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Reconsidering Constitutional Formation II Decisive Constitutional Normativity

From Old Liberties to New Precedence

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Ulrike Müßig
Editor

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To the KUS voyagers including Christoph,
crossing the Atlantic on the Thor Heyerdahl
(October 2017–April 2018)

Acknowledgements

This second volume is part of the journey, funded by the ERC Advanced Grant ReConFort. The physical journey in relation to the key category 'precedence of constitution' started with the international conference on '*Grondwettelijke voorrang*—Precedence of Constitution' at the Royal Flemish Academy of Belgium for Science and the Arts, Brussels, on March 14, 2016, which was supported by the Vrije Universiteit Brussel and the CORE Network and facilitated by Dirk Heirbaut and Dave De ruysscher. The Rt. Hon. Lord Robert Reed (United Kingdom Supreme Court, London) opened the conference with his presentation on the sensitivities of common law, *viz*., the law of the European Union. Facing the beginning of Britain's negotiations concerning its withdrawal from the Union the immemorial custom reasoning of the common law bridges the pretended gap by indicating Britain's connections with the European constitutionalism via eighteenth-century America. It was the British-American discursive common law community where the American history of establishing the Constitution as law, up to the landmark case of *Marbury v. Madison* in 1803 started from.

Every journey requires a profound orientation. The compass for the ReConFort research presented here, as indicated by the title *Decisive Constitutional Normativity*, was the discourse-related analysis concerning how contemporaries communicated the constituting of the whole political order as a legal order. Beginning in the late eighteenth century, the 'new' normativity was not invented in one precise moment. Rather, it often emerged from long and intensive debates of the 'old' concepts of fundamental rights. As Principal Investigator, my contribution to this volume, 'A new order of the ages (Novus ordo seclorum)', provides the map for the ReConFort research approach to the relevant discourses. That is why it analyzes in detail the American discourse, its commonalities with the 'old' common law theory of the seventeenth century, and the departure from the Anglo-American transatlantic discursive community in 1776, and the 'replacement' of common law with natural law. The French discourse, in contrast, emerged out of the *Declaration of the Rights of Man and Citizen* in 1789, reaching for the philosophical universality as '*Le but de toute institution politique.*' The Rousseauist

understanding of law as the expression of the *volonté générale* and, consequently, of freedom to participate in legislation (Art. 6) was totally unknown to the American colonies' legal argumentation. Instead, they conducted their 'case' as though it were a common law litigation. Whereas the American resistors differentiated constitutional law and ordinary law conceptually in their effort to justify the revolution as legitimate, French discourse allows, even today, no review of statutes for unconstitutionality except for the narrow scope of the 'prior question of constitutionality' (*question prioritaire de constitutionnalité*, QPC), dealing with the *a posteriori* control of promulgated statutes being compatible with the rights and liberties guaranteed by the current French constitution in Art. 61–1.

A comprehensive history of constitutional precedence was never ReConFort's intention. ReConFort's concentration on the historic discourses makes sense precisely because the contemporary models of constitutional precedence are already visible: the English 'negative' model, with no constitutional precedence due to the doctrine of parliamentary sovereignty hindering any hierarchy of public laws; the American model, with the theory of constitutional precedence proclaimed in Art. VI clause 2 of the United States Constitution of 1787 but with no provision at either federal or state level of how to implement this precedence (this finally being introduced by the United States Supreme Court over fifteen years later in *Marbury v. Madison*); the French model of venerating the *volonté générale* to be superior to the constitution and therefore excluding constitutional precedence, except for the narrow QPC, introduced as late as 2008. Intellectually, these facts provided termini; ReConFort aimed to explain both the routes taken to arrive at these destinations, as well as how these would affect the constitutional sojourn to follow.

The physical journey continued with the ReConFort midterm conference, 'From Golden Liberty to Golden Age—New Order through Normativity versus Instrumentalisation of Old Liberties', at the University of Passau, and the Carl Friedrich von Siemens Foundation in Munich (19–21 September 2016). Both the spring and the autumn destination afforded the ReConFort project excellent contributions to comparative constitutional history, both from researchers directly connected to the project as well as scholars whose interests have coincided with it. They all, spanning research about constitutional normativity and precedence in Austria, Belgium, Germany, Italy, Norway, the Netherlands, and Poland, demonstrate the diversity as well as the commonality of the legal-historical foundations of Europe. The American constitutional discourse, itself extensively influenced by British common law, serves, in turn, as an inspiration and a basis for constitutional experiments from the French Revolution to the end of Napoleon, in the halls of revolutionary thought in the Frankfurt Assembly as well as those of liberal-nationalism of Unification Italy, and in the theoretical discourse of twentieth-century Austria. The questions raised in the papers compiled here resonate today, as the European legal community faces new challenges of communicating its concepts of freedom, political power, law, and the nature of the constitution itself.

Every journey depends on reliable, inspiring, and faithful traveling companions. For the intellectual journey through the discursive dependencies of constitutional formation in eighteenth- and nineteenth-century Europe, via the key categories of

constituent sovereignty (ReConFort I, SHJL 6) and justiciability of power (final conference in Toruń, Poland, February 2018), the company matters even more than on flights or train rides. In September 2016 Marcin Byczyk (Poznań) and in November 2016 Bodie Ashton (Adelaide) joined the well-established postdoc team of Brecht Deseure (Brussels), Giuseppe Mecca (Macerata), and Anna Tarnowska (Toruń). While they are newcomers to the journey, much like the old hands they are the right people in the right positions. Bodie Ashton's professional standing as academic editor managed to adopt the diversity of notes in this multilingual volume to the unificatory needs of open access. This comprehensive volume would not have been possible without the continuous support of my brilliant team at the Passau chair, whom I offer my warmest thanks yet again. I am particularly grateful to the project manager Stefan Schmuck, my secretary Elisabeth Schneider, the ReConFort doctoral students Franziska Meyer and Joachim Kummer, the trainee lawyer Donata Zehner, and the assistant Maike Schwiddessen. They have all dedicated themselves wholeheartedly to my intellectual journey into the decisive constitutional normativity. This support has taken me even further into uncharted but exciting waters; included in this volume are the first English translations of Emmanuel Joseph Sieyès' draft *Du Jury Constitutionnaire* (1795), and Tsar Alexander I's *Projet de Constitution pour le Royaume de Pologne* (1812), thereby making these extraordinary documents in their diversity accessible to the international research discourse. Both require extensive further research, and in the case of the latter, my hopes rest on the feedback to my keynote address to the ESCLH 4th Biennial Conference 2016, lecturing on Polish Republicanism (1573–1831) and American Constitutionalism (1764–76). Special thanks, furthermore, go to the National Museum Kraków (*Muzeum Narodowe w Krakowie*), which granted permission for the open access publication of manuscripts of the Princes Czartoryski Library (*Biblioteka Książąt Czartoryskich*), collection Druckich-Lubeckich. A special mention is also due to Luigi Lacchè (Macerata) as *spiritus rector* of the *Giornale di Storia Costituzionale*. A special issue of the Giornale n.34 (II-2017), regarding sovereignty and constitution, "Historical Issues and Contemporary Perspectives" appeared in January 2018, including the aforementioned contribution of Lord Reed, as well as articles written by other speakers at the midterm conference. It is precisely this degree of multinational cooperation between the academic communities of Europe that ReConFort has both fostered and benefitted from.

Finally, no voyage of discovery is ever uniformly calm, and my most faithful companions through every storm have always been, and remain, my family: Guntram, Christoph, and Johanna. I owe them more than words can express.

Passau, Germany Ulrike Müßig
May 2018

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A New Order of the Ages. Normativity and Precedence

Ulrike Müßig

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Abstract In the second research period of the Advanced Grant ReConFort (2016–17), precedence of constitution was the central interest for understanding historical constitutional discourses; these discussions have been further enriched by research into the Polish case study of 1815, which is also addressed in this volume. On the functional level as *tertium comparationis*, precedence of constitution guarantees the normativity of the modern constitutional concept, comprising the conceptual differentiation from ordinary law, the aggravated alterability (sometimes even up to an 'eternal' restriction on the constituent power) and the hierarchically supreme justiciability as legal tests for subordinate laws. Arising out of the American and French Revolution, the new normativity of the 'constitution', now connoted as a legal text, fixed the *whole* political order into *one* legal order. This claimed to be 'the basis and foundation of government', as the Virginia Declaration of Rights of 1776 starts, or '*Le but de toute institution politique*', in the wording of the preamble of the French 1789 Declaration of the Rights of Man and Citizen. However, irrespective of the superficial linguistic commonalities, the revolutionary American and French discourses on constitutional precedence differ significantly, and met widely varying challenges. Nevertheless, both discourses provided the basic framework for European constitutional developments of decisive normativity in the late eighteenth and nineteenth century. Therefore, they act as cornerstones for comparative research on this key category, reconsidering constitutional formation between old liberties and new precedence. These foundations have guided not only the Principal Investigator's following essay, but also the papers of the ReConFort postdocs and the contributions of the speakers at the international Brussels conference, on 14 March 2016, which are combined in this volume.

In the case of America, colonist resistance against Westminster produced a written superior law set above all political power, due to the efforts to justify the revolution as a legitimate breach of common law. The colonies' legal argumentation conducted their case like a common-law litigation and borrowed from a long-standing constitutional semantic already traceable in early modern European monarchies. The subordination of ordinary legislative assemblies under fundamental laws (*lois fondamentales*)—as demonstrated in the granting of religious freedom to all inhabitants in the founding document of the Colony of West New Jersey (1676)—remained based on the traditional grounds that fundamental laws had a specific importance that elevated them above ordinary laws. Neither legal legitimation nor the binding of political authority by very important laws was a new or even revolutionary concept. The British-American discursive common law community was built around the prominence of the *Magna Carta* and the Bill of Rights, and it was indeed these fundamental laws on which the colonists relied for recalling their customary old liberties as subjects of the British king. Facing Westminster's unitarian legislative absoluteness in the imperial context, the colonists developed the differentiation between legal and constitutional; the Stamp Act and the Sugar Act, although *legal*, were argued to be *unconstitutional* due to the violation of common law liberties. A complementary legal argument was the distinction of the Empire from internal colonial polities, which were governed by the old liberties and privileges as English subjects and not by the superintending power

of the British Parliament. In the unsettled connexion of the colonies to Britain, American lawyers relied on Coke's supremacy concept of common law as immortal custom, as it was understood through Blackstone's *Commentaries*. As long as the legal debate was kept on the customary level of their old rights as Englishmen, all questions of precedence were mere questions of the applicability of ordinary law. This changed with the natural law 'basis and foundation of government' expressed in the Virginia Bill of Rights, which itself was not vested with any superior rank, but was still analogous to common law.

The Declaration of Independence invoked a united American people, distinct from the British colonial power. Thereby emerging, the constituent American people became the reference point for establishing the constitution as law, as well as its revision and interpretation, though there were only the people of the thirteen individual states of the Union. Due to the lack of an unitarian state, the supremacy of the United States Constitution rested not only on it being the legal benchmark for all political powers to protect freedom and property, but also on it being the guarantee for the existence of the Union. Such an interlinkage between the Constitution and the Union invigorated the distinction between superior constitutional law and ordinary statutory law (also of the single federal states), and opened up the discourse on constitutional jurisdiction. In bidding farewell to the Lockean idea that there was 'no judge on earth between the legislative and the people', the secular 'judge' filled the gap between the legislative branch and the people, which had been caused by the legal separation of the Constitution from the ordinary legislation. The ordinary jurisdiction of the Supreme Court became authorised to measure the statutory law against the 'higher will of the people', meaning the Constitution. The Lockean right to resistance—addressed in his god-judge equivalence—was taken up by the federal jurisdiction. *Marbury v. Madison* (1803) accepted the latter's prerogative to examine statutory constitutionality or unconstitutionality in a 'judicial review.'

The common law tradition of the American idea of law was far removed from the French Rousseauist understanding of law as the expression of the *volonté générale*. Freedom by participation in legislation—articulated in Art. 6 Declaration of the Rights of Man and Citizen as (fraternal-political) equality (*liberté, egalité, fraternité*)—is and was totally unknown to the American constitutional discourse. Furthermore, '*Le but de toute institution politique*' of the 1789 declaration reached for the same universal validity, but its philosophical wording only achieved the appropriate legal status by incorporation in the preamble of the September Constitution (1791). Whereas the American resistors differentiated constitutional law and ordinary law conceptually in their effort to justify the revolution as legitimate, the French discourse is, even now, very reluctant to review the unconstitutionality of acts of the legislative assembly, disregarding the difference between the ordinary legislative assembly and the constituent assembly (representing national sovereignty), following Sieyès' differentiation between constituent national sovereignty and constituted sovereignty. Even under the current French Constitution (enacted on 4 October 1958), there is no review of statutes for unconstitutionality except for the narrow scope of the 'prior question of constitutionality' (*question*

prioritaire de constitutionnalité or QPC) dealing with the *a posteriori* control of promulgated statutes being compatible with the rights and liberties guaranteed by the constitution in Art. 61-1. The failure of Sieyès' draft of a '*jury constitutionnaire*' in the Thermidorian debates of the year III (1795; reproduced here in the French original in Appendix A and in the English translation in Appendix B) was only the first link in a chain of reasoning to refuse any judicial authority to declare statutory law to be unconstitutional and overrule it. Sieyès planned for his jury to be staffed with former congressmen rather than professional judges. However, the Rousseauistic dogma of the general will and the continuous constituent power of the French people did not allow for Sieyès' project to open a window of opportunity for constitutional complaints to be addressed even by individual citizens in their own name to the constitutional jury. Together with the skepticism of the Constitutional Convention about the jury's resemblance to the judicial privileges of the *Ancien Régime*, this led to Sieyès' petition being rejected unanimously in the Constitutional Convention of the year III.

Finally, sketching matters of juridification, supremacy, and revision in the public sphere around the constituent St. Paul's Church Assembly underlines the interconnection not only between the discourses established in the above case studies (applied in a different context), but also between the key issues of the ReConFort project as a whole. In spite of the fact that it ultimately failed to come into force, the German Imperial Constitution of 1849 is a clear example that national sovereignty (*Reconsidering Constitutional Formation* I) marked the starting point for the process of juridification of sovereignty; constitutional precedence (*Reconsidering Constitutional Formation* II) was the legal tool to complete the process of juridification of sovereignty.

1 Novus Ordo Seclorum

The motto *Novus Ordo Seclorum* ('A new order of the ages'), appearing underneath the unfinished pyramid on the reverse side of the Great Seal of the United States, was coined in 1782 by Charles Thomson. He adapted it from Virgil's *Eclogue IV*, a pastoral poem of the first century BCE, where a Sibyl prophesied the fate of the Roman Empire in her longing for a new era of peace and happiness.[1]

[1]Translation (by James Rhoades): 'Now the last age by Cumae's Sibyl sung/Has come and gone, and the majestic roll/Of circling centuries begins anew: Justice returns, returns old Saturn's reign, With a new breed of men sent down from heaven. Only do thou, at the boy's birth in whom/The iron shall cease, the golden age arise. Under thy guidance, whatso tracks remain/Of our old wickedness, once done away/Shall free the earth from never-ceasing fear. He shall receive the life of gods, and see/Heroes with gods commingling, and himself/Be seen of them, and with his father's worth/Reign o'er a world at peace.' The oracle of Sybil refers to the Old Testament history, starting with Adam and Eve, of the reprehensibility of the (five) lineages before the Great Flood. After the Flood, the 'golden age', beginning with Noah, followed. Sibyl was part of this sixth lineage. People of this age stayed always healthy, did not age, and died peacefully. This was

Charles Thomson (1729–1824) was the secretary of the Continental Congress;[2] his name appeared on the first published version of the Declaration of Independence in July 1776, alongside that of John Hancock, the congress' president.[3] Thomson placed the motto beneath the unfinished pyramid,[4] whose vacant peak stood for the lost monarchy after the renegade colonies have declared themselves independent on 4 July 1776. The pyramid and its motto, therefore, acted as the graphical depiction that marked 'the beginning of the new American Era', commencing from the Declaration of Independence.

2 Definitions of Normativity and Precedence

Normativity in modern constitutional dogma[5] means the obligatory character of the constitution as a legal regime to control[6] and to restrict state power.[7] This amounts to the positivistic, compulsory, and justiciable nature of constitutional law, its

followed by the age of the titans. Cf. *Die sibyllinischen Orakel, Die Aussprüche und Weissagungen der alten Sibylle über die Vergangenheit, Gegenwart und Zukunft der Welt, Aus alten Schriften in deutscher Übertragung mit Einleitung und erläuternden Anmerkungen*, 2nd ed., ed. Richard Clemens (Wiesbaden: Fourier, 1985), 65–6, 80–1, 90–1. The idea of paradisiacal conditions in present time are the theme of Virgil's fourth *Eclogue*. The text describes a new golden era which begins with the birth of a mysterious boy. This age is characterised by the absence of misery, hassles, and the enjoyment of the fruits of the earth without the effort of the people—there being no need for agriculture, commerce, or seafaring. This utopia becomes concrete for Virgil with Augustus. See Töns (1977), 154–5. Cf. Ryberg (1958), 112–31. In the first two pages, Ryberg points out that the golden age was already addressed by Hesiod.

[2]Thomson served as the secretary of the Continental Congress from its founding in 1774 until its dissolution in 1789. His role was essentially to keep the minutes of the Congress, undertaking duties that nowadays are undertaken by the Department of State, the Secretariat of the Senate, and the Clerk of the House of Representatives. He was considered by his contemporaries to be an unimpeachable figure whose honesty was above reproach, and documents with his signature were considered 'the Truth.'

[3]Between the founding of the Continental Congress in 1774 and the enacting of the United States Constitution in 1789, there was no cameral differentiation of the executive and legislative branches; the Congress occupied both. It also voted for the 'President of Congress', as the office of the President of the United States obviously did not exist at the time.

