popular element of Constant's understanding of sovereign power. Even though Constant's preoccupation with the individual and individual rights has often been emphasised in the secondary literature, except for the 'constructivist' rendition proposed by Garsten, his particular conception of the collective subject of popular sovereignty has not been given much attention. I argue that Constant theorises the subject of popular sovereignty as an aggregate of individuals, rather than as a 'body politic'

(a political community in the sense of a single moral person with a separate, independent collective personhood and agency).⁷

Throughout his texts, Constant refers to the subject of popular sovereignty in rather vague and strongly varying terms: ‘the association’, ‘society’, ‘the people’, ‘the nation’, or even just ‘all’ (*tous*). When discussing popular sovereignty in the 1815 *Principles of Politics*, the most elaborate account Constant gives of its subject is, in fact, a negative one:

In a society founded upon the sovereignty of the people, it is certain that no individual, no class, are entitled to subject the rest to their particular will. But it is not true that society as a whole has unlimited authority over its members. The universality of citizens is [the] sovereign in the sense that no individual, no faction, no partial association can arrogate sovereignty to itself, unless it has been delegated to it. But it does not follow from this that the universality of citizens, or those who are invested with the sovereignty by [it], can dispose sovereignly of the existence of individuals.

(Constant, 1815/1988, pp. 176–177, modified translation)

It is clear by now that Constant focuses mostly on what sovereignty does not mean. And it certainly does not mean unlimited power. Constant rejects Rousseau’s definition of the social contract as “the complete alienation of each individual with all his rights, without any reservations, to the community” precisely because it results in unlimited power (*ibid.*, p. 177). Yet, Rousseau’s definition of the social contract is closely intertwined with his conception of collective subjectivity and Constant’s critique of the former cannot be understood apart from his critique of the latter. Rousseau’s theory of popular sovereignty hinges on the fact that “the sovereign” constitutes a “body politic”, a political community with a separate purpose, agency, and personhood; a collective entity that is not reducible to its individual members:

Right away, in place of the particular individuality of each contracting party, this act of association produces a moral and collective body, composed of as many members as the assembly has voices, and which receives from this same act its unity, its common self (*moi*), its life, and its will. This public person, which is thus formed by the union of all the individual members, used to be called a *city*, and now is called *republic* or *body politic*.

(Rousseau, 1762/2002, p. 164)

Such an understanding of collective subjectivity is crucial to Rousseau’s goal

7 The distinction, with a long history in political thought, goes back to Roman private law, where a distinction existed between *universitas* (association) and *societas* (aggregate) as different types of collective entities (cf. Oakeshott, 1975).

[t]o find a form of association that may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, joining together with all, may nevertheless obey only himself, and remain as free as before.

(Ibid., p. 163)

Some have taken Rousseau's conception of the body politic to favour a homogeneous, natural community (based on, e.g. ethnic ties) (e.g. Gauchet, 1997, pp. 51–64; Dunn, 2002, pp. 13–16). Yet, Rousseau explicitly confirms the constructed character of the body politic by arguing that the body politic comes about through the alienation of the aspiring members' individual sovereignty. Rousseau also repeatedly refers to "the sovereign" as a "moral" (Rousseau, 1762/2002, p. 164, 166) or "artificial" (ibid., p. 197) rather than a natural person. Neither does it follow from his definition of the body politic that Rousseau completely disregards the individual members and their rights: the power that the body politic has over its members may be absolute, but it cannot be arbitrary (ibid., p. 174). Rousseau's conception means first and foremost that "the sovereign" *qua* sovereign has a separate existence. The collective entity, although it is a moral person, is ontologically real.

Constant's understanding of collective subjectivity is very different from Rousseau's. To begin with, as we have seen in Constant's famous passage about limited sovereignty, the individual members do not transfer, let alone alienate, any of their rights to the collective entity. Individual rights should remain outside the scope of governmental power. As a consequence, they also remain outside the scope of sovereign power, which has the function of establishing the legitimacy of governmental power and is, in that sense, dependent upon the latter's extension. On this reading, it is thus, first and foremost, Constant's conception of governmental power that is limited, the limited conception of popular sovereignty is merely a consequence thereof.