[4]The designer of the pyramid in 1782, including the Eye of Providence motif, was a lawyer named William Barton. He, in turn, was probably influenced by Francis Hopkinson's pyramid design on the $50 Continental Currency banknote (1778); Hopkinson had also been consulted in 1780 on the heraldic design for the Great Seal. For the final design of the reverse side of the Great Seal, Charles Thomson specified 'A Pyramide unfinished'. He put a triangle around the eye of Providence, as suggested by the first committee.

[5]Cf. for the Parliamentary Council (*Parlamentarischer Rat*) Badura (1973), 19–20, 23.

[6]Loewenstein (1975), 127.

[7]Badura (1973), 19, 22; Friedrich (1953), 135. Cf. Starck (1992), § 164 Recital 1. Unless otherwise noted, all translations are those of the author.

differentiation from and hierarchical precedence over ordinary law[8] and, moreover, its aggravated alterability.[9] In the specific provisions of the German Basic Law (Articles 1 section 3, 20 section 3, 79 section 3)[10] the so-called 'eternity clause' in Article 79 section 3 restrains even the constituent power.

Reconsidering constitutional formation, one should be very aware that it is the *normativity* which is the *novelty* of the modern constitutional concept arisen out of the American and the French Revolutions at the end of the eighteenth century. Neither governmental legitimisation nor legal binding of political authority were new terms, but rather had long been part of the old constitutional semantics.[11] Also, the subordination of legislative assemblies—as in the founding document of the Colony of West New Jersey (1676)[12]—remains on the traditional ground of the specific importance of fundamental laws (*lois fondamentales*) that were higher–ranking than ordinary laws.[13] In the case of America, it was the break with the English mother country that required a new legal fixture of the (whole) political order. 'Constitution' was now connoted as a legal text, fixing the political order into a legal order. This provided, according to the opening sentence of the Virginia Declaration of Rights of 12 June 1776, 'the basis and foundation of government.'[14]

[8]Cf. Kastari (1966), 49–50, 52.

[9]Badura (1992a), § 159 Recital 1. The term normativity thus describes two different aspects of the constitution: in a narrow sense, normativity refers to the positivistic mandatory effect of the constitution as a legal rule, as described in Badura (1992b), vol. VII, § 160 Recital 2; in a broader sense, normativity is a comprehensive term for the specific legal effects of the constitution.

[10]For the coherence between Articles 1 (3), 20 (3), 79 (3) cf. Dreier (2007), 3–4, 53–4. Dreier does not differentiate between the mandatory effect and the precedence of the constitution.

[11]For details cf. Müßig (2006b), 1–2.

[12]A dissociation between ordinary and higher-ranking laws already emerged rudimentarily during the colonial era, especially within the framework of the founding document of the Colony of West New Jersey from 1676 ('Concessions and Agreements'). A particular part of this founding document, agreed upon in 1677 under the title 'The Charter or Fundamental Laws, of West New Jersey' clearly articulates the subordination of the legislative assembly under these fundamental articles and states the prohibition to pass laws which contradict these fundamental articles. Cited in Stourzh (2015), 58. Cf. also *Fundamental Laws and Constitutions of New Jersey 1664-1961*, ed. Boyd (1964), 13.

[13]Cf. fundamental work on the terms *lex fundamentalis*, *lois fondamentales*, and constitution: Mohnhaupt and Grimm (2002), 38–9, 48, 62–3; Mohnhaupt (2016), "Leges fundamentals", column 693–695; Gough (1961); Mohnhaupt (1982), 3–33; Mohnhaupt (1998), 121–158; Mohnhaupt (2011), 697–724.

[14]'A DECLARATION OF RIGHTS made by the representatives of the good people of Virginia, assembled in full and free convention which rights do pertain to them and their posterity, as the basis and foundation of government.' Compare *le but de toute institution politique* in the wording of the preamble of the Declaration of the Rights of Man and Citizen of 1789: Willoweit and Seif (=Müßig) (2003), 250.

Normativity is expressed by the positivation in one unified constitutional text. The textual 'seclusiveness' stands for the differentiation between constitutional law and ordinary legislature. The old constitutional semantics knew particularly important, fundamental laws,[15] but not the idea of a unified law, which is a gauge for the legitimacy of all other laws. As James Iredell phrased it in his 'Instructions to Chowan County Representatives' (1783), this was to be a 'Republic where the Law is superior to any or all the Individuals, and the Constitution superior even to the legislature, and of which the judges are guardians and protectors.'[16]

The central consequence of normativity is the *supremacy* of the constitution, its *precedence*. With the American Revolution, constitutional law and other kinds of law were conceptually differentiated, contrary to English terminology.[17] For the English legal minds, such as Lord Bolingbroke (1678–1751)[18] or William Blackstone (1723–80),[19] there was an equivalence between the constitution (or frame) of government and the system of laws.[20] These theorists and practitioners neither distinguished between fundamental and statutory law, nor measured the latter against the first. By 1776, the American resistance against Westminster produced the notion of a constitution 'as a written superior law set above the entire government against which all other law is to be measured.'[21] The context for this was the American effort to justify the revolution as legitimate breach of law.[22]

[15]To their priority by 'advice and approval of the most influential': Ulrike Seif, "Einleitung", in Willoweit and Seif (2003), xii ff.

[16]The *Papers of James Iredell*, ed. Higginbotham (1976), vol. II, 449.

[17]Wood (1969), 260. In 1789, France adopted the English word *constitution*, with all its blurring of constitutional discussion, and then only discussed the extent of the division of power that had become necessary. See also Stern (1984), 9.

[18]For details, his commitment to the treaty of Utrecht and his literary treatment in the 'Idea of a Patriot King' (1738), cf. Müßig (2008c), 16–17.

[19]Cf. Müßig (2008c), 18–19.

[20]Cf. Blackstone, William (1979), *Commentaries on the Laws of England*, vol. I, 126; Bolingbroke, Henry St. John (1749), *The idea of a patriot king*, 84 (universal law of reason, given immediately to all men by god vs. particular law, or constitution of laws, given to man by man); Bolingbroke, Henry St. John (1754), *A Dissertation upon parties*, 141–2 in regard to the distinction between government and constitution: 'By constitution we mean […] the assemblage of laws, institutions and customs, derived from certain fix'd objects of public good, that compose the general system, according to which the community hath agreed to be govern'd […] By government we mean […] that particular tenor of conduct, which a chief magistrate, and inferior magistrates, under his direction and influence, hold in the administration of public affairs.'

[21]Wood (1969), 260.

[22]Müßig (2006b), 4.

The taxation of the colonies by the Westminster Parliament without the consent of the inhabitants, as embodied in the Sugar Act (American Revenue Act/American Duties Act) of 1764[23] and the Stamp Act (Duties in American Colonies Act) of 1765,[24] was 'unconstitutional', while the resistance of the colonies was, it was argued by those same resistors, 'constitutional.'[25] In the context of the eighteenth-century British discourse 'the terms constitutional and unconstitutional, mean legal and illegal', as it was explained by William Paley in *The Principles of Moral and Political Philosophy* (Philadelphia 1788). It was exactly on this aspect that the Americans diverged from the English terminology. As John Adams[26] articulated in 1773—even before the American Revolutionary War had begun, and three years prior to the Declaration of Independence—the principal difficulty in the debate with England lay in the 'different ideas [about] the words legally and constitutionally',[27] and in the shift of Westminster from the highest common court to the sovereign lawmaker. This leads us to the analysis of the legal argumentation of the American colonies, and how they conducted their case like a common law litigation in the court of Anglophone public opinion.[28]

[23]American Duties Act of 29 September 1764, in 4 George III, c. 15. The revenue-raising act, passed by the Westminster Parliament on 5 April 1764, stated in its preamble: 'it is expedient that new provisions and regulations should be established for improving the revenue of this Kingdom […] and […] it is just and necessary that a revenue should be raised […] for defraying the expenses of defending, protecting, and securing the same.' A significant section of the colonial economy during the Seven Years' War dealt with supplying food and supplies to the British Army. Therefore, it is often said that the protests against the Sugar Act were motivated more by economic needs rather than by the constitutional issue of taxation without representation.

[24]Duties in American Colonies Act of 22 March 1765, in 5 George III, c. 12.

[25]'Therefore the terms constitutional and unconstitutional mean legal and illegal.' Paley (1825), 372. See also Stourzh (1988), 35, 45ff.; Wood (1969), 10ff., 261.

[26]John Adams (1735–1826): Graduating from Harvard University in 1755, Adams was a lawyer in Suffolk County, Massachusetts. As opponent to the Stamp Act he later, in 1768, represented the city of Boston in the General Court. Growing increasingly prominent in legal and political circles, Adams became a congressman at the Continental Congress, and served between 1774 and 1777, and was also a signatory to the Declaration of Independence. His first diplomatic appointment was as the American minister plenipotentiary to Holland in 1782; three years later, he was appointed as the American representative at the Court of St. James. He served in this capacity until 1789, when he became the United States' first vice president, under George Washington. In 1797, he stood for president and won the election, and served as the second president of the United States until 1801. Cf. Dodge and Koed (2005), 542–3; Encyclopædia Britannica (2007) *Founding Fathers*, 16–25.

[27]Adams, John, letter to the *Boston Gazette* (8 February 1773), in *The Works of John Adams* (1851), vol. III, 556.

[28]Greene (2010), 186.

3 The Constitutionality of the Colonies' Legal Argumentation Conducting Their Case like a Common Law Litigation

The colonial lawyers, such as Richard Bland,[29] James Otis,[30] Daniel Dulany,[31] John Dickinson,[32] James Wilson,[33] Thomas Jefferson,[34] John Adams, Alexander

[29]Richard Bland (1710–76): A cousin of Thomas Jefferson, Bland was born in Orange County, Virginia. Bland studied at the College of William and Mary, as well as the University of Edinburgh. For over three decades (1742–75) he represented Prince George County in the Virginia House of Burgesses, and was a member of several committees. This made him a logical delegate to the first and second Continental Congresses (1774–5), following which he took part in the Virginia Conventions, which opposed continued British rule. Pate (1931), 20.

[30]James Otis (1725–83): Like Adams a Harvard-trained lawyer, James Otis worked first in Plymouth before relocating to Boston. In 1761, he gave a speech in the writs of assistance case, which can be considered the prologue to the American Revolution. Writs of assistance gave the bearer (usually a British customs or excise official) *carte blanche* to search any premises for contraband. American colonists saw this as a dangerous instrument that could be used by officials to further personal agendas. Otis argued that they were unconstitutional; John Adams, who had watched Otis' oration, credited this moment as being the birthplace of 'the Child Independence.' Later, Otis was elected to the lower House of the General Court of Massachusetts. Huitt (1953–4), 152–3.

[31]Daniel Dulany (1722–97): Born in Maryland, Dulany studied at Eton College and Clare Hall, Cambridge University. He passed the bar in England in 1742, in Maryland in 1747. From 1751 to 1754 he was a representative in the House of the Maryland Legislative Assembly. From these beginnings he assumed a number of important positions, including Secretary of the Province (1761–74). He opposed the imposition of the Stamp Act; nevertheless, he remained a loyalist to the Crown during the American Revolution, the result of which was the confiscation of his property by American authorities in 1781. Riggs (1946), 8–15.

[32]John Dickinson (1732–1808): Dickinson studied law in London and practiced in Philadelphia. He represented Delaware in the Stamp Act Congress (1765). He was a delegate for Pennsylvania in the Continental Congress (1774–6), and was re-elected to the Congress in 1779. He prepared among others the Articles of Confederation, though he voted against the Declaration of Independence, as he believed reconciliation with Britain was still possible. In 1781 he became the president of Delaware, and from 1782–5 the president of Pennsylvania. He signed the United States Constitution as a delegate from Delaware. Gummere (1956), 81–8; Encyclopædia Britannica (2007) *Founding Fathers*, 72.

[33]James Wilson (1742–98): Wilson attended the Universities of St. Andrews, Glasgow, and Edinburgh, and emigrated to America in 1765. He studied law and was admitted to the bar in 1767; from 1778 he practiced in Philadelphia. In 1774, he became a member of the Provincial Convention of Pennsylvania, and was an intermittent member of the Continental Congress. He represented Pennsylvania at the Constitutional Convention (1787) and was a signatory to the Constitution. *Biographical Directory of the United States Congress*, 2180.

[34]Thomas Jefferson (1743–1826): A defining and vital figure in early American constitutionalism and federalism, Thomas Jefferson began work as a lawyer in 1767. Two years later, he became a member of the Virginia House of Burgesses, a position he relinquished in 1775 to join the Continental Congress. He was the primary author of and signatory to the Declaration of Independence. Thereafter he served as governor of Virginia (1779–81) and again as a congressman (1783–4), before being appointed minister of plenipotentiary to France (1784) and sole minister to

Hamilton,[35] Charles Carroll of Carrollton,[36] and James Iredell[37] seemed to 'conduct their case like a common-law litigation in the court of Anglophone public opinion.'[38] Other lay leaders, merchants, printers and planters, including Stephen Hopkins,[39] Benjamin Franklin,[40]

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the King of France (1785). These appointments lasted five years; upon his return he served as George Washington's secretary of state until 1793. In 1797 he became John Adams' vice president; in 1801 he was elected as the third president of the United States, and served two terms until 1809. *Biographical Directory of the United States Congress*, 1326–7; Encyclopædia Britannica (2007) *Founding Fathers*, 115–137.

[35]Alexander Hamilton (1755 or 1757–1804): Hamilton emigrated to America in 1772, where he received his education, and entered the Continental Army as a captain of the artillery in 1776. He was a member of the Continental Congress in 1782, 1783, and 1788, and of the New York State Assembly in 1787. He was a member of the Philadelphia Constitutional Convention which adopted the Constitution, and he also took part in the Ratification Convention of 1788. Together with James Madison and John Jay, Hamilton wrote the series of essays known as *The Federalist*, which formed the basis of all modern interpretations of the Constitution. From 1789 until 1795 he was secretary of the Treasury in the cabinet of George Washington. In 1804, he took part in a duel with Vice President Aaron Burr. Burr was victorious, and Hamilton was mortally wounded. *Biographical Directory of the United States Congress*, 1182; Encyclopædia Britannica (2007) *Founding Fathers*, 96–105.

[36]Charles Carroll of Carrollton (1737–1832): The third in a line of Charles Carrolls (the others being Charles Carroll the Settler and Charles Carroll of Annapolis), Carroll was born in Maryland, and studied law in both France and England. He returned to Maryland in 1765, and in 1775 became a delegate to the Convention of Maryland. The next year, he joined the Continental Congress, which he served until 1778. He was re-elected in 1780 but declined the appointment. He was a state senator for Maryland from 1777 until 1800, and a United States senator between 1789 and 1792. A signatory to the Declaration of Independence in 1776, he was also the last surviving of the original Founding Fathers when he died in 1832. *Biographical Directory of the United States Congress*, 790.

[37]James Iredell (1751–99): A native of Sussex, England, Iredell migrated to America at seventeen years old, where he studied law. At twenty-six, he was appointed as a judge and, in 1779, he became the attorney general. He campaigned for the acceptance of the United States Constitution in North Carolina and, in 1790, he was nominated by Washington to an associate judgeship in the Supreme Court. Connor (1912), 225–53.

[38]Greene (2010), 186.

[39]Stephen Hopkins (1707–85): Raised on a farm on Rhode Island, Hopkins was descended from a line of important local political figures, including the first governor of Rhode Island, Benedict Arnold. Hopkins, too, followed this path, becoming a member of the Rhode Island General Assembly (1732–52; 1770–75). From 1751–54 and once more in 1773, he was the chief justice of the Superior Court of Rhode Island, and he also served as governor for four non-consecutive periods between 1755 and 1768. As a member of the Continental Congress from 1774 to 6, he was also a signatory to the Declaration of Independence. *Biographical Directory of the United States Congress*, 1277; Encyclopædia Britannica (2007) *Founding Fathers*, 110.

[40]Benjamin Franklin (1706–90): Franklin first made his name as a printer and publisher in Philadelphia, after having learnt the trade in Boston, Philadelphia, and London. He bought the *Pennsylvania Gazette* in 1729. From 1736 to 1750, he was clerk of the Pennsylvania General Assembly. He held several public offices in the following years. From 1775 to 1776 he was a member of the Continental Congress and he signed the Declaration of Independence. Afterwards he became diplomatic commissioner to France and later minister to France from 1776 to 1785. *Biographical Directory of the United States Congress*, 1081; Encyclopædia Britannica (2007) *Founding Fathers*, 77–91.

Samuel Adams,[41] William Hicks, and William Henry Drayton,[42] showed such a substantive familiarity with the common law reasoning and constitutional thought that one could think of a discursive community between both sides of the Atlantic.

3.1 The British–American Discursive Common Law Community

Key to this common law community was the familiarity with the same textbooks. English and American lawyers alike learned from Blackstone's *Commentaries on the Laws of England* (1765–9),[43] whose American edition (1771–2) was the only legal textbook in the colonies *en route* to independence.[44] The reception of Blackstone in James Kent's *Commentaries on American Law* (1826) demonstrated his great significance for the American understanding of the common law; indeed, it was the Blackstone commentaries that inspired the American constitutional fathers to conceive of the American president as a temporary, substitute monarch, founded after the ideal of the English king. Blackstone's conception of the 'Rights of Englishmen' as 'Rights of Mankind' is said to be an inspiration for the demand for universal human rights in the American Revolution.[45] He is also called a mentor for the strong judiciary in the American constitution of 1787.[46]

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[41]Samuel Adams (1722–1803): A descendent of Puritan migrants, Samuel Adams showed a keen mind for politics. He entered Harvard at the age of fourteen and eventually achieved a Masters degree; upon leaving his studies, however, he became a maltster and tax collector. From 1765 to 1774 he was a member of the Massachusetts General Court and from 1774 to 1781 a member of the Continental Congress. He was a signer of the Declaration of Independence. In 1781 he served as the president of the Massachusetts State Senate and from 1794 to 1797 he was governor of Massachusetts. *Biographical Directory of the United States Congress*, 543.

[42]William Henry Drayton (1742–79): Drayton studied in England and returned to South Carolina in 1764, where he studied law and was admitted to the bar. In 1770, on the order of King George III, he was appointed privy councillor of South Carolina and shortly thereafter assistant judge. After taking actions in the revolutionary movement, he was removed from both positions. In 1775 he served as president of the Council of Safety and in 1776 as chief of justice. In 1778 he was made a member of the Continental Congress, a position he held until his untimely death from typhus in the following year. *Biographical Directory of the United States Congress*, 892.

[43]Seif (=Müßig) (2008), "Blackstone, William", column 614.

[44]Seif (=Müßig) (2008), "Blackstone, William", column 616.

[45]The first chapter of the first volume of Blackstone's *Commentaries* categorises the principal absolute rights as those of security, liberty, and property. Blackstone, William (1979), *Commentaries on the Laws of England*, vol. I, chap. 1, 119ff. See also Hanbury (1950), 318ff.; Lucas (1963), 142ff. These documents show the influence of Locke's conception of a general natural law that binds all government to heed security, liberty, and property of the individual.

[46]Carrese (2003), 117.

Blackstone's well-known comment on parliamentary sovereignty[47] is based on Sir Edward Coke's seventeenth-century definition of the supreme jurisdiction of the High Court of Parliament:

> Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds. Of this court it is truly said: *Si antiquitatem spectes, est vetustissima, si dignitatem, est honoratissima, si jurisdictionem, est capacissima.*[48]

Irrespective of this court conception, Blackstone required for Great Britain as an empire with colonies, 'a supreme, irresistible, absolute uncontrolled authority, in which the *jura summi imperii,* or the rights of sovereignty reside[d]'[49] and, as the contemporary *Agent for the Province of the Massachusetts Bay* in London would have added, 'to which all other *Powers* should be subordinate[d].'[50] This unitarian legislative supremacy in the imperial context was a logical violation of defining Parliament's sovereignty on the basis of the court's conception, and deprived the British discourse of any possibility to differentiate between legal and constitutional. This was exactly the legal point at which the colonists had to leave the motherland. They pleaded to be the 'better Englishmen', on the basis of the customary limitations for Westminster's supremacy in the imperial constitution, which they started to distinguish from the ordinary law.

3.2 *Customary Old Liberties Against Parliamentary Absoluteness*

The first legal point of the colonists was the differentiation between 'legal' and 'constitutional.' They argued that acts of Parliament, although legal, were against their ancient liberties under the common law and therefore unconstitutional. Faced with the Stamp Act and the Sugar Act, it became obvious in the colonies that Westminster 'Parliament […] was no longer simply the highest court among others in the land, but had in truth become the sovereign law-maker of the realm, whose power, however arbitrary and unreasonable, was uncontrollable.'[51] What the

[47]Blackstone, William (1979), *Commentaries on the Laws of England*, vol. I, chap. 2, 156. Blackstone literally repeated Coke's definition.

[48]Coke, "The Fourth Part of the Institutes of the Laws of England concerning the Jurisdiction of Courts" in Coke, Edward (1797), *The Institutes of the Law of England, Second to Fourth Parts*, Part IV, 36.

[49]Blackstone, William (1979), *Commentaries on the Laws of England,* vol. I, 50–1, 178–80.

[50]Mauduit, Jasper (1766), *Legislative Authority of the British Parliament*, 11. Mauduit was the agent in London for the Province of the Massachusetts Bay between 1762 and 1765.

[51]Cited in Wood (1969), 265. Cf. also the differentiation between judgment and statutes in the preceding sentence: 'that law was something more than a judgment, more than simply the acts of a supreme court that could be interpreted, adjusted, or voided by other courts when required by the principles of reason and equity that supposedly adhered in all law.'

colonists risked losing was the supremacy of common law, established by Sir Edward Coke since the seventeenth century. 'His' supremacy of common law translated the inherent customary consensus on liberties since time immemorial into legal arguments against the Stuart absolutism[52]; This common law understanding was present at Westminster in the Whig differentiation between ordinary legislation and the fundamental laws of nature,[53] benefitting from the theories of natural law expounded by John Locke in his *Second Treatise* (1689),[54] and Thomas Rutherforth in his *Institutes of Natural Law* (1754–6). The fundamental laws of nature were held by the latter 'to bind the legislative body itself, and not to be alterable by its authority.'[55] Whereas Rutherforth's statement saw Westminster as subject to the fundamental laws of nature, which seemed suitably straightforward for the colonists' legal argumentation, it was the Lockean natural 'Law antecedent and paramount to all positive Laws of men'[56] that lay at the heart of the sovereignty of the British Parliament. In the constitutional struggles against the absolutism of the Stuart dynasty, it provided Westminster with the authority of the last word on public good (*publick good; common wealth*),[57] which could not be left to the

[52]Müßig (2009), 174–81.

[53]This was explicitly established by the former attorney general and chief justice of common pleas, Lord Camden, in two speeches he gave in the House of Lords on 2 February and 7 March 1766: 'Deriving either "from the Law of Reason and of Nature" or "from [the] Custom and Usage [of] our own Constitution," fundamental law consisted of those "public laws" that "prescribe[d] the form, and establish[ed] the constitutional power of the legislative body of the society."' Cit. in Greene (2010), 95. Both speeches (the first one dates on 2 instead of 6 February) are also compiled in *Proceedings and Debates of the British Parliaments respecting North America*, 1754–1776, ed. Simmons and Thomas (1983), vol. II, 125f. (via report in the proceedings of 3 February), 147.

[54]Müßig (2014), "*Locke, John*", columns 1029–32.

[55]Rutherforth (1862), chap. VI (Of Civil Laws), section XX (General division of civil laws), 399. Rutherforth's *Institutes* was one of the most widely cited legal references among the founding generation of the United States.

[56]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 168, 397–8.

[57]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 168, 397–8: 'The old Question will be asked in this matter of Prerogative, "But who shall be Judge when this Power is made a right use of?" I answer: Between an Executive in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no Judge on Earth […] the people have no other remedy in this, as in all other cases where have no judge on Earth, but to appeal to heaven […] And therefore, tho' the People cannot be Judge, so as to have by the Constitution of that Society any Superiour power, to determine and give effective Sentence in the case; yet they have, by a Law antecedent and *paramount to all* positive Laws of men, reserv'd that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth, viz. to judges whether they have just Cause to make their Appeal to Heaven.' If the monarch was free to decide upon the public good alone, any restraints the law places on the execution of prerogative rights would be useless; the monarch would be absolute sovereign in regard to the connection between Coke's doctrine of common law based on reason and Locke's postulate of an antecedent natural law. Cf. in detail Seif (=Müßig) (2003b), 110–40.

monarch's discretion.[58] The common law background of the Lockean precepts gave significant persuasive weight to the colonial contention that Westminster had no jurisdiction over internal colonial affairs, as well as that the British king had ceased to be king for the colonies.[59] Indeed, the omnipotent reason of the common law—its reason-based supremacy—was the godfather of the American limitation of any state power by the state goal to protect property in the sense of life, liberty, and possession.[60] John Phillip Reid explicitly held the 'American argument [was] similar to the old Whig case against Charles I and James II, except now the supremacy of parliament, not the royal prerogative, was the issue.'[61] While the British understanding of the unwritten British constitution puts the sovereign parliament at the core, the colonial comprehension of the British complex of statutes, common-law judicial precedents, particular documents having constitutional status (such as the famous *Magna Carta* of 1215), and constitutional conventions for the structure of government, was a restraint on arbitrary power. The threat of arbitrariness could emanate from any centre of power, be it the throne, the House of Lords, or the House of Commons. Therefore, in the American 'reading' of the unwritten British constitution, arbitrary power could also be vested in Parliament. If Parliament legislated for the colonies without a check or balance to call it to account, it ran into danger to act arbitrarily as the Sugar Act and Stamp Act proved.

3.2.1 American Sympathies for the Supremacy of Common Law

According to Sir Edward Coke, the specific historical legitimisation of common law, amounting to its supreme quality, is based on its age, since it is said to date back to the Norman Conquest (1066). This idea, however, did not originate with Coke. The equation of 'old law' as 'good law' was well established for the common law since the fifteenth century and its overall roots date back to 'antiquity'. As John Fortescue wrote:

> [T]he realm has been continuously regulated by the same custom as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them. [No other laws] are so

[58] In the Declaration of the Houses in Defence of the Militia Ordinance of 6 June 1642, Parliament claimed the ultimate authority to decide on the public good. Likewise, the Nineteen Propositions of 1 June 1642 expressly stated 'that the great affairs of the kingdom, [held as] matters as concern the public, […] are proper for the High Court of Parliament, which is your Majesty's great and supreme council.' Cited in *The Constitutional Documents*, ed. Gardiner (1906), no. 53, 250–1. Cf. also Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 159, 392.

[59] Müßig (2014), "Locke, John", columns 1029–32.

[60] Locke, John (1963), *Second Treatise of Government*, § 123ff. Cantor (1997); Hostettler (1997); Stoner (1992). Cf. also Seif (=Müßig) (2008a), "Coke, Edward", column 871–5 for further references.

[61] Reid (1974), 1067.

> rooted in antiquity. Hence there is no gainsaying nor legitimate doubt but that the customs of the English are not only good but the best.[62]

This praise of the English law to which Fortescue's oeuvre owes its name, *In Praise of the Laws of England* (about 1470), deems the proof of the quality of the common law to reside in its unaltered usage since the oldest ages, since time immemorial. The continuous general custom legitimised the unwritten common law: 'because it is given to all in common it is called common law. And for that there is no other law than this, it exists as one from of old, and in general councils or parliament it is suffered to be observed.'[63] According to Christopher St. German, the general custom was a universal consensus: 'the common law proper was divers general customs of old time used through all the realm, which have been accepted and approved by our sovereign lord the King and his progenitors and all their subjects.'[64]

On the other hand, the common law was the purview of lawyers, unknown beyond the realms of the London Inns of Court.[65] How can a law, based on the technicalities of writs and developed by and for the knowledge of a legal elite, be traced back to the consensus of the people? Nobody, after all, is born as a lawyer.[66] How could common law lawyers explain that the customary law respected by the judiciary could bind the nation as a whole? This could only be achieved by the judicial consent faking the popular consent. The 'collective mind of the profession' thus subsumed and adopted the mantle of authority customarily represented by popular consent.[67] In this way, artificial reason replaced general custom, more as an interpretative authority[68] rather than as legislative consensus.[69]

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[62]Fortescue (1997), chap. XVII, 26–7.

[63]Horne (1893), 5. Cf. also Doe (1990), 26; Lieberman (1989), 72.

[64]St. German (1974), 45. Prior to Blackstone, St. German's *Doctor and Student* (1528) was the primary English legal textbook, with the 'dialogue' of the title being a discussion of the role of equity.

[65]'The general customs were the strength and warrant of maximes, which were unknown outside the Inns of Court.' St. German (1974), 59. Cf. also Guy (1985), 20–1; Stein (1966), 10.

[66]'[T]he common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man´s naturall reason; for Nemo nascitur artifex.' Coke, Edward (1794), *The First Part of the Institutes of the Laws of England*, 97b.

[67]Finch (1759), 52–3. Cf. also Dodderidge (1631), 103; Prest (1977), 326–7. Further, the assessments of the British legal history: Doe (1990), 26; Ives (1983), 161.

[68]The authority of the general custom for the *common law*, however, is not negated. Cf. explicitly Coke, Edward (1826), *The Reports, Ninth Reports* 75b = 77 ER 843 (*Combes's Case*).

[69]Coke, Edward (1826), *The Reports, Second Reports* 81a = 76 ER 597 (*Lord Cromwel's Case*); Coke, Edward (1826), *The Reports, Sixth Reports* (*Sir John Molyn's Case*).

The foundation for this reasoned concept of the common law was established by Sir Edward Coke in his *Reports* (1600-15)[70] and his quadripartite *Institutes of the Laws of England* (1628-44).[71] The reasonableness of the common law was the battle cry of the common law lawyers against Stuart absolutism.[72] It governed the arguments against the prerogative courts and against the royal prerogative. For instance, as the chief justice of the Common Pleas Court between 1606 and 1613, and of the King's Bench Division between 1613 and 1616, Coke made use of this argumentation to establish the supremacy of the jurisdiction of the common law over the monarch in the writs of prohibition and the case law, namely the *Prohibitions del Roy* (1607), the *Case of Proclamations* (1611) and the *Case of the Five Knights* (1627).

Just as his equation of custom with lawfulness was not new, neither was Coke's association of law and reason. As early as Cicero, it had been argued that 'law is the perfection of reason, which lies within the human nature.'[73] The synonymy of law and reason therefore marked the medieval Christian state theory by mediation of the scholasticism; law was, according to Thomas Aquinas, 'nothing else than a certain order of reason for the common wealth, promulgated by the responsible for the community.'[74] The reason conception of common law, however, was less based on the political philosophical theory but more on the linguistic congruency. It was already in the earliest case law journals (the so-called year books from the thirteenth century onwards)[75] that Latin-ancient-French legal terminology of Norman origin[76] proves the linguistic equation of the law (*ley* = *law*) and reason (*reason, resoun*)[77]: 'ley est resoun'[78]; 'le ley est fond de reason, et ceo que est reason est ley'[79]; '[d]onq comon reason, quiest comon ley'[80]; 'carriens deins le monde parle si

[70]John Hamilton Baker, "Coke's Note-Books and the Sources of his Reports", in Baker (1986), 183, 186–7. It is only the *Reports 1–11* that Coke edited himself; *Reports 12* and *13* were published posthumously. Here, the standard edition of the *English Reports* 1900–1932 (ER 76, 77) is used.

[71]Coke's *Second Part* (1642) contains a commentary to the *Magna Carta* and other medieval laws. Coke's *Fourth Part* (1644) depicts the different jurisdictions of England. As books of authority, they have the nature of legal sources; both parts justify the precedence of common law and the sovereignty of Parliament as highest court of law.

[72]Gray (1980), 25–6; (1992), 85–121; Lewis (1968), 330–1.

[73]Cicero (1959), De legibus, I, v, 19, 316.

[74]Aquinas, Thomas (1892), *Summa theologiae*, I^{a}-II^{ae}, quaestio XC, Arg. 4, 152.

[75]The year books (late thirteenth century till 1535) were replaced by personal decision compilations, such as Coke's *Reports*. In 1865, the semi-official redaction entity Incorporated Council of Law Reporting was introduced, which published the *Law Reports*. These exist today as the standard compilation of the All England Law Reports.

[76]Van Caenegem (1987), 114–15; Pollock and Maitland (1952), 79–80.

[77]Middle English Dictionary (*reason*): reison, seyson, resun, resoun, reson, raison, reason. Cf. also Baker (1979), 176. *Ley* = *law* is not to be equated with *loi*.

[78]18 & 19 Ed. III (RS), 379 per *Stonore J*.

[79]T 14 Hen. VI, 19, 60 at 21 per *Vampage*.

[80]H 35 Hen. VI, 52, 17 at 53 per *Fortescue CJKB*.

reasonablement come le ley parle.'[81] Occasionally, 'reason' and 'justice' appear synonymously. For instance, the medieval travel report *Mandeville's Travels* from the fourteenth century demonstrates justice in England through the reasonable and equal treatment of the poor and the rich: 'in that ile also er wonder rightwise iuggez, for they do resoun and trewth to like men, als wele to pouer as to riche.'[82] Reginald Pecock describes the law of England as reasonable law in *The Folower to the Donet* (ca. 1453): 'And as for the lawe of the kyng of englond, what is *iugid bi iugis agens* such constreyners, al is taken to be lawe of resoun, which thei callen her common lawe.'[83]

When viewed together with common law, 'reason' not only means rationality of the highest degree (*ratio summa*), but also the intellectual method of the common law lawyers.[84] 'Reason' is the capability acquired by means of legal training to develop legal rules out of the formless[85] entirety of the legal knowledge since time immemorial. This was achieved in an inductive manner, handed down through year books and reports of preceding lawyers since the thirteenth century. This is demonstrated by Coke's terminology of 'artificial reason',[86] which found its way into the *Prohibitions del Roy* (1607).[87] Like an artist, the lawyer exercises his legal capabilities. The reasonableness of the law is perceived as its character; nobody could be legally knowledgeable if he had not understood that first: 'The reason of the law is the life of the law, for though a man can tell the law, yet if he knows not the reason thereof, he shall soon forget his superficial knowledge.' In the first part of his *Institutes of the Laws of England*, Coke adds to this the need for sustainable professionality. The reason of the law is nothing to be understood in passing: 'But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but also many others, for *cognitio legis est copulata et complicata*, and this knowledge will long remain with him.'[88] 'Artificial reason'

[81]P 13 Hen. VII, 22, 9 at 23 per *Fineux CJKB*. Cf. further examples at Müßig (2009), 177.

[82]Mandeville (1932), 141, line 24.

[83]Pecock (1924), 143. Cf. Green (1945), 12–13.

[84]Dodderidge (1631), 242; Finch (1759), 52; Noy, William (1641), *A Treatise of the Principal Grounds and Maxims of the Laws of this Kingdom*, 1, cited in accordance with Burgess (1992), 40. Cf. also Sommerville (1986), 92–3.

[85]Lambarde, William (1619), Eirenarcha, 511.

[86]The adjective is derived from *artifex* (lat.: artist) and signified the product of an artist, rather than 'synthetically man-made.'