Constant is not at all interested in the 'act' of aggregation itself. He takes society, i.e. the aggregate of individuals, as a given (Constant, 1821/2015, pp. 29–30). And the political organisation of that aggregate does not fundamentally change the position, the status, or the character of the individuals who are involved in it. Contrary to Rousseau, who considers the collective to be an artificial but real public person with concrete characteristics, Constant explicitly calls the sovereign "an abstract being":

The repose and happiness of all is better guaranteed by the independence of each, in everything which is not harmful to others, than by any of the attempts, open or disguised, violent or equivocal, which are constantly repeated by authority and unfortunately blessed by some shortsighted philosophers, to endow society, that abstract and fictive being, at the expense of individuals, the sole real and sensible beings.

(Ibid., p. 33)

For Constant, the collective does not have its own, separate reality. The collective subject of sovereign power is merely the sum of these individuals and not an independent collective person. In Constant's framework, the crucial step of Rousseau's social contract, i.e. the constitution of the body politic, is not taken. There is no constitution of a political community. As I argue in the concluding section, Constant's understanding of sovereign power does not have a constituent dimension.

The individual exercise of sovereign power

Popular sovereignty is thus attributed to an aggregated collectivity and it is exercised by the individual members. More precisely, they exercise it in their own name and on their own behalf rather than on behalf of the collective. Constant's sovereign power is the specific power of the *individual* to give their assent to governmental power. For Constant, sovereign power is thus a generalised form of individual assent rather than a collective power. This interpretation, although perhaps unconventional, is confirmed in one of Constant's earliest political texts. Because this particular text is not often discussed in the secondary literature, it is worth quoting the relevant passage at length:

It is a universal principle, true in all times and circumstances, that no man can be bound except by the laws in which he has concurred. In a very restricted society, this principle can be applied in an immediate manner and does not need an intermediary principle to become a habitual practice. But in a different combination, in a very large society, we must add a new principle, a principle intermediary to that which we have just stated. This intermediary principle says that individuals can contribute to the formation of laws, either in person or by their representatives. Whoever wishes to apply the first principle to a large society without employing the intermediary, would inevitably upset it; but this upheaval, which would attest to the ignorance or ineptitude of the legislator, would prove nothing against the principle. The State would not be shaken because of the acknowledgment that each of its members must concur in the formation of laws, but because one was unaware that, in the surplus of a given number, the members must, in order to concur, be represented.

(Constant, 1797/2003, p. 35, my translation)

The principle that "no man can be bound except by the laws in which he has concurred" refers to the principle of popular sovereignty. It restates the idea that only legitimate governmental power can create a legal obligation (whereas force or illegitimate power cannot). And governmental power can only be legitimate if it is sanctioned by the assent of all. The passage also emphasises the individual character of the *exercise* of that sovereign power: "this intermediary principle says that *individuals* can contribute to the formation of laws, either in person or by their representatives" [my emphasis].

Obviously, some form of institutional organisation is required to allow individuals to exercise sovereign power, i.e. express their assent.⁸ As Constant stipulates, individual assent can be expressed either directly or through representation. Electing representatives amounts to the exercise of sovereign power: it is an expression of assent that establishes the legitimacy of their legislative (i.e. governmental) power. Contrary to what is usually assumed (e.g. on the basis of Constant's lecture on *The Liberty of the Ancients Compared with that of the Moderns*, 1988b), Constant does not argue that popular sovereignty necessarily requires representative government. Admittedly, given that France is a large society,⁹ he does not spend much energy on the Rousseauian scheme wherein the individual members (permanently) participate in the legislative assembly in person. But he accepts it as a theoretically valid option. A different form of the direct expression of assent is included in the 1815 *Acte additionnel* that Constant drafted himself and to which he refers in the 1815 *Principles of Politics*: the *Acte* made it possible for the (enfranchised) population to directly ratify the constitution (cf. Laquière, 2003).