[87]'…are not to be decided by natural reason but by artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.' *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 Co.Rep. 64 = 77 ER 1342–1343 per *Edward Coke, C.J.*

[88]Coke, Edward (1794), *The First Part of the Institutes of the Law of England*, 183b. See also Coke, Edward (1794), *The First Part of the Institutes of the Laws of England*, 394b: '*ratio est anima legis*, for then we are said to know the law when we apprehend the reason of the law, that is when we bring the reason of the law so to our own reason, that we perfectly understand it for our own.'

is the collective knowledge of the common law judges and Coke seems to allude to the scholastic interconnection of human and divine ratio by Thomas Aquinas: '*ratio est radius divini luminis.*' The metaphorical contrast between the 'darkness of ignorance' and the 'light of legal reason' super-elevates legal training 'by reasoning and debating of grave learned men'[89] as *ratio legis,* and cements thereby the monopoly of interpretation for the learned lawyers and their superiority over the legally untrained monarch: 'and thereupon judgement is given according to the law, which is the perfection of reason.'[90] This legitimation of the common law by means of judicial reasonableness[91] corresponds to the authority of the general custom amended through the ages: 'if all the reason that were dispersed into so many heads were united into one, yet would he not make such a law as the law of England is, because by many successions of ages it hath been fined and refined by so many learned men.'[92]

It is by making use of the reason conception that Coke justifies the supremacy of the common law: a perfect expression of reason that commands what must be done and bans the opposite. This highest degree of reasonableness as divine wisdom[93] may be completed in the human spirit in the form of judicial wisdom.[94] The common law is the judicial understanding of the divine reasonableness and hence of divine origin: 'without question *lex orta est cum mente divina*, and this admirable unity and consent in such diversity of things proceeded from God the fountain and founder of all good laws and constitutions.'[95] Thereby common law defends liberty. In the case of the American colonies, the point of rupture was the liberty of no taxation without political, parliamentary representation. This, they argued, was in the spirit of the *Magna Carta* (1215); this was the occasion by which American theorists differentiated between a fundamental law of nature and ordinary legislation.

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[89]Coke, Edward (1794), *The First Part of the Institutes of the Laws of England*, 232b.

[90]Coke, Edward (1794), *The First Part of the Institutes of the Laws of England*, 232b. Coke's wording mirrors that of Cicero: '*ratio est radius divini luminis.*' He continues: 'and by reasoning and debating of grave learned men the darkness of ignorance is expelled, and by the light of legal reason the right is discerned, and thereupon judgement is given according to the law, which is the perfection of reason.'

[91]'[G]ood law, if it be well understood; for *non in legendo sed intelligendo leges consistunt*.' Coke, Edward (1826), *The Reports, Eighth Reports*, 167a = 77 ER 726 (*The Earl of Cumberland's Case*).

[92]Coke, Edward (1794), *The First Part of the Institutes of the Laws of England*, 97b.

[93]Cf. the differentiating criteria between good and evil which coincides with the divine spirit: *orta autem est simul cum mente divina.* Cicero (1959), *De legibus II*, iv, 10, 382.

[94][Q]*uae cum adolevit atque perfecta est, nominatur rite sapientia*. Cicero (1959), *De legibus I*, viii, 22, 320.

[95]Coke, Edward (1826), *The Reports, Third Reports*, iv. In the edition in the *English Reports*, the foreword is not printed.

3.2.2 Liberty Defending Common Law Versus Discretion Granting Executive from an American Perspective

In the American colonies the reason-based supremacy of law set itself above all authority, not only above monarchical sovereignty. According to the American body of knowledge on Coke's impact on American liberalism,[96] the obligation of the prerogative to adhere to an extra-statutory fundamental law (*Fundamental Law of Nature and Government*[97]; *a Law antecedent and paramount to all positive Laws of men*[98]) was adapted to become the binding force of the state goal to protect life, liberty, and possession, after the Declaration of Independence (1776) has replaced the Lockean 'property'[99] with the pursuit of happiness,[100] though still tracing Locke's idea of property as tied to liberty, consent, and limited government. Opposing Hobbes' fear of submission based on mortal danger,[101] Locke's idea of self-determination as an a priori ownership in oneself, in one's own manpower and resources,[102] led to the assumption of freedom and equality as intrinsic rights.[103] The individual freedom to produce wealth by labour results in the material wealth of human society.[104] From the restriction of ruling onto the protection of life, liberty, and possession, together with the institutional transferral of rights to the powers of the community,[105] Locke concludes his conception of ruling and governance as akin to a legal-fiduciary trust, which is held in the interest of the ruled ones.[106] This amounts to a right of resistance of the people (*residual power*) in case of misconduct without questioning the institutional persistence of a common supreme power, the legislative power as a whole.[107]

The opposition between common law (which defended liberty) and prerogative (which provided for monarchical discretion) was fundamental to Locke's differentiation between legislative and executive power: 'Where the Legislative and Executive Power are in distinct hands, (as they are in all moderated Monarchies, and well-framed Governments) there the good of the Society requires, that several

[96]Cantor (1997); Hostettler (1997); Stoner (1992). Cf. also Müßig (2008a), "Coke, Edward", column 871–5 for further references.

[97]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 159, 392.

[98]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 168, 397f.

[99]Locke, John (1963), *Second Treatise of Government*, chap. IX (Of the Ends of Political Society and Government), § 123ff., 368ff.

[100]Bailyn (1967); Dworetz (1990); Hartz (1955); Schultz (1993); Macpherson (1990).

[101]*Bellum omnium contra omnes; homo homini lupus.*

[102]Locke, John (1963), *Second Treatise of Government*, chap. V, § 27, 305–6.

[103]Locke, John (1963), *Second Treatise of Government*, chap. VII, § 87, 341–2.

[104]Locke, John (1963), *Second Treatise of Government*, chap. V, § 41, 314–15.

[105]Locke, John (1963), *Second Treatise of Government*, chap. IX, § 131, 371.

[106]Locke, John (1963), *Second Treatise of Government*, chap. XIII, § 149, 384–5.

[107]Locke, John (1963), *Second Treatise of Government*, chap. XIX, § 243, 445–6.

things should be left to the discretion of him, that has the Executive Power.'[108] To the extent that laws passed by the legislative branch did not contain any rule, the power of decision-making was afforded to the monarchical executive that had discretion: 'Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in hands, to be ordered by him.'[109] This executive, discretionary decision-making power corresponds to the monarchical prerogative: 'This power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative.'[110] The public good was the yardstick for discretionary decisions, '[f]or Prerogative is nothing but the Power of doing publick good without a Rule.'[111]

Locke, however, was not prepared to leave the decision on the public good to the arbitrary decision of the monarch. While he acknowledged that some decisions were, by necessity, within the purview of the executive discretion 'as the publick good and advantage shall require', he continued: 'nay, 'tis fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government, viz.'[112] It was not the will of the ruler, but rather a natural law that existed a priori and was of the highest, extra-statutory nature ('a Law antecedent and paramount to all positive Laws of men') that determined the public good, and it was this natural law to which the discretionary decision of the prerogative had to adhere. As Locke pointed out, '[t]he old Question will be asked in this matter of Prerogative, But who shall be Judge when this Power is made a right use of?'[113] Locke's answer attributed the 'ultimate determination' of the limits of the prerogative to the 'Law antecedent and paramount to all positive Laws of men'; this was not subject to the final adjudication of any earthly authority. Indeed, if a government were to continuously abuse its exercise of power, the only recourse of the people was to appeal to a morally just 'supreme judge' to vindicate their cause and resistance. Redress could thus be achieved through the acquiescence, alteration, or abolition of the offending government, if the popular appeal was based upon the rectitude of their intentions ('approving consciences'), moral character capable of self-government, and justness of cause: 'yet they have, by a Law antecedent and paramount to all positive Laws of men, reserv'd that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth, viz. to judges whether they have just Cause to make their Appeal to Heaven.'[114]

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[108]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 159, 392. Note Locke's formulation of the idea of the 'moderated monarchy.'

[109]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 159, 392.

[110]Locke, John (1963), *Second Treatise of Government*, chap. XIV, §§ 159–60, 393.

[111]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 166, 396.

[112]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 159, 392.

[113]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 168, 397.

[114]Locke, John (1963), *Second Treatise of Government*, chap. XIV, § 168, 397–8.

What was ground-breaking for the decisive constitutional normativity in the revolutions of the eighteenth century was not the institutional realization of the *Treatises*' separation of the legislative and executive power as different state functions, but the juridification of the starting point to 'form themselves into a political Society […and to] become a sovereign State,'[115] which was achieved by building on Locke's notion of the natural right of people.[116] The reasoning of the Virginian planter and later delegate to the Continental Congress Richard Bland (1710–76) transformed the Lockean state of nature into the settlement 'by Englishmen at their own Expense', after they had decided 'to quit the Society of which they are Members, and to retire to another Country.'[117] Bland's argumentation that 'they recover their natural Freedom and Independence: The Jurisdiction and Sovereignty of the State they have quitted ceases'[118] was also employed by Benjamin Franklin in his essay 'On the Tenure of the Manor of East Greenwich.'[119] This indicates the denial of the Parliament's authority to legislate on colonial internals to be the second legal point of the common law litigation conducted by the Americans.

3.3 *No Westminster Legislation on the Internal Colonial Polities*

The next step in the common law litigation against the Sugar Act of 1764 was the argumentation that the Westminster Parliament should be excluded from all legislation over the domestic affairs of the colonies.[120] After the differentiation between 'legal' and 'constitutional' and the condemnation of legally-issued statutes infringing upon common law liberties as 'unconstitutional', the American revolutionaries introduced the distinction of the internal colonial polities from the Empire as a whole. Whereas the first are governed by the old liberties and privileges as English subjects (specifically, the right of not being governed by laws made without consent, as indicated in the *Magna Carta*), the latter falls under the general

[115]Bland, Richard (1766), *An Inquiry on the rights of the British colonies*, cited in Greene (2010), 89.

[116]Locke, John (1963), *Second Treatise of Government*, chap. XI, § 134, 373–5, and § 136ff., 376ff. Cf. also Dunn (1969), 45–80; Hofmann (2012). Cf. Müßig (2014), "Locke, John", column 1029–32.

[117]Bland, Richard (1766), *An Inquiry on the rights of the British colonies*, in Greene (2010), 89.

[118]Bland, Richard (1766), *An Inquiry on the rights of the British colonies*, in Greene (2010), 88.

[119]Franklin, Benjamin, "On the Tenure of the Manor of East Greenwich" (11 January 1766; sometimes referred to as of 6 January), in *Benjamin Franklin's Letters to the Press*, ed. Crane (1950), 48.

[120]Greene (2010), 79.

superintending power of the British Parliament. This protest, elaborated by the various provincial assemblies of the thirteen colonies, is remarkable in its references to the legal status quo of the British Empire. So, in 1764, the Connecticut Assembly articulated against the proposed stamp duties that it is a 'fundamental principle of the British Constitution' that 'no law can be made or abrogated without the consent of the people by their representatives.'[121] The wording of the Virginia Assembly's protest referred explicitly to the 'ancient and inestimable Right of being governed by such Laws respecting their internal Polity and Taxation as are derived from their own Consent'[122]—again claimed by the Virginia House of Burgesses and reiterated similarly in public resolutions by the assemblies of Rhode Island, Maryland, and Connecticut in September and October 1765.[123]

Of the nine older North American colonies whose assemblies passed resolutions against the Stamp Act (those of Georgia, North Carolina, Delaware, and New Hampshire did not), four claimed exclusive jurisdiction over both taxation and internal legislation (Virginia, Rhode Island, Maryland, and Connecticut). If one also counts the Massachusetts House's October message to Governor Bernard that the province's authority to make laws for the 'internal government and taxation' had 'been never […] questioned; but has been constantly recognized by the King and Parliament',[124] this exclusive jurisdiction applied to a majority of five of the nine colonies. When the American colonies pleaded for 'an exclusive Power of making Laws for their internal Polity and Government,' they made a recourse to 'a perfect *internal* Liberty, as to the Choice of their own Laws, and in all other Matters that are *purely* provincial.'[125]

3.3.1 Systematic Distinction of 'Internal' and 'External' Spheres of Colonial Government

The Virginian Richard Bland was the mastermind for the systematic distinction between 'colonies' "internal" and "external" spheres of government.'[126] In *The*

[121] See Footnote 120.

[122] See Footnote 120.

[123] Greene (2010), 79–80, with references (n. 26) to Virginia Petition (18 December 1764), Virginia Resolutions (30 May 1765), Rhode Island Resolves (September 1765), Maryland Resolves (28 September 1765), Connecticut Resolves (25 October 1765), in Edmund (1959), 14, 48, 50–1, 53, 55. All of the assembly resolutions are conveniently collected in the same volume, at 47–62.

[124] Massachusetts House to Bernard, 23 October 1765, in *The Writings of Samuel Adams*, ed. Cushing (1904), vol. I, 17–18.

[125] "A Letter to the Gentlemen of the Committee of London Merchants Trading to North America" (London: 1766), 9–10; "Remarks on the Maryland Government," *American Magazine 1* (1741), 30, cited according to Greene (2010), 86.

[126] According to Greene's argument in *The Constitutional Origins of the American Revolution*, 81, and Bailyn's analysis in *The Ideological Origins of the American Revolution*, 2.13, No. 55.

Colonel Dismounted (1764), he explained that because Virginians were entitled to all of the 'liberties and Privileges of English subjects, they must necessarily have a legal Constitution.' For him the legal English constitution was defined by 'a legislature composed in part of the representatives of the people who may enact laws for the INTERNAL government of the colony and suitable to its various circumstances and occasions.'[127] 'Without such a representative,' for Richard Bland 'no law can be made', and therefore he concluded that Westminster Parliament, in which the colonists were not represented, 'had no authority to pass laws for the "INTERNAL government"' of the colonies without violating 'the most valuable part' of the colonists' 'Birthright' as Englishmen: the right 'of being governed by laws made with our own consent', as embodied in chapter 12 of the *Magna Carta* (1215).[128] Parliament's authority for all aspects of 'EXTERNAL government', however, remained unquestioned.[129] This argument continued in Bland's second pamphlet, *An Inquiry into the Rights of the British Colonies*,[130] which was published early in 1766 after Westminster had passed the Stamp Act against widespread colonial resistance. Bland's associate in the Virginia House of Burgesses, Landon Carter (1710–78),[131] sang from the same hymn sheet against the Stamp Act and vigorously supported the colonists' claim 'of being solely governed and taxed by Laws made with the Consent of the Majority of their own Representatives, according to an Englishman's inherent Birthright.'[132]

The colonists' contention that they were 'the better Englishmen' can also be traced in the note of four members of the Massachusetts Assembly, including Samuel Adams and James Otis,[133] to a London correspondent in December 1765: 'The general superintending Power of the Parliament over the whole British Empire is clearly admitted here, so far as in our Circumstances is consistent with the

[127]Bailyn (1967), 2.13, No. 55. As with those quotes that follow, the emphasis exists in the original.

[128]Willoweit and Seif (=Müßig) (2003), 9. Cf. Bland, Richard (1764), *The Colonel Dismounted*, in *Pamphlets on the American Revolution*, ed. Bailyn (1965), 320; cf. also Bailyn (1967), 2.13, No. 55; and Greene (2010), 81.

[129]Bland, Richard (1764), *The Colonel Dismounted*, in *Pamphlets of the American Revolution*, ed. Bailyn (1965), 320.

[130]Bland, Richard (1766), *An Inquiry on the rights of the British colonies*, in Greene (2010), 88.

[131]Carter, Landon (1965), *The Diary of Colonel Landon Carter of Sabine Hall*, 1752–1778, which provides an account of colonial life immediately prior to the American War of Independence.

[132]Greene (1968).

[133]The catchphrase 'taxation without representation is tyranny' was ascribed to Otis in 1763, but there is no evidence that he said it. On the other hand, in 1764 Otis wrote, '[That n]o parts of his Majesty's dominions can be taxed without their consent.' Otis, James (1764), *Rights of the British Colonies*, 65. Cf. also Smith (2011), 174, n. 13; Breen (1998), 378–403; Samuelson (1999), 493–523.

Enjoyment of our essential Rights, as Freemen, and British Subjects.'[134] As Adams pointed out, the 'general superintending Power over the whole British Empire' did not cover internal affairs of the colonies. If the colonists were 'indeed […] British Subjects, (& they never can brook to be thought anything less) it seems necessary that they should exercise this Power within themselves; for they are not represented in the British Parliam[en]t & their great Distance renders it impracticable.'[135]Only if each legislature within the Empire had an exclusive legislative authority within its own jurisdiction, according to the Massachusetts Assembly, was it able to ensure 'that equality [of rights and status] which ought ever to subsist among all his Majesty's subjects in his wide extended empire.'[136]

3.3.2 Specific Matters of the Colonies' Own Nature Versus General Matters of the Empire

Stephen Hopkins, Rhode's Island's elected governor, continued on this point still further. 'In an imperial state, which consists of many separate governments each of which hath peculiar Privileges and of which kind it is evident that the empire of Great Britain is,' he argued, 'no single part, though greater than another part, is by that superiority entitled to make laws for or to tax such lesser part.' This was the reason, Hopkins believed, why each of the colonies had to have 'a legislature within itself to take care of its interests and provide for its peace and internal government.'[137] Again, as with Richard Bland and the Massachusetts representatives, Westminster's authority for matters of a general nature within the British Empire remained unquestioned. The New York pamphleteer William Hicks similarly stands in this line: To govern the colonies 'according to the principles of the national constitution,' he pointed out, required the colonies to be 'vested with authority of legislation' over all provincial matters 'and have right to be represented in their Assemblies, in whom [alone] that authority [was] lodged.'[138] A colonists' supporter in London describes the autonomy of the internal government as the same for the English people and the American people: 'Our Constitution is so tender of the

[134]Greene (2010), 82.

[135]Samuel Adams to Reverend G[eorge] W[hitfield], 11 November 1765, in Greene (2010), 82 f.

[136]Otis, James et al. to Dennys De Berdt, 20 December 1765, in *The Writings of Samuel Adams*, ed. Cushing (1904), vol. I, 20, 28–9, 67. See also Greene (2010), 83.

[137]Hopkins, Stephen (1765), *The Rights of the Colonies Examined*, in *Pamphlets of the American Revolution*, ed. Bailyn (1965), vol. I, 512, 519. See also Greene (2010), 83.

[138][Hicks, William] (1765), *Considerations upon the Rights of the Colonies to the Privileges of British Subjects*, 11; [Fitch, Thomas et al.] (1764), *Reasons Why the British Colonies, in America, Should Not Be Charged with Internal Taxes*, in *Pamphlets of the American Revolution*, ed. Bailyn (1965), vol. I, 395, 406. Cf. the argumentation in Greene (2010), 84.

Rights and Liberties of the Subject,' wrote the anonymous author of *A Vindication of the Rights of the Americans* in 1765, 'that the People of *England* have their Representatives, the *Scotch* theirs, the *Welsh* theirs, the *Irish* theirs, [and] the *Americans* theirs, for they have Assemblies and Parliaments, each of which represent the Bulk of the People, of that Generality, or Division, for which such Assembly or Parliament is appointed to be held.'[139] 'In extensive Territories not confined to one Island, or one Continent, but dispersed through a great Part of the Globe,' this British voice for the Rights of the American people carries on, 'the Laws cannot be put into execution, nor the Rights of the People preserved, without their being arranged into several Classes' of coordinate legislatures, because each, presumably, has its own exclusive jurisdiction over the internal affairs of its territory.[140]

All these American statements of the second half of the seventeenth century, from Richard Bland to William Hicks, circumscribe the exemption of the imperial constitution from the English constitution of parliamentary supremacy. The customary coinage of the colonial status was furthermore elaborated in the third legal argument developed by the American in their own case.

3.4 Self-reliance of the British Imperial 'Constitution'

The third legal point was the self-reliance of the imperial constitution with its principled customary limitation, to be differentiated from the British constitution of parliamentary supremacy that had emerged by the 1760s. In the line of arguments, which held Great Britain and the British Empire to be distinct political entities, the focus lies on history, when different groups of colonists each set forth to establish a new settlement in North America in different places, at different times, for different reasons. Some were commercial ventures, others havens of religious liberty for those who founded them, and at least Georgia began as a penal colony. How could the British Empire be administered and coordinated in the colonies, then, when the colonies were at least two months away by ship? One way would have been to forge a workable intercolonial union that could coordinate the individual colonial governments for shared goals without repeated recourse concerning individual policy decisions to the mother country. The failure of this goal narrowed the British options down to long-distance governance: holding the American colonies together for purposes of defense and foreign policy and dealing with them directly to regulate trade and raise revenue. Thus, by 1763, at the conclusion of the Seven Years' War, the only certainty about constitutional arrangements with the colonies was uncertainty. Blackstone's *Commentaries* only provided his analysis of the

[139] *A Vindication of the Rights of the Americans*, 10–11, cited according to N.N. (1765b), Greene (2010), 84–5.

[140] See Footnote 139.

state-organisational status of the 'American plantations' as 'distinct dominions.' He analysed them as 'subject […] to the control of the parliament; though (like Ireland, Man and the rest) not bound by any acts of parliament, unless particularly named.'[141] He stressed the self-reliance of the colonial justice: 'they have courts of justice of their own,' with a line of appeal 'to the king in council here in England.'[142] He acknowledged their own legislation: 'Their general assemblies which are their house of commons, together with their council of state being their upper house, with the concurrence of the king or his representative the governor, make law suited to their own emergencies.'[143]

The *nature* of Parliament's relation to the colonies, however, had not been defined in the *Commentaries*. This was the gap for the legal argument of exempting the imperial constitution out of the sovereignty of Parliament. The reasoning was as follows: After the Glorious Revolution and the usage of the Bill of Rights during succeeding decades, Britain had obviously consented to the doctrine of parliamentary supremacy in the domestic sphere. In the colonies, though, neither the people at large through custom nor their representatives in the several colonial legislatures had given such consent. There was no point in extending the British constitution to the Empire conglomerate, as Richard Bland has put it, because it was 'in vain to search into the civil Constitution of *England* for Directions in fixing the proper Connexion between the Colonies and the Mother Kingdom.'[144] Whereas the British constitution was based around the sovereignty of Parliament, the imperial constitution through which their colonies were connected to Great Britain remained based on the old common law liberties, usages, and customs, according to the American view.

It was the 'loose texture' of Britain's 'extended and diversified' empire—to borrow from the wording of Colonel Isaac Barré's speech in the House of Commons during the Stamp Act crisis[145]—that allowed for its deviating interpretations, either in an unitarian way (from the perspective of London), or in a federal way (from the perspective of the colonies).[146] The metropolitan discourse thought the British Empire to be an unitarian state centred around the sovereign Parliament

[141]Blackstone, William (1979), *Commentaries on the Laws of England*, vol. I, Introduction, sec. IV, 105.

[142]Blackstone, William (1979), *Commentaries on the Laws of England*, vol. I, Introduction, sec. IV, 105.

[143]See Footnote 142.

[144]Bland, Richard (1766), *An Inquiry on the rights of the British colonies*, in Revolutionary Virginia, ed. Van Schreeven and Scribner (1973), vol. I, 34.

[145]Barré, Isaac, Speech to the House of Commons, 24 February 1766, in *Proceedings and Debates of the British Parliaments respecting North America*, ed. Simmons and Thomas (1983), vol. II, 296. Cited according to Greene (2010), 102 (n. 74).

[146]Mauduit, Jasper (1766), *Legislative Authority of the British Parliament*, 11. Cf. Greene (2010), 102 (n. 74).

and 'organized on the principle of devolution.'[147] From the colonial point of view, there was no concentration of authority within the Empire as being 'predominantly federal in practice,'[148] with London's authority limited by the delegated colonial authorities. These constitutional positions on both sides of the Atlantic were irreconcilable.

For the colonies the British move towards extending Westminster as an inter-colonial Parliament with full authority in taxation and all other colonial concerns caused fear of 'a dangerous federal union.'[149] In the metropolitan power centre only singular voices in the Commons and the Lords conceded that there were and have to be limits upon Parliament's colonial authority. Charles Pratt, one of the architects of the Pratt-Yorke opinion of 1757,[150] had by now been elevated to the title of Lord Camden; he favoured 'the sovereign authority, the omnipotence of the legislature,' but clearly pointed out that there were 'some things it [Parliament] cannot do.'[151] In his view the sovereignty did not empower Parliament to act 'contrary to the fundamental laws of nature, contrary to the fundamental laws of this Constitution.'[152] His speeches of 2 February and 7 March 1766 were pervaded by implicit distinctions between ordinary law and fundamental law, either borrowing 'from the Law of Reason and of Nature' or 'from [the] Custom and Usage [of] our own Constitution.'[153] Lord Camden and the likeminded William Pitt the Elder[154] in the

[147]N.N. (1765a), The Political Balance, 45. Cf. Greene (2010), 102 (n. 74).

[148]Tucker and Hendrickson (1982), 175, 179. Cf. Greene (2010), 102 (n. 74).

[149]Charles Yorke, speech of 15 February 1765, in *Proceedings and Debates of the British Parliaments respecting North America*, ed. Simmons and Thomas (1983), vol. II, 26. Cited according to Greene (2010), 103.

[150]Charles Pratt (1714–94), afterwards Lord Camden: A former attorney general and then chief justice of common pleas, Pratt was one of the authors of the Pratt-Yorke opinion of 1757 (also known as the Camden-Yorke opinion) on the question of the right to own and govern new colonies. The opinion was issued in response to a petition from the British East India Company, over their land disputes either bought or conquerred. According to the official legal Pratt-Yorke opinion, the British East India Company held property in India according to treaty, but these lands would be considered under the sovereignty of Great Britain in the same way that territories acquired by conquest were. This opinion came to apply elsewhere of the developing British Empire.

[151]Camden speeches, 2 February and 7 March 1766, in *Proceedings and Debates of the British Parliaments respecting North America*, ed. Simmons and Thomas (1983), vol. II, 125ff., 321ff.

[152]See Footnote 151.

[153]See Footnote 151.

[154]William Pitt, 1st Earl of Chatham (1708–78): William Pitt (often referred to as Pitt the Elder, to distinguish from his son of the same name), was an important English politician of the eighteenth century, and counterpart of Robert Walpole. An orator of some repute, he was a member of the Parliament since 1735, from 1766 and 1768 he served as prime minister (beforehand between 1757 and 1761 under Newcastle he had a leading role). In spite of his attempts, both military and political, he was unable to halt the American independence movement, and he died in 1778. His son, William Pitt the Younger (1759–1806), was similarly a highly influential politician and, twice, prime minister. "Pitt, William", in Die Brockhaus Enzyklopädie Online, https://brockhaus.de/sites/default/files/pdfpermlink/pitt-william-73e49415.pdf (6 May 2014) accessed 14 March 2017.

Commons were convinced that fundamental laws and old common law liberties restricted and bound also the legislative body itself and could not be abrogated by any parliamentary sovereignty. For them the ancient British principle of no taxation without representation (chapt. 12 *Magna Carta* 1215) ranked among these fundamental laws.[155] Due to the authoritative myth of the *Magna Carta* and this guarantee, which has already been into the articles of the Barons,[156] Parliament had 'never levied Internal Taxes on any subject without their own consent.'[157] Before the differentiation between Parliament's authority to tax and its authority to legislate for the colonies emerged in the colonial discourse, Pitt held it explicitly 'essentially necessary to liberty.'[158] For the 1st Earl of Chatham and contrary to Robert Walpole, 'this kingdom, as the supreme governing and legislative power, has always bound the colonies by her laws, by her regulations, and restrictions in trade, in navigation, in manufactures—in every thing, except that of taking their money out of their pockets without their consent.'[159]

Most of the London establishment, though, regarded the power to tax as 'a necessary part of every Supreme Legislative Authority' and believed 'if they have not that Power over America, they have none, & then America is at once a Kingdom of itself',[160] as the Connecticut agent Jared Ingersoll reported to his constituents in February 1765. From the London perspective, the logic of the parliamentary supremacy left no space for customary restraints upon the authority of Parliament. Parliament was 'the only natural, constitutional Seat of complete Jurisdiction in the Kingdom' and that jurisdiction necessarily extended not just throughout the home islands but 'over the property and person of every inhabitant of a British colony' as well.[161] In his reply to Camden, William Murray, Lord Mansfield (1705–93)[162] stressed that Parliament represented 'the whole British empire' and had 'authority to

[155]Willoweit and Seif (=Müßig) (2003), 9.

[156]Stubbs (ed.) (1905), 289ff.

[157]Camden's speech, 7 March 1766; Pitt's Speech, 14 January 1766, in *Proceedings and Debates of the British Parliaments respecting North America*, ed. Simmons and Thomas (1983), vol. II, 81–92, 320–2. Cited according to Greene (2010), 95 (n. 59).

[158]Pitt's speech, 14 January 1766, in *Proceedings and Debates of the British Parliaments respecting North America*, ed. Simmons and Thomas (1983), vol. II, 81–92, 320–2. Cited according to Greene (2010), 95 (n. 59).

[159]See Footnote 158.

[160]Jared Ingersoll to Thomas Fitch, February 1765, in *Prologue to Revolution,* ed. Morgan (1959), 30. Cited according to Greene (2010), 100 (n. 71).

[161]N.N. (1766), *The General Opposition of the Colonies to the Payment of the Stamp Duty*, 25–6; [William Knox] (1765a), *A Letter to a Member of Parliament,* 21; [William Knox] (1765), *The claim of the colonies to an exemption from internal taxes imposed by authority of Parliament*, 2. Cited according to Greene (2010), 97 (n. 62).

[162]Lord Mansfield was the judge in in the *Somerset's Case*. Here it was held that slavery itself could not exist in England, because it contradicted the grant object of English law: Liberty. It was therefore not compatible with the natural laws of the mankind. Shaw (1926), 6; Nadelhaft (1966), 196.

bind every part and every subject without the least distinction' in matters of taxation as well as legislation.[163] This position in the debate over the repeal of the Stamp Act is consistent with his reasoning in the famous *Somerset case*,[164] in which an American resident was barred from exercising his rights over his slave in England as against the natural laws of mankind and the common law liberty, 'if not [allowed] by positive law.'[165] Though celebrated for his enlightened advocacy for freedom, Mansfield implicitly held that a statute could feasibly allow slavery, though the institution of slavery was contrary to fundamental laws.

Pitt and Camden were lone voices crying in the wilderness, whereas for most contemporaries unlimited sovereignty lay in the king-in-Parliament. The overwhelming majority position in the Stamp Act discourse held that customary restrictions upon Westminster's authority were synonymous with infringements against the sovereignty of the British crown over the colonies. Representing the metropolitan opinion, Lord Egmont argued that Parliament, by virtue of its 'supreme, absolute and unlimited' power, could levy taxes 'upon the People not by right of their having *representatives* but [by virtue of their] being *subjects* to the Government.'[166]

Regardless these arguments, the strength of colonial resistance against the Stamp Act forced Westminster to retract it. However, the repeal was accompanied by the Declaratory Act, which explicitly asserted that Westminster 'had hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America […] in all cases whatsoever.'[167] This consolidation of the unlimited and inimitable sovereignty of Parliament effectively meant, for the colonists, the fading of 'the essence of all their British ancestors had fought for, took the very savour out of that fine Anglo-Saxon liberty for which the sages and patriots of England had died.'[168] Having slammed the door, London had thus set the last scene for the American case conducted like a common law litigation. The legal question of the binding authority of usage and custom for the colonial constitutions was still very much open to debate, and it was

[163]Mansfield's speeches, 3 February 1766, in *Proceedings and Debates of the British Parliaments respecting North America*, ed. Simmons and Thomas (1983), vol. II, 128–130. Cited according to Greene (2010), 99.

[164]*Somerset v. Stewart* (1772) 20 St Tr 1 per Lord Mansfield, who held that English law did not permit a United States resident to exercise his rights over his slave, declaring slavery to be 'so odious that nothing can be suffered to support it but positive law.' As Mansfield pointed out, no such law existed.

[165]*Somerset v. Stewart* (1772) 20 St Tr 1.

[166]Egmont's speech, 6 March 1766, in *Proceedings and Debates of the British Parliaments respecting North America*, ed. Simmons and Thomas (1983), vol. II, 126–7, 320–321. Cited according to Greene (2010), 101 (n. 72), as of 7 March 1766.

[167]American Colonies Act (1766), 6 Geo 3 c 12.

[168]Mims (1941), 71.

exactly this assessment which was needed for justification of the 'rioting crowds' in the upheavals against Stamp Act.[169]

3.5 *Legal Force of Custom in the Unsettled Connexion of the Colonies to Britain*

In their protest against both interference in local affairs by Westminster through legislation and direct parliamentary taxation throughout the *Stamp Act* crisis, the American colonists put enormous stress on the traditional foundation of their rights in the old common law liberties. In making their arguments for exemption from Westminster legislation and taxation, the colonies' spokesmen relied on the assumption that the colonial constitutions 'had been established by long custom and' that custom 'was currently sanctioned by accepted usage.'[170] This redress to custom does not appear to be mere rhetoric. Of course, their argumentation would not have been so convincing if it had not exactly matched the supremacy of law concept established by Sir Edward Coke on the understanding of common law as immortal custom. 'Times immemorial' was and remains a commonly-employed phrase by English lawyers. Thus, the customary basis of colonial constitutions might have been felt by the colonists to be a legal argument in itself, one that could not be surmounted by common lawyers. The latter could not help but accept whatever had been done in a community in the very earliest times to be legal, and whatever had been abstained from to be illegal. When the colonists denounced London's violation of their 'old rights' through the alteration of their 'customary constitution[s]',[171] they were in line with 'a common law way of thinking about politics […] viewing each controversy as a matter, not for free invention or for fresh deduction from first principles, but for judicious choice, with attention to precedent always in order but authoritative solution always elusive.'[172] In the tradition of the seventeenth-century reasoning the colonists emphasised continuity rather than novelty and established 'some reason greater than custom alone, for by common law, unreasonable customs have no legal force.'[173] At the heart of this reason-based customary longing for rights as Englishmen was the Sullivan Draft[174] of the Declaration and Resolves on Colonial rights of the First Continental Congress of 14 October 1774[175] which reads as an American adoption of the English Bill of Rights

[169]Reid (1974), 1067.

[170]Reid (1976), 341; Reid (1995); Grey (1978), 863.

[171]Grey (1978), 853–4.

[172]Stoner (1992), 177.

[173]See Footnote 172.

[174]The Sullivan Draft was named for Major General John Sullivan (1740–95), the delegate from New Hampshire (and, later, governor) who first presented the resolutions.

[175]*Journals of the Continental Congress*, 1774–1789, ed. Ford (1904), vol. I, 63–73.

of 1689.[176] Indeed, as late as the nineteenth century, the attachment to the common law traditions was vivid, as could be heard in Edmund Burke's Speech on Conciliation with America: the colonists were 'not only devoted to liberty, but to liberty according to English ideas, and on English principles. Abstract liberty, like other abstractions, is not to be found […] Their love of liberty, as with you, [is] fixed and attached on this specific point of taxation.'[177]

Following the Boston Tea Party and the adoption of the Intolerable Acts, delegates gathered on 5 September 1774, at Philadelphia, in what was to become the First Continental Congress. Every colony but Georgia was represented. They voted on the next day to appoint a committee 'to state the rights of the Colonies in general, the several instances in which these rights are violated or infringed, and the means most proper to be pursued for obtaining a restoration of them.'[178] This led to the proposal of Joseph Galloway, a prominent young Pennsylvanian lawyer.[179] Galloway's Plan of Union was a conservative attempt to unite the colonies within the Empire. In addition, it advocated the creation of an American colonial parliament to act in coordination with Westminster.[180] Though it achieved a not inconsiderable degree of support in the First Continental Congress, Galloway's Plan of Union was opposed by the more radical delegates in the Congress. Consequently, it was introduced to the Congress on 28 September 1774, with the latter formally declining to adopt the plan, six votes to five, on 22 or (sometimes reported) 27 October. With Galloway's proposal rejected, the delegates instead adopted the Declaration of Colonial Rights,[181] based on Sullivan's draft. This draft, formulated

[176]Historical Notes of the American Colonies and Revolution, ed. Griffith (1843), 114.

[177]Burke's speech, in *The works of the right honourable Edmund Burke*, ed. Rivington and Rivington (1826), 49.

[178]*Journals of the Continental Congress*, 1774–1789, ed. Ford (1904), vol. I, 26.

[179]Joseph Galloway (1731–1803): A lawyer by training, Galloway had already made a name for himself in Pennsylvania at a young age. He became a member of the Assembly of Pennsylvania in 1756, and ten years later became the speaker of the Assembly. He took a critical stance with regards to the Stamp Act, but he was a Loyalist who opposed independence. His Plan of Union, which offered a compromise while remaining under the British umbrella, was rejected by the Continental Congress. As a result of Galloway's support for Britain, after 1778 he migrated to Britain. See, for reference, the three-part biography published by Baldwin (1902a, b, c), 161–91 (no. 2), 289–321 (no. 3), and 417–42 (no. 4).