Constant's representative system is a complex institutional arrangement with five *governmental* powers and refined checks and balances (Constant, 1815/1988, pp. 184–185). I focus exclusively on the elective segment of that arrangement as I am only interested in the exercise of *sovereign power*, i.e. the expression of assent. In the 1815 *Principles of Politics*, Constant advocates for the direct popular election of the second legislative chamber (ibid., pp. 201–213).¹⁰ The question is who (or what) is represented by the elected representatives, given that the subject of sovereign power is not a body politic but an aggregate of individuals? When those individuals elect the representatives, they establish the legitimacy of their legislative power. As Constant stipulates, from that moment on, the power of the representatives becomes the general will (ibid., p. 175). The legislative power represents the general will, and the general will is represented by the legislative power. So, whereas the individual members cannot act on behalf of 'society' as a whole (they exercise sovereign power in their own name), the elected representatives can (they exercise governmental power in the name of the aggregate). Constant accepts this implication but in a qualified manner. The general will/interest needs to be understood as the aggregate of the individual wills (and only a limited part thereof), and it is thus composed of multiple concrete, separate interests:

8 My focus here is on the organisation/exercise of sovereign power and not on the organisation of governmental power. The latter is, for Constant, an issue that does not directly pertain to the principle of popular sovereignty.

9 The arguments that Constant provides in support of the representative system are mostly of a sociological nature (Constant, 1819/1988, pp. 314–315). Although they are very interesting in themselves, I leave them aside, as they do not touch upon the theoretical issues that I want to discuss in this text.

10 This chamber exercises "the representative power of public opinion" and shares the legislative power with the first, hereditary chamber.

The general interest is nothing but the reunion, the conciliation of all the private interests that exist simultaneously. If the general interest was something else, it would be a chimeric abstraction. [...] It is not necessary to claim so much contempt for private interests: these are the only real interests because society is nothing but the aggregation of the private individuals that are a member of it.

(Constant, *Session des chambres de 1818 à 1819, Discussion sur le projet relatif aux pétitions*. Cited in Feldman [2008, p. 691, footnote 76])

With this view, Constant goes against the “very exaggerated idea of the general interest” (Constant, 1815/1988, p. 205) that prevailed in the post-revolutionary constitutional debates. As Lucien Jaume has argued (Jaume, 1998, pp. 161–166), the dominant position, defended by Sieyès and Cabanis among others, was that popular unity should be substantive and therefore handed down from above. This was the only way the unity of the general will could be achieved and guaranteed. The general will was not to be constructed by collecting and synthesising individual or sectional input; representatives were not to represent their electorate, they were chosen to determine ‘the general will’ on behalf of the nation as a whole. In other words, the dominant view corresponds to the understanding of the collective subject of popular sovereignty as a body politic. As a consequence, electoral colleges were generally preferred over the direct popular election of representatives. Constant’s conception of sovereignty power, on the contrary, rejects the idea of a substantive popular unity whether it is presupposed bottom up or enforced top down.

The political implications of popular sovereignty

Based on this analysis of Constant’s conception of popular sovereignty, I principally agree with Garsten’s assessment of Constant’s theoretical/political position as pluralist and dynamic, even though I think it is theoretically more precise to attribute these characteristics to Constant’s conception of popular sovereignty instead of to his conception of representative government. Whereas Garsten claims that Constant theorises representative government as a correction to popular sovereignty (Garsten, 2009, p. 91), I have argued that Constant’s representative system allows the individual members of the aggregation to express their assent, i.e. exercise their sovereign power. In my reading, popular sovereignty and representative government are thus not so much opposed but connected, although I believe that the connection, for Constant, is not a necessary one. Yet, overall, I agree with Garsten that Constant is not worried about the one-on-one transferral of popular will into governmental power but, on the contrary, heavily emphasised the possibility of contesting governmental power from below.

It is easy to see that Constant’s conception of the aggregated subject of sovereign power endorses a significant degree of *pluralism*. Because he thinks of this subject (i.e. society) as the aggregate of its individual members, he can easily

accept that society harbours multiple, different, and potentially conflicting interests. Constant does not believe that society is (or should be) characterised by unity or homogeneity: “variety is what constitutes an organisation, uniformity is mere mechanism. Variety is life, uniformity is death” (Constant, 1814/1988, p. 77). The fact that sovereign power is not exercised in the name of a collective in the sense of a body politic with its own purpose, agency, and personhood also helps to guarantee the possibility of *contesting* the legitimacy of governmental power. For Constant, submitting governmental power to the “assent of all”, exercised by the individual members in their own name and on their own behalf, is a way to *prevent* particular groups from indefinitely usurping governmental power:

The axiom of the people’s sovereignty has been thought of as a principle of freedom. It is in fact a principle of constitutional guarantee. It aims to prevent any individual from seizing the authority which belongs only to the political society as a whole. It determines nothing, however, about the nature of this authority itself. It in no way adds to the sum of individual liberties, therefore, and if we do not turn to other principles for determining the extent of this sovereignty, freedom could be lost, despite the principle of the sovereignty of the people, or even because of it.

(Constant, 1806/2003, p. 11)

It is precisely because the possibility of contestation needs to be guaranteed that Constant does *not* think of popular sovereignty as a principle of collective empowerment. It does not entail the constitution of a collective subject. The essence of sovereign power is individual judgment, rather than the formation and expression of collective will. Sovereign power does not concern the *constitution* of governmental power, but merely the possibility to approve or contest its legitimacy. In other words, it is crucial that ‘governmental power’ and ‘sovereign power’ are exercised by individuals in different capacities (the former in the name of society, the latter in their own name).

Paradoxically, this conception of sovereign power also introduces a bias in favour of the existing institutions. The fact that sovereign power is recast as the possibility of contestation has a conservative penchant, at least in Constant. It is hard to see how assent could be expressed or withdrawn except through the *existing* institutional framework. Although others like Rousseau and Sieyès have identified this as a fundamental problem for political theory (i.e. the infamous paradox of constituent power, cf. Walker and Loughlin, 2008), it is not an issue at all for Constant: sovereign power simply does not have a constituent dimension. The power to *constitute* governmental power is, according to Constant, not a part of popular sovereignty:

There really is a prerogative – when we are speaking abstractly – that society does possess and does not delegate to the government, namely the right to change the organization of the government itself. To delegate this right

would set up a vicious circle, since the government could use it to transform itself into a tyranny. But this very exception confirms the rule. If society does not delegate this prerogative, neither does it exercise it itself. Just as it would be absurd to delegate it, so it is impossible to exercise it and dangerous to proclaim it.

(Constant, 1806/2003, p. 18)

In order to serve its purpose, i.e. “to prevent any one interpretation of the popular will from claiming final authority” (Garsten, 2009, p. 91), such a constitutive dimension is also unnecessary and could even be detrimental. As Constant writes, it could be used to transform the existent system into a tyranny with the risk of completely eliminating the power to contest the legitimacy of governmental power. The objective to keep the possibility for contestation open is realised at the cost of maintaining the institutional status quo. Constant’s understanding of popular sovereignty thus entails genuine opportunities for contesting the legitimacy of governmental power while also working to keep the existing organisation of governmental power in place.

In conclusion, I want to emphasise that the way Constant understands popular sovereignty is a form of political power that is crucially important. Legitimacy requires that citizens can express or withdraw their assent to the regime and its concrete policies. Sovereign power, however, does not exhaust all the possible forms of political power. In fact, the crisis of democracy that keeps the interest in Constant’s theory alive may require us to theorise (and practice) alternative forms of power that do have a constituent dimension and are less tied to the institutional status quo.

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