[180]Galloway's Plan of Union mooted an American Parliament to act in conjunction with Westminster, with Westminster maintaining a right of veto. The king would elect a president-general to act as the enactor of the laws. Baldwin (1902c), 417ff. Baldwin suggests that the Plan of Union was popular, but its failure was the result of Galloway's opposition to the Revolutionary Suffolk Resolves. This would indicate that the Continental Congress was largely staffed by moderates, with the Resolves being a singular sticking point. On the other hand, Kelly and Harbison argue that the discussion surrounding the Resolves demonstrates that extremists were gaining the upper hand. Baldwin (1902b), 317; Kelly and Harbison (1970), 83.

[181]Curiously, the Plan of Union does not appear in the minutes of the Congress. Some historians have suggested that it was deliberately expunged; others, taking into account Charles Thomson's reputation for honesty, assume that this was a genuine oversight on his part—a curious notion, given the importance of the Plan. Baldwin (1902b), 317 (n. 3). Cf. also Wood (2015).

in the manner of common law,[182] began by listing Westminster's unconstitutional acts; the three statutes of 1774[183] were denounced as 'impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights.'[184] Against 'these arbitrary proceedings of Parliament and administration', as the Sullivan Draft put it:

> [t]he good people of the several colonies […] justly alarmed at these arbitrary proceedings of Parliament and administration, have severally elected, constituted, and appointed deputies to meet and sit in General Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties may not be subverted.[185]

The Sullivan Draft continued with the justification of the colonists' rights as the customary rights of Englishmen. As with those of Englishmen still on the Home Islands, these rights emanated from the 'very earliest times' of their ancestors:

> Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, declare, That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following rights.[186]

What followed was the explicit enumeration of these rights; these were related to 'the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.'[187] Finally, the draft concluded with reference to the

[182] *Journals of the Continental Congress*, 1774–1789, ed. Ford (1904), vol. I, 63–73.

[183] These three acts were, respectively, "An act to discontinue, in such manner and for such time as are therein mentioned, the landing and discharging, lading, or shipping of goods, wares and merchandise, at the town, and within the harbor of Boston, in the province of Massachusetts Bay, in North America" (Boston Port Act), "An act for the better regulating the government of the province of the Massachusetts Bay in New England" (Massachusetts Government Act), and "An act for the impartial administration of justice, in the cases of persons questioned for any act done by them in the execution of the law, or for the suppression of riots and tumults, in the province of the Massachusetts Bay, in New England." (Administration of Justice Act). Afterwards, another statute—"for making more effectual provision for the government of the province of Quebec, etc." (Quebec Act)—also became contentious. *Historical Notes of the American Colonies and Revolution*, ed. Griffith (1843), 114.

[184] *Historical Notes of the American Colonies and Revolution*, ed. Griffith (1843), 114.

[185] *Historical Notes of the American Colonies and Revolution*, ed. Griffith (1843), 114–15. At this stage, the 'several colonies' to which Sullivan referred were New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Newcastle, Kent and Sussex on Delaware, Maryland, Virginia, North Carolina, and South Carolina.

[186] *Historical Notes of the American Colonies and Revolution*, ed. Griffith, (1843), 115.

[187] These rights are explicitly defined in *Historical Notes of the American Colonies and Revolution*, ed. Griffith (1843), 115–16.

immutability and irreversibility of the rights and liberties, 'which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.'[188] The ending also reinforced the 'Americans as fellow-subjects in Great Britain', and framed the preceding text not as a revolutionary document, but rather a vehicle 'to restore harmony between Great Britain and the American colonies.'[189]

As long as the American colonists deemed themselves common subjects of the same king, and argued on the customary level of their old rights as Englishmen, there could not be the idea of the precedence of a written constitutional text. All questions of precedence were mere questions of the applicability of ordinary law. In the case of collision of colonial 'laws, by-laws, usages and customs' with English law, Blackstone held them to be 'utterly void and of no effect.'[190] Only in 1776 did the Americans 'substitute' their old rights as Englishmen with 'natural freedoms.' Taking the plunge and reorienting the American conception of the law according to natural law reasoning instead of the immortal customs of common law appeared to be constitutional 'pragmatism.'[191] In doing so, they declared independence and were no longer common subjects of the same king. Therefore, any invocation of their customary rights as Englishmen had been voided.

4 Establishing Constitution as Law

4.1 Emergence of the Constituent American People

4.1.1 Natural Law 'Basis and Foundation of Government'

It was the Virginia Bill of Rights[192] that constituted the decisive move away from the colonists' justifications on the grounds of traditional common law liberties. In this document, no reference at all was made to the customary rights and liberties of the colonists as Englishmen. The legitimising authority was not 'custom' but

[188] *Historical Notes of the American Colonies and Revolution*, ed. Griffith (1843), 116.

[189] *Historical Notes of the American Colonies and Revolution*, ed. Griffith (1843), 116–17.

[190] Blackstone, William (1979), *Commentaries on the Laws of England*, vol. I, 105.

[191] Cf. Bernstein, "The Current Global Resurgence of Pragmatism", lecture at the Katholische Akademie in Bayern, Munich, 21 March 2017.

[192] The Virginia Declaration of Rights had a tremendous influence on the development of the American constitutional process. It proclaimed the natural equity of man, individual rights, and that the right to govern derived its legitimacy from the people. This was demonstrated by its wording, in which its origins were stated to be in the 'representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them, and their posterity, as the basis and foundation of government.' It was modelled on the English Bill of Rights. Hunt (1917), 276, "In Convention—June 12, 1776", *Postscript*, no. 72 (14 June 1776), 1. Virginia Bill of Rights in: McClain (1913), 382.

'nature', the blueprint being the law of nature according to Locke, and the concept '[t]hat all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.' Written by George Mason, and adopted by the Fifth Virginia Convention on 12 June 1776, the claimed generality as 'the basis and foundation of government' marked the Virginia Bill of Rights as a revolutionary caesura.[193] The first formulation of popular sovereignty can be found in Section 2: 'That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.' The later constitutional framework of the United States Constitution (1787) is already evident here in the provision on the government[194] and the separation between the legislature and the executive.[195] Section 7 recalls the supremacy of legislation: 'That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised.'[196] Section 15 makes references to fundamental principles of higher-ranking authority, but does not yet recognise the precedence of the written constitution: 'That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and

[193]Cf. *le but de toute institution politique* in the diction of the preamble of the Declaration of the Rights of Man and Citizen (1789), in Willoweit and Seif (=Müßig) (2003), 250.

[194]Virginia Bill of Rights in: McClain (1913), 383. 'Section 3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community; of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal. Section 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.' Cf. "In Convention—June 12, 1776", *Postscript*, no. 72 (14 June 1776), 1.

[195]Virginia Bill of Rights in: McClain (1913), 383. 'Section 5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part, of the former members, to be again eligible, or ineligible, as the laws shall direct. Section 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.' Cf. "In Convention—June 12, 1776", *Postscript*, no. 72 (14 June 1776), 1.

[196]Stimson (2004), 79.

virtue and by frequent recurrence to fundamental principles.'[197] Nevertheless, the Virginia Bill of Rights was regarded at the level of ordinary legislation, not vested with any superior rank, and still analogous to common law. Later declarations of rights after the break with England included a series of rights in accordance with natural law preambles. These rights had previously been enjoyed by the Americans as rights of Englishman and codified law which has already existed; now, however, they had been elevated to the new level of superior constitutions.[198]

4.1.2 Independence from Being Subjects of the 'Same' King

In his essay entitled 'The Irrelevance of the Declaration,' the New York historian John Phillip Reid argued that the important part of the Declaration was not its preamble, but rather the charges it levelled against George III.[199] He was right to do so. In summer 1775, John Dickinson's Olive Branch Petition addressed a catalogue of colonists' complaints to Westminster; its failure to elicit positive action encouraged the Americans to seriously consider the role of the king as a nonpartisan patriot monarch of his whole people. This, naturally, must have included the Americans themselves, as George III's common, English subjects. Yet, as it became increasingly obvious in 1775–6 that the king was not willing to intervene in favour of the colonists against Westminster's self-understanding as a superior legislative power, the colonists resorted to formulating a new course of political action that included both independence from Britain and the creation of 'an AMERICAN COMMONWEALTH.' On their way to declaring themselves independent the American colonists made it clear that they were about to terminate the submission under British statehood as 'common subjects of the same King.'[200]

From the point of view of the Americans, Parliament had no say in the relations between Britain and the colonies; according to the Chief Justice of the Rhode Island Supreme Court, Stephen Hopkins, it was 'absurd to suppose that the common people of Great Britain have a sovereign and absolute authority over their fellow subjects in America, or [indeed] any sort of power whatsoever over them.'[201] When George III refused his arbitration role requested by the colonies, he assumed in their view full responsibility for the injustices suffered by the colonies. This responsibility was subsequently established in the initial wording of the Declaration of Independence of 4 July 1776:

[197]Vetterli and Bryner (1987), 76.

[198]Stourzh (2015), 58.

[199]Reid (1981), 46–89.

[200]"Letter from a Plain Yeoman", *Providence Gazette*, 11 May 1765, cited in *Prologue to Revolution*, ed. Morgan (1959), 73.

[201]Philalethes, *New York Gazette Post Boy*, 8 May 1766, cited in Greene (2010), 88 (n. 41).

> Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.[202]

A close reading of the Declaration immediately reminds the reader of the structure of the English Bill of Rights of 1689. This began with an enumeration of all the infringements of James II against the 'lawes and liberties of this Kingdome.'[203]

After the list of all these justifications for the revolution the Declaration states:

> Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred [sic!] to disavow these usurpations, which, would inevitably interrupt our connections and correspondence.

Even at this seemingly terminal point in Anglo-American relations, the Declaration of Independence still highlighted their discursive commonalities. Nonetheless, the 'British brethren' left their common, transatlantic kin no other choice, but to declare themselves independent, as '[t]hey […] have been deaf to the voice of justice and of consanguinity.' By addressing 'necessity' the American colonies claimed their right of resistance as a measure of self-defence, just as Parliament itself has done standing against the Stuart king, Charles I, when it issued the Militia Ordinance of 1642.[204] The Declaration concluded its justifications by stating that '[w]e must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.'[205] The connection with the decision for war and peace in the ending wording makes the range of this recourse to 'necessity' obvious. The central issue was the question of sovereignty: who had the final say when it really mattered.[206]

4.1.3 Constitutional American People of the United Colonies (1776–8)

The Declaration of Independence invoked a united American people, one singular constitutional population, distinct from the British colonial power: 'When […] it becomes necessary for one people to dissolve the political bands which have

[202]Fröschl (2014); Wills (1978), *passim*; Armitage (2002), 39–45.

[203]Willoweit and Seif (=Müßig) (2003), 236–7.

[204]*The Constitutional Documents of the Puritan Revolution 1625–1660*, ed. Gardiner (1906), No. 54, 254–5, 257.

[205]Fröschl (2014); Wills (1978), *passim*; Armitage (2002), 39–45.

[206]For further argumentation cf. Müßig (2008b).

connected them with another.'[207] The redress of the initial wording to 'the separate and equal station to which the Laws of Nature and of Nature's God entitle them,' thereby alluding to the old phrase from Bracton ('under God and the law') increases the appearance of unity. In spite of this, the American people did not enter the stage of history homogenously, in the form of a unitarian state, but rather as a federal union of thirteen individual states. Moreover, though the unanimity of the Declaration suggested unity, the Declaration itself included the seemingly irreconcilable concept that 'these United Colonies […] ought to be Free and Independent States […] And that as Free and Independent states, they have full power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do.'[208]

This fundamental contradiction of 1776, in which (supposedly) one people was divided amongst and represented by thirteen autonomous states, was determinative for the history of the United States, as almost all discussions on the rights of the individual states *vis-à-vis* the central government—for instance, the various States' Rights debates, the Jacksonian Nullification Crisis of 1832–7, and the secession of the Confederate states in 1860–1[209]—may be traced back to it. Indeed, common political discourse customarily referred to the United States in the plural ('the United States are'), with the modern singular usage ('the United States is') only entering general usage after the end of the Civil War in 1865.[210] Furthermore, South Carolina's Declaration of Secession (24 December 1860), which was one of the direct *casus belli* of the Civil War, explicitly justified the separation from the Union by invoking the Declaration of Independence and the Articles of Confederation:

> In pursuance of this Declaration of Independence [1776], each of the thirteen States proceeded to exercise its separate sovereignty; adopted for itself a Constitution, and appointed officers for the administration of government in all its departments – Legislative, Executive and Judicial. For purposes of defense, they united their arms and their counsels; and, in 1777, they entered into a League known as the Articles of Confederation, whereby they agreed to entrust the administration of their external relations to a common agent, known as the Congress of the United States, expressly declaring in the first article, that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not, by this Confederation, expressly delegated to the United States in Congress assembled.[211]

South Carolina's justification for secession was that it had never surrendered the sovereignty it had won as an independent state in 1776, neither to the Continental Congress under the Articles, nor to the Union under the 1787 Constitution. With the explicit reference to the Treaty of Paris of September 1783, which brought the War

[207]Text of the Declaration in Thomas Jefferson, Writings, ed. Peterson (1984), 13–14. For the assessment as one constitutional people cf. Mansfield (1989), 290.

[208]Thomas Jefferson, *Writings*, ed. Peterson (1984), 24.

[209]Ellis (1987), *passim*.

[210]Cf. Fröschl (2015), 40.

[211]Bruun and Crosby eds. (1999), 340–2.

of Independence to a close, and the acknowledgement of the individually-named 'United States' by the 'Britannic Majesty', this single-state legal focus position was even more underlined and emphasised. In the line of the South Carolinian arguments for the separation from the United States lay also the recourse to the 'two great principles asserted by the Colonies, namely: the right of a State to govern itself; and the right of a people to abolish a Government when it becomes destructive of the ends for which it was instituted.'[212] Undisputable was the final conclusion of the secessionist state, 'that each Colony became and was recognized by the mother Country as a free, sovereign and independent State.'[213]

This nineteenth-century reasoning reflects the debates at the end of the Stamp Act crisis, revolving around the legitimacy and desirability of a federal union or an incorporating union. For a Barbadian pamphleteer, 'Our Governments […] are founded on similar Principles',[214] and in March 1766 an anonymous writer in the *Pennsylvania Journal* proposed 'a confederacy of states, independent of each other, yet united under one head', concluding that 'all the powers of legislation may subsist full and complete in each part, and their respective legislatures be absolutely independent of each other.'[215] The struggle of the 'Colonies [to be] coordinate members with each other and with Great Britain, of an empire united by a common executive sovereign, but not united by any common legislative sovereign' was the driving force behind the American Revolution, more so than any other claim or grievance, as James Madison later observed.[216] The necessity of a federative union was highlighted by the Declaration of Independence, since only a united action in the war against Great Britain seemed likely to bring success to the colonies. But separation from Britain by no means resolved this ancient question. To the contrary, it made it even more challenging by complementing it with the equally vexing problem of how to forge a viable political and constitutional union out of thirteen distinct polities that had previously been tied together only by their common relationship to the British Empire through the emerging imperial constitution.[217] Therefore the *Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia* were only adopted on 15 November 1777 after long discussions,[218] though any incorporating union (such as the example of England and Scotland since 1707) was out of question. The first two articles stipulated that '[t]he style of this confederacy shall be "The United States of

[212]Bruun and Crosby (eds.) (1999), 340–2.

[213]See Footnote 212.

[214]Cited in *Prologue to Revolution*, ed. Morgan (1959), 20.

[215]F. L., *Pennsylvania Journal,* 13 March 1766, in *Prologue to Revolution*, ed. Morgan (1959), 91.

[216]James Madison, "Notes on the Resolutions, 1799–1800", in *The Writings of James Madison*, ed. Hunt (1906), vol. VI, 373.

[217]Greene (2010), 188.

[218]The ratification process was finished with the adoption of Maryland on 1 March 1781.

America."', and '[e]ach state retains its sovereignty, freedom and independence […] which is not expressly delegated to the United States in Congress assembled.'[219] The longest of all the provisions, Article IX, amounted to half of the text of the Articles of Confederation. It regulated that 'the united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war […] of sending and receiving ambassadors—entering into treaties and alliances […] The united states in congress assembled shall never engage in a war […] nor enter into any treaties or alliances […] unless nine states assent to the same.'

All decisions of importance and relevance had to be made by nine out of thirteen states, which amounted to a necessary majority of seventy percent of the individual states represented in Congress. Ten years later, the majority in the debates of the federative United States Constitution of 30 July till 1 August 1787, borrowing from the historical examples of the Netherlands, the Swiss Confederation, and the Holy Roman Empire, pointed out that not individuals but individual *states* were represented in Congress,[220] which was to be done equally and with the need of unanimity for general and fundamental matters.[221] This proves that winning independence in 1783, though effectively securing the original goal of the revolutionaries to gain local control over local affairs, left the question of how to bring the individual states into an 'effective union.' The state organisational issue to distribute authority between the centre and the peripheries was the primary concern of the American constitutional discourse during the 1780s and particularly during the national debate over the establishment of a new federal union 1787–8. Indeed, it might have been the driving force behind the recovering of the constitution as one legal written document at the core of a polity, defining its government's powers and responsibilities and the limits on those powers and specifying the rights of the people. In examining the United States Constitution of 1787, its focus on sovereignty issues between the Union and single states and its understanding as supreme legal codex for the existence of the union (and therefore nation) becomes readily apparent.

[219]Reproduced in *The Debate on the Constitution: Federalist and Antifederalist Speeches*, Articles and Letters during the Struggle over Ratification, ed. Bailyn (1993), vol. I, 954–64, and vol. II, 926–36.

[220]Thomas Jefferson, *Writings*, ed. Peterson (1984), 28–31.

[221]The opposition (most prominently, Benjamin Franklin) argued that population figures or economic power should be represented proportionately, rather than equally.

4.2 *Constitution as Supreme Legal Codex for Central State Issues*

4.2.1 Focus on the Division of Sovereignty Between Union and Single States

The United States Constitution was meant to be a ground-breaking document. Given this, its preamble, beginning with the phraseology '[w]e the people of America do hereby declare', seems uncharacteristically cautious. There is no other explicit reference to the sovereignty question within the preamble. This is perhaps because of the perceived experimental character of the Constitution itself, and its aim to establish an expansive federal republic by majority decision. The architects of the Constitution were well aware of this character. In his Federalist Paper No. 85, Alexander Hamilton invoked the words the Scottish Enlightenment philosopher David Hume, in order to point out that '[t]o balance a large state or society […] on general laws, is a work of so great difficulty [that] time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they INEVITABLY fall into in their first trials and experiments.'[222]

The delineation of competencies between the Union and the States (Art. 1, sec. 8, 9, 10) is, along with the separation of powers (Art. I, sec. 1 and Art. 2, sec. 1)[223] the leading constitutional theme in the organisation of the United States. The address to an internal and external defensive sovereignty[224] is not necessary. The Constitution articulated the rights of the Congress in legislation (Art. I, sec. 8) —the classical rights of sovereignty—and reduced correspondingly the rights of the union states, thus demonstrating the focus on the division of sovereignty between union and union states. It designed a federal state with a strong centralised power. With the American founding fathers having Blackstone's *Commentaries* as a

[222] *The Federalist Papers*, published originally as a series of eighty-five essays in two New York newspapers between 1787 and 1788, were originally intended to help sway New York public opinion towards acceptance of the draft produced at the Constitutional Convention. Collected and published together in 1788, they have since become the acknowledged, authentic commentary on the interpretation of the United States Constitution, and are consulted by the Supreme Court. Though the essays were written under a collective *nom-de-plûme* ('Publius'), there were three authors: Alexander Hamilton (1755/1757–1804), who wrote the majority; James Madison (1751–1836), the 'father of the Constitution'; and John Jay (1745–1829), who focused mostly on foreign affairs and whose contributions were limited to five essays due to illness. Alexander Hamilton, *Federalist* No. 85, in Hamilton, Madison, and Jay (1961), The Federalist Papers, 526–7. Cf. David Hume, "Of the Rise and Progress of the Arts and Sciences", in Hume (1788), Essays and Treatises, vol. I, 112.

[223] The *Federalist*'s individual analysis of the three powers (Legislature: No. 55-66; Executive: No. 67-77; Judicial: No. 78-83) puts forward the idea of a mixed constitution, in which, borrowing from Montesquieu's phrasing, every power is accorded a virtue according to its function: the legislative, prudence, because of the plurality in advising; the executive, energy, because of its concentration of power in one person. Cf. Müßig (2013a), paper 5, 15 (n. 129).

[224] Cf. Müßig (2016), 35–6, 50–1, 74–5.

model, the image of the President as surrogate monarch was already on the table, and elucidated in Art. 2, sec. 1's provision that 'the executive power shall be vested in a President.'[225] Legislation (Art. I sec. 1, 8) and budgetary sovereignty (Art. I, sec. 7) were subject to the two chambers of Congress: the House of Representatives, being the elected representatives of the people (Art. I, sec. 2), and the Senate, being the representatives of the individual states (Art. I, sec. 3). The bicameral system was created to enable compromises between the interests of the big states and the small ones. In the House of Representatives, every state was to have representatives according to its size (Art. I, sec. 2); in the Senate, according to the principle of equality of the states, every state was to have two senators (Art. I, sec. 3).

4.2.2 The Constitution as Guarantee for the Existence of the Union

According to the Federalists, such as Hamilton, Madison, and John Jay, the supremacy of the constitution was self-evident, because it was the benchmark for the action of all political powers. In the constitution, not only a political order that is able to protect freedom and property is manifested, but it is also the only system that can guarantee the existence of the nation. According to *Federalist* Paper No. 84, written by Hamilton (writing under the pseudonym 'Publius', meaning 'of the people'), '[t]he great bulk of the citizens of America are with reason convinced, that Union is the basis of their political happiness.'[226] This conviction arose because this 'great bulk of the citizens' was represented by 'a national government' (No. 85).[227] As for his rhetorical question 'whether […] the proposed Constitution has not been satisfactorily vindicated from the aspersions thrown upon it; and whether it has not been shown to be worthy of the public approbation, and necessary to the public safety and prosperity', Hamilton explained that a decision upon the constitution was a decision upon the 'very existence of the nation.'[228] His

[225]The president is directly elected by the people, by way of electors. Despite accountability to Congress (Art. 2 Section 3 United States Constitution), the president does not depend on the Congress. The president in turn cannot dissolve Congress. The president's staff consists of his personal advisers and is not accountable to Congress. The president's important role in the legislative process, despite having no formal right of legislative initiative, emerges from the right to 'recommend to their consideration such measures as he shall judge necessary and expedient' (Art. 2 Section 3). Further, the president has a suspensive veto (Art. 1 Section 7). Cf. Muß (2013), *passim*; Beke-Martos (2012), 155–174.

[226]Hamilton, Alexander, *Federalist* No. 84, in Hamilton, Madison, and Jay (1961), The Federalist Papers.

[227]'A NATION, without a NATIONAL GOVERNMENT, is, in my view, an awful spectacle'. Hamilton, Alexander, *Federalist* No. 84, in Hamilton, Madison, and Jay (1961), The Federalist Papers, 527.

[228]'No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country, or to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party; let him reflect that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation;

explanations that the consent to the constitution should be governed by '[n]o partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice,'[229] with the decisive aspect being 'not a particular interest of the community, but the very existence of the nation', marks the superiority of the general will approving the constitution over the consensus to a statute.

The opposition to the federal Constitution, which in 1787 fostered the development of hierarchical laws, has been extensively investigated by Gerald Stourzh, who likened it to the political thought of the nineteenth-century Austrian theorist Adolf J. Merkl.[230] As an example of this, Stourzh referred to the correspondence of an anonymous anti-Federalist farmer. In his sixth letter, the farmer (assumed to be the New Yorker Melancton Smith) wrote:

> Of rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or abolish them. These, such as the trial by jury, the benefits of the writ of habeas corpus, &c., individuals claim under the solemn compacts of the people, as constitutions, or at least under laws so strengthened by long usage as not to be repealable by the ordinary legislature – and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.[231]

From this anti-Federalist opposition against the precedence of constitution over the ordinary laws (both of the union and of the federated states), it becomes clear that the development of the supremacy of constitution in the American constitutional discourse also comprised the political issue of the state-organisational relationship between union and single federated states; its preeminence was fostered by the equivalence of the existence of the Union and the coming-into-existence of the Constitution.

4.2.3 Constitutional Silence on Precedence

The supremacy of the Constitution as proclaimed in Art. VI clause 2 of the 1787 text was left without statement how to implement the precedence at either federal or

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and let him remember that a majority of America has already given its sanction to the plan which he is to approve or reject.' Hamilton, Alexander, *Federalist* No. 84, in Hamilton, Madison, and Jay (1961), The Federalist Papers, 523.

[229]Hamilton, Alexander, *Federalist* No. 84, in Hamilton, Madison, and Jay (1961), The Federalist Papers, 523.

[230]For more on Hans Kelsen and Adolf J. Merkl, please refer to the contribution by Thomas Olechowski; for a condense overview of Stourzh' long-standing research on constitutional precedence please refer to his essay, both in this volume.

[231]Letters from the Federal Farmer, letter 6, in Storing (ed.) (1981), 261. Only recently has Smith been assumed to be the author; Smith was a prominent critic and opponent of the United States Constitution. See also Stourzh (1999), 123, republished in Stourzh (2007), 321. It is through these works by Stourzh that Smith's letter, its meaning, and its importance has been brought to my attention.

single state level.[232] This seems to owe to the discussion leading from the 1760s, which saw judicial review as a contradiction of popular sovereignty; according to the introductory preamble, it was this popular sovereignty that legitimated constitutional legislation.[233] This reluctance to affirm constitutional supremacy should also be understood by reference to the common law context of the American discourse. In the leading *Bonham's Case*,[234] known also in the colonies, Coke formulated the precedence of common law even over the laws of Parliament.[235] The willingness of the colonies to adhere to this reasoning was only bolstered during their struggles against Westminster legislation.

The counter-position of the sovereignty of Parliament[236] was about to cause much unease in the colonies. Contrary to Coke, Blackstone's *Commentaries* stipulated that, '[w]here the common law and a statute differ, the common law gives place to the statute.'[237] This established the precedence of the legislative over the judicial. But even before Blackstone's definition of parliamentary sovereignty was able to gain a foothold in the colonies, the American discourse had already adopted the position that there must be limitations to Westminster's jurisdiction.

With this we return to the justification of the American Revolution as an act of resistance against the unconstitutional action of the English Parliament. It is true that the elected colonial representative bodies did not expressly confess to the invalidity of unpopular parliamentary laws in the protest against the motherland,[238] but popular sovereignty took parliamentary sovereignty off the table. The idea of popular sovereignty was formulated by the Committee of Correspondence of the

[232]Since the Supreme Court's decision in *Marbury v. Madison* (5 U.S. (1. Cranch) 137) in 1803, the competence to decide the constitutionality of laws passed by Congress is recognised.

[233]'We the people of the United States do ordain and establish this constitution for the United States of America.' Cited by Willoweit and Seif (=Müßig) (2003), 255.

[234]'And it appears in our books that in many cases the common laws will control acts of parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void.' 8 Co.Rep. 107a = 77 ER 638; Plucknett (1926/27), 34.

[235]Coke, however, did not decide on the issue of sovereignty, leaving it open to interpretation. See also Mosse (1950), 160–1.

[236]Concerning Parliament's claim of sovereignty as the highest common law court in the English constitutional struggles of the seventeenth century, see Müßig (2006a), 48ff.

[237]Blackstone, William, *Commentaries on the Laws of England*, Introduction, section III, 89. See also Jezierski (1971), 95–106.

[238]House of Burgesses of Virginia 1764: 'And if it were proper for the Parliament to impose Taxes on the Colonies at all, which the Remonstrants take Leave to think would be inconsistent with the fundamental Principles of the Constitution, the Exercise of that Power at this Time would be ruinous to Virginia.' Cited in *Prologue to Revolution*, ed. Morgan (1959), 17; Resolution of Maryland 1765: 'Unconstitutional and a Direct Violation of the Rights of the Freemen of this Province' (*Prologue to Revolution*, 53); Resolution of Massachusetts 1765: 'That all Acts made, by any Power whatever, other than the General Assembly of the Province, imposing Taxes on the Inhabitants are Infringements of our inherent and unalienable Rights, as Men and British Subjects: and render void the most valuable Declarations of our Charter' (*Prologue to Revolution*, 57).

city of Boston for the first time in 1772, which quickly spread to the other colonies.[239] With the Virginia Bill of Rights of 1776, the dam broke.[240]

Nonetheless, the 1787 Constitution remained cautious in its implementation of popular sovereignty, in contrast to the celebratory rhetoric of its preamble. Regardless the importance of the Virginia Bill of Rights eleven years earlier, by 1787 conservative reservations against the people as the sovereign power were still insurmountable. In the Philadelphia Constitutional Convention, the conviction that unlimited popular sovereignty could actually *endanger* the Constitution still prevailed.[241] The exclusion of direct popular involvement in the constitutional amendment process, and the introduction of the bicameral system went in the same direction.[242] Art. V of the 1787 Constitution clearly demonstrates the distrust of direct popular involvement in this amendment process:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[243]

Furthermore, the 1787 text contained no declaration of human rights. It was only in 1791 that the Bill of Rights became part of the Constitution due to conditions set

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[239]'All men have a Right to remain in a State of Nature as long as they please: And in case of intolerable Oppression, Civil or Religious, to leave the Society they belong to, and enter into another.—When Men enter into Society, it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions, and previous limitations as form an equitable original compact.—Every natural Right not expressly given up or form the nature of a Social Compact necessarily ceded remains.—All positive and civil laws, should conform as far as possible, to the Law of natural reason and equity.' *The Writings of Samuel Adams*, ed. Cushing (1904), vol. II, 351–2. Concerning the revolutionary theoretical significance of the idea of popular sovereignty in the American Revolution see among many Engel (1961), 211; Arendt (1963), 152; Wood (1969), 353–354; Adams (1973), 138–40.

[240]'That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them […] that government is, or ought to be, instituted for the common benefit […]; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.' Swindler (ed.) (1979), 49. See also Stourzh (1976), 397ff.

[241]At the meeting of 21 July 1787, for example, James Madison referred to unlimited popular sovereignty as 'the real source of danger to the American Constitutions.' Cited in *The Records of the Federal Convention of 1787*, ed. Farrand (1911), vol. III, 74.

[242]Constitutional amendments require a two-thirds majority in both houses of Congress and must also be ratified by three-quarters of the States by legislatures or constitutional conventions (Art. V).

[243]Willoweit and Seif (=Müßig) (2003), 275–6.

out during the debates of ratification in the individual states (*Amendments*). They lay down a catalogue of individual rights, including those of freedom of religion, speech, and assembly, as well as the inviolability of the person and property. In America—the New World—class differentiations were a memory of the old continent. For that reason, the idea of equality was not as much emphasised as in the French Declaration of the Rights of Man and Citizen, while the American guarantees of freedom of assembly and the right of petition (Article 1 of the *Amendments*) have no equivalent in the French Declaration. At this point the beginning of a tradition becomes noticeable, through which the United States fostered a unique self-characterisation that differentiated it from its European forebears. This continued after independence and was strongly emphasised in the First Amendment of the United States Constitution 15 December 1791: The federal legislature was prohibited from passing resolutions concerning the creation of a state religion or the prohibition of the free practice of religion. This prohibition for the federal legislature also includes the restriction of the freedom of speech and press, as well as the freedom of assembly and the right to petition.[244]

Constitutional jurisdiction, which was crucial for the precedence of constitution, was not included into the 1787 text, as there was no majority in the Convention for so strong a constitutional jurisdiction.[245] Nevertheless, the need for an authoritative final judge in disputes between the centre and the periphery—disputes that had been unsolvable in the years between 1765 and 1776—contributed to the American development of a judicial review and to the revision of Locke's concept of there being no competent earthly judge between the legislature and the population.

4.3 *Farewell to the Lockean 'Inter legislatorem et populum nullus in terris est judex'*

According to his letter about tolerance ('Epistola de tolerantia', 1689), for John Locke there was no judge on earth between the legislation and the people. This role could only be occupied by God, and it was God who personified the figure of judgemental resistance against executive or legislative excess.[246] With the

[244]The First Amendment was adopted on 15 December 1791. Here it was established that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' It is part of the Bill of Rights, which was enacted by popular pressure in order to explicitly establish the guarantees of individual rights in the face of governmental interference. Nowak and Rotunda (ed.) (1991), 937.

[245]For details, see Dippel (1987), 150.

[246]Locke (1989), *A Letter Concerning Toleration,* 86. In 1689, Locke answered the question: *Quis erit inter eos judex?*—who shall be the judge between them?—with: *solus deus* (God alone). My argumentation here follows Stourzh (2015), 113–14.

separation of legislation and constitution, or the distinction between superior constitutional law and ordinary statutory law, the Americans entertained the possibility of having a secular judge between the legislation and the people. This would take the form of judges who were authorised to measure the statutory law against the 'higher' will of the American people, as embodied by the constitution. The higher legitimation by the constituent general will was explained by Hamilton in his Federalist Paper No. 85.

This process indeed commenced during the 1780s in some of the federal states of America, especially in the state of North Carolina. By the competence for ordinary jurisdiction to measure the statutory law against the 'higher' will of the people, in other words the constitution, the feudal right of resistance, as it is assumed by Locke—where God as judge means resistance—was replaced by the (constitutional) courts.[247] The federal jurisdiction adopted this opinion; as a result, it was applied to the famous legal case of *Marbury v. Madison* (1803), which is considered to be the foundation of the 'judicial review'—the prerogative of the judges to examine constitutionality or unconstitutionality. *Marbury v. Madison* held *praeter legem* that '[i]t is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule', and that the Constitution was the superior measurement for ordinary statutes ('If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply'). However, it is crucial to analyse the context of this decision. That context is provided by Hamilton's plea for the introduction of a judicial review, made fifteen years earlier.

The interpretative authority of jurisdiction and the fundamental character of the Constitution were the starting points for the argumentation set forth in *The Federalist* No. 78. According to Hamilton:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[248]

James R. Stoner argues[249] that Hamilton's plea for the judicial review relied on common law reasoning, irrespective the latter's super-elevation of Parliament's wisdom (also: *ultimum sapientiae*)[250] not to enact any statute 'against the truth' due

[247]Stourzh (1989), 73.

[248]Hamilton, Alexander, *Federalist* No. 78, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 467.

[249]Stoner (1992), 207–9 (n. 41).

[250]Coke, Edward (1797), *The Institutes of the Law of England*, *Second to Fourth Parts*, Part IV, 3.

to the knowledge of the represented subjects of the whole realm.[251] Hamilton overcame this well-known line of precedence against judicial review, also attached to *Bonham's case*,[252] by asserting that a written constitution is a law and therefore examining the violation of constitution by statute is to be held analogous to the clash of two statutes. If two statutes on the level of the same legislative authority were incompatible, it is 'the nature and reason of thing'[253] that decides for the preference of the more recent. *A minore ad maius* the analogy leads to preference for a constitutional provision over a conflicting statute, as 'the nature and reason of thing' says so *a fortiori*, if the legal provisions of a superior authority were at risk of being infringed. Hamilton's statement of the different legal quality of a constitution relied on his assessment of the uniqueness of the constituent power, which he expressed in *The Federalist* No. 83,[254] and his tolerance towards implicit, unwritten powers, as argued in *The Federalist* No. 33.[255] Irrespective of the lack of express constitutional competences to enforce the goals and limits of a written constitution, such a judicial power of 'mitigating the severity and confining the operation of [unjust and partial] laws,'[256] was inferred from the Constitution.[257] Anti-Federalist critics, writing under the pseudonym 'Brutus', condemned the idea of judicial review, on the grounds of unelected judges having the competence to review and nullify acts of elected legislative representatives.[258] In response,[259] Hamilton

[251]Coke, Edward (1826), *The Reports, Eleventh Reports*, 14a = 77 ER 1163 (*Priddle and Napper's Case*). Whereas Thomas Smith (*De Republica Anglorum*) and William Lambarde (*Eirenarcha*) emphasise consensus of the represented subjects to the parliamentary statute, Coke stresses the knowledge of the represented subjects on the parliamentary statute: 'the law intends that every person hath knowledge thereof, for the parliament represents the body of the whole realm.' Coke, Edward (1797), *The Institutes of the Law of England, Second to Fourth Parts*, Part IV, 26. The knowledge of the represented subjects on the parliamentary statute is not an original thought, new is only the reduction of the representation away from the consensus and only to the aspect of knowledge. Cf. Crompton, Richard (1637), L'authoritie et jurisdiction, fol. 16[r].

[252]Coke's argumentation in Priddle and Napper's Case starts: 'And as it is said in Powden…' which refers to 8 Co.Rep. 107a = 77 ER 638 (*Dr Bonham's Case*).

[253]Hamilton, Alexander, *Federalist* No. 78, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 468.

[254]Hamilton, Alexander, *Federalist* No. 83, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 497.

[255]Hamilton, Alexander, *Federalist* No. 33, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 205.

[256]Hamilton, Alexander, *Federalist* No. 78, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 470.

[257]See Footnote 255.

[258]'Brutus', Essay XI, in Storing ed. (1981), vol. II, 418, 420.

[259]'Brutus', Essay XI, in Storing ed. (1981), vol. II, 358–452. Stoner refers to the complete text of Brutus's letter. Stoner considers Hamilton's opening comments in *Federalist* No. 81 on the power of constructing laws according to their spirit to be a direct response to Brutus' Essay XI. Stoner (1992), 208 (n. 45). See also Diamond (1976), 249–81.

argued that 'in voiding unconstitutional acts the courts serve as the people's champion.'[260]

This defence of judicial review in No. 78 can only be understood in the common law context of artificial reason, which was established as the seventeenth-century basis for supremacy of law under the auspices of the oft-quoted Sir Edward Coke. The conception of 'artificial reason', elucidated in the seventeenth-century precedent *Prohibitions des Roy*,[261] was established as being superior to the 'natural reason' of the monarch; this was transformed in the Federalists' discourse into the 'solemn and authoritative' reason of a constituent assembly fully aware of the 'Decisive Constitutional Normativity' and its necessity to prevail over the 'momentary inclination' of the people represented by legislature.[262] To continue this argument, it is the spirit (or, rather, reason) of the common law that no particular legislative act nor any specific legal ruling has the final word on what is just,[263] but only the 'collective mind of the profession' which adopted the mantle of authority customarily represented by popular consent.[264]

It was in this manner that seventeenth-century common law was the bulwark against Stuart absolutism;[265] artificial reason replaced general custom, more as an interpretative authority[266] rather than as legislative consensus.[267] With this as the common law basis of Hamilton's argumentation, it is not difficult to follow Publius (Hamilton) in assessing the judges as 'the bulwarks of a limited Constitution'[268] and 'faithful guardians of the Constitution,'[269] the people as its 'natural

[260]Stoner (1992), 209.

[261]*Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 Co.Rep. 64 = 77 ER 1342–1343 per Edward Coke, C.J.

[262]Hamilton, Alexander, *Federalist* No. 78, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 469–70.

[263]According to Stoner, '[t]he most vivid illustration of this way of thinking I know is the criticism of the Supreme Court Decision in Dred Scott by the great common lawyer, Abraham Lincoln.' Stoner (1992), 264 (n. 55). See also Johannsen (ed.) (1965), *passim*.

[264]Finch, Henry (1759), *A Description of the Common Laws of England*, 52–3. Cf. also Dodderidge, John (1631), *The English Lawyer*, 103; Prest (1977), 326–7; Doe (1990), 26; Ives (1983), 161.

[265]Gray (1980), 25–6; Gray (1992), 85–121; Lewis (1968), 330–1.

[266]The authority of the general custom for the *common law*, however, is not negated. Cf. explicitly Coke, Edward (1826), *The Reports, Ninth Reports*, 75b = 77 ER 843 (*Combes's Case*).

[267]Coke, Edward (1826), *The Reports, Second Reports*, 81a = 76 ER 597 (*Lord Cromwel's Case*); Coke, Edward (1826), *The Reports, Sixth Reports* 5b = 77 ER 261 (*Sir John Molyn´s Case*).

[268]Hamilton, Alexander, *Federalist* No. 78, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 469.

[269]Hamilton, Alexander, *Federalist* No. 78, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 470.

Guardians,'[270] and 'the general spirit of the people and of the government'[271] as 'the only solid basis of all our rights.'[272]

5 Summary of Sections 3 and 4

For all that the American Revolution and the subsequent United States Constitution were, indeed, revolutionary, this does not mean that either was unprecedented or unheralded. On the contrary: at every step in the struggle, first with Britain and then amongst themselves, the minds fashioning the American future continually referred back to the concepts of law and legitimacy. Unsurprisingly, these concepts had their origins in the Old World of Europe, as befitting a new society consecrated upon the foundations of the old. The push for independence was not solely a military endeavour but also a legal one, as the leading figures of the Revolution referred to the guiding lights of English common law—William Blackstone and Edward Coke—in order to demonstrate that it was, in fact, England that had forsaken English law, by denying loyal English subjects (as the American colonists, until the very end, argued themselves to be) their rights as Englishmen. This included the right of representation (which could not conceivably be achieved through the institution of the Westminster Parliament) and the right not to be taxed without this aforementioned representation. In part, this explains the ultimate appeal of rebellion: to the Americans, it was not they who were breaking the law by revolting against Britain, but in fact the British who were acting illegally by denying fundamental rights under common law. To the Americans, they were the 'better Englishmen' than the English.

Having established this legitimacy of revolution, the Americans were next faced with the challenge of legitimising their own governance. This they accomplished again with reference to European precedent, adapted to their own needs. King George III was replaced by his secular stand-in, President George Washington. However, to avoid the very pitfalls that had catalysed the Revolution in the first place, the Founding Fathers aimed to delineate clear responsibilities and powers through the use of an explicit, written law of higher character than ordinary law. The resultant United States Constitutional system, enhanced by the federal precedent *Marbury v. Madison (1803)*, insisted upon formalised mechanisms, such as judicial review to protect constitutionally-granted rights and liberties, thus introducing not only a founding body of law but also the means by which that body of law gained normative precedence. Once again, such a development in some ways

[270]Hamilton, Alexander, *Federalist* No. 16, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 117.

[271]Hamilton, Alexander, *Federalist* No. 84, in Hamilton, Madison, and Jay (1961), *The Federalist Papers*, 514.

[272]See Footnote 271.

jettisoned existing European ideas (such as the Lockean model of God-as-resistance), while adapting others, such as Coke's superiority of 'artificial reason' over 'natural reason.' Ultimately, networks and connections across the Atlantic amounted to a hoard remaking traditional understandings of constitutionalism.[273] Regardless its substance, by the early nineteenth century, the United States Constitution was established as the normative, precedential body of law in the fledgling United States of America. Having been influenced by Europe, America was, through this development, able to turn the tables, and itself influence the Old World, while Europe itself went through a major period of transition.

6 Legal Transition of Philosophical Truths

The American Revolution had brought about a *Novus Ordo Seclorum* on one side of the Atlantic. Continental Europe's 'new order of ages', which would establish both normativity and precedence, roughly coincided with the same period. The starting point for this new order, though, was totally different from that of the American colonies, as were many of the assumptions and processes that would shape it.

In 1827, the German poet and playwright Johann Wolfgang von Goethe lyricised the existence of America in his poem *Den Vereinigten Staaten* (*To the United States*):

> America, you are better off than
> Our continent, the old.
> You have no castles which are fallen,
> No basalt to behold.
> You're not disturbed within your innermost being,
> Right up till today's life
> By useless remembering
> And unrewarding strife.[274]

Goethe's verse is, however, less praise of the United States, so much as a lament of Europe's 'historical baggage'—the 'fallen castles' and perpetual 'strife' that would colour any radical shift to a new era. Goethe himself had been a witness to this roughly three decades earlier, as the newly-minted French Republic began its

[273]Cf. Müßig (2017).

[274]Goethe, Johann Wolfgang von (1948), "The United States", in The Permanent Goethe, ed. Mann, 655. Cf. the original German: Goethe, Johann Wolfgang von (1842), "Zahme Xenien: Den vereinigten Staaten", in Goethe, Nachgelassene Werke, vol. XVI, 96.

own constitutional experiment, similar yet distinct to that begun by Washington, Madison, Hamilton, and the American constitutionalists.

The critical, formative years of this experiment were between the Years III and VIII (1794/5-9/1800); this period marked the interval between the establishment of the Directorate and its apotheosis into Bonaparte's single rule.[275] The National Convention (*Convention nationale* = *la Convention*),[276] as the first French assembly elected by a suffrage without class distinctions, set forth the draft of the radical democratic 'Jacobin' or 'Mountain' Constitution of the Year I (*Acte constitutionnel du 24 juin 1793*),[277] which planned to wipe out the monarchy. In the following eight months (from autumn 1793 to spring 1794) these radical democratic ambitions were discredited by the Terror of the Committee of Public Safety (*comité de Salut public*) under the auspices of Maximilien de Robespierre[278] and his Jacobins. During the Thermidorian[279] constitutional debate, the majority of the members of the Convention (*conventionnels*) had no intention whatsoever to bring the Jacobin constitution of 1793 into force. With the beginning of the Parisian *sans-culottes* insurrection on 1 Prairial III (20 May 1795), which resulted in the storming of the Convention with the battle cry 'bread and the constitution of 1793', the

[275]Particular attention to the Polish, Belgian, and Italian case studies can be found in vol. I of the ReConFort proceedings, Müßig (ed.) (2016).

[276]The National Convention was a constituent assembly that gathered between 20 September 1792 and 26 October 1795, when it was disbanded. Together with the *Constituante*, the Convention was addressed by Sieyès as a 'primary assembly.'

[277]The Jacobins, centred on the Society of Friends of the Constitution, was the driving political force behind the revolutionary government, and was divided between the moderate Girondins and the radical Mountain faction, headed by Robespierre. The enacting of the Constitution of the Year I marked the consolidation of the Mountain as the dominant faction within the Jacobin Club (hence the interchangeability of the term 'Jacobin' or 'Mountain' to with regards the constitution). See, for example, McPhee (2012), 152–5.

[278]Maximilien François Marie Isidore de Robespierre (1758–94): Arguably the most famous of the French Revolutionaries, and a symbol of its excesses, Robespierre was born in 1758 in Arras, though by the time the Revolution he had considerable influence in the capital; as a result, he was elected to the National Convention as a Parisian deputy in 1792. As a member of the Constituent Assembly he had maintained his political independence, though he was soon associated with the *Montagnard* (Mountain) faction of the Jacobin Club. His growing notoriety led to Girondist deputies accusing him of aspiring to dictatorship. He was also accused of being responsible for a massacre in the prisons of Paris. This only emboldened Robespierre, and he rose to the leadership of the Mountain. The ultimate responsibility for the execution of King Louis XVI fell to him; following this, in 1793, he politically crushed the Girondins, before beginning the Terror in order to destroy them totally. As the president of the Committee of Public Safety, the zenith of his power came with the trial and execution of his major political rivals Hérault de Séchelles and Robert Danton. Yet this notoriety also made him a target; just months after Danton and Séchelles' deaths, Robespierre was deposed, arrested on the orders of the National Convention, and sent to the guillotine. Thomas (1915), 2070–1.

[279]The adjective 'Thermidorian' refers to 9 Thermidor Year II (27 July 1794), when Robespierre and his radical co-revolutionaries came under concerted attack in the National Convention. It also describes the constitutional discourse in the National Convention (also known as the Thermidorian Convention) until the introduction of the Directory.

willingness to promulgate the implementing laws (*lois organiques*) for the enforcement of the Mountain Constitution faded. It was only after Robespierre's fall that the National Convention could turn to the 'commission of the eleven'[280] to formulate a new constitution. The eleven commissioners proposed the Directory Constitution of the Year III (1795), which passed on 22 August 1795 (5 Fructidor of the Year III).[281] Its pillars were the return to the 1791 constitution, the affirmation of equality within the limits of civil equality, and the ruthless protection of the Republic against any legislative omnipotence or executive dictatorship. Similarly, protection was needed against the revolutionary subversive ghost of the faubourg Saint-Antoine,[282] bordering the Bastille. The bicameral legislature was composed of the Council of Five Hundred, with its right to legislative initiative, and of the Council of Ancients (sometimes referred to as the Council of Elders; *Conseil des Anciens*), whose 250 deputies accepted or rejected proposed bills. Crucially, the executive power in the hand of five directors[283] was vested in an executive college as the Committee for Public Safety had been. Thus, even if concentration of executive power was to be avoided by the re-election of one of the directors each year within the five-year term, the Directory still retained great power. This included emergency powers to curb freedom of the press and freedom of association.

6.1 Sieyès' Constitutional Jury (jury constituionnaire)

In this discursive context, the task of legally protecting the Revolution, from itself as well as outsiders, fell to Emmanuel Joseph Sieyès (1748–1836), the Roman Catholic abbot and political theorist whose 1789 pamphlet *Qu'est-ce que le tiers-état?* (*What is the Third Estate?*) had become the French Revolution's guiding manifesto. Sieyès proposed the introduction of a constitutional jury whose

[280]On 29 Germinal III (18 April 1795). The commission member were: Antoine-Claire Thibaudeau, Louis-Marie de La Révellière-Lépeaux, Denis Toussaint Lesage (d'Eure-et-Loir), François-Antoine Boissy d'Anglas, Jacques-Antoine Creuzé-Latouche, Jean-Baptiste Louvet de Couvray, Théophile Berlier, Pierre-Claude-François Daunou, Jean-Denis Lanjuinais, Pierre-Toussaint Durand de Maillane, Pierre-Charles-Louis Baudin (des Ardennes).

[281]Cf. in regard to the Constitution of the Year III: Mathiez (1934); Lefebvre (1943); Brunel (1985), 687–96; Pertué (1989), 284–6; Troper (1996); Bart et al. (eds.) (1998); Conac and Machelon (eds.) (1999); Luzzatto (2001); Troper (2006).

[282]The so-called Réveillon riots (*affaire Réveillon*) was one of the first violent upheavals of the French Revolution, and took place between 26 and 29 April 1789. The target was Jean-Baptiste Réveillon's factory in the St. Antoine district of Paris, which produced luxury wallpaper. Facing the pre-revolutionary economic crisis, Réveillon had responded to it by cutting workers' wages, while at the same time calling for the reduction of royal taxes. As a result, the workers demonstrated in front of the *Hôtel de ville*, with the catch-cry of 'the bread for two pennies' (*Le pain à deux sous*).

[283]The Directors were chosen by the Council of the Ancients, from the list presented by the Council of Five Hundred.

juridical-political competences comprised the adjudication of complaints, even by individuals, regarding constitutional infringements by constituted powers,[284] reform and review of the Constitution itself every ten years. It also included, rather uniquely, an equitable jurisdiction as 'court for human rights'[285] if asked by official judicial referral of ordinary courts. This supplementary constitutional equity was based on natural law (most likely reflecting the character of 1789 Declaration of the Rights of Man and Citizen) and planned to be accessible if courts declared themselves unable to reach a decision in the absence of an applicable positive law or if they held the decision according to the legal text to be against their conscience.[286]

Sieyès' proposal was put forward at a time when normativity and constitutional precedence were very hard to establish. During the Revolution, the constitution was primarily conceived as a mean to guarantee the organisation of the powers and their functions. As Michel Pertué has demonstrated, the Revolution 'refused always to convey to any institution outside the legislative body the competence to verify and to guarantee the democratic process of the legislation and its conformity with the laws, the principles of the declaration of rights of man and citizen and with the constitution.' The dominant *légi-centrisme* was, in Pertué's reading, the Rousseauist understanding of law as the expression of the *volonté générale*, immunising the sovereign legislative assembly against the obligation to follow superior rules.[287] Unsurprisingly, then, Sieyès' draft was rejected unanimously, but the course of debates illustrates decisive milestones of the French constitutional 'belief' after 1789.[288]

It goes without saying that, in the unpreceded constitutional debates in Revolutionary France, nominalist certainty or even autonomy of constitutional semantics was an illusion. Yet, as the ReConFort project with its functional approach has consistently demonstrated, there was and is a mutual interdependency between the artifice or constituent making of a constitution and the discourse of public opinion and understanding.[289] With this in mind, the debates in the National Convention on the 2 and 18 Thermidor Year III (20 July and 5 August 1795) are crucial not only for the understanding of French constitutional history. More expansively, they are vital for determining whether there is a common European core of normativity and precedence or whether modern European integration, though built since the grounding treaties as legal community, has ignored or not been fully aware of different national concepts of constitutional normativity and precedence.[290]

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[284]Bastid, Paul (1939), *Les Discours de Sieyès*, 32.

[285]Bastid, Paul (1939), *Les Discours de Sieyès*, 42.

[286]Bastid, Paul (1939), *Les Discours de Sieyès*, 46–7.

[287]Pertué (2003), 46. Cf. also Maus (2006), 665.

[288]Cf. especially the first version of the speech of 2 Thermidor III in Bastid, Paul (1939), *Les Discours de Sieyès*, 18–20.

[289]Cf. Müßig, "Juridification by Constitution", in Müßig (ed.) (2016), 3.

[290]Elsewhere, I have addressed the methodological naïveté regarding the European Court of Justice, which, very broadly speaking, evolves between a continental court style and a common law precedence manner. Seif (=Müßig) (2003a), 1–23.

In contrast to the American recourse to the feudal-medieval common law right to resistance and the British reasoning of supreme parliamentary wisdom, the French starting point of 1789 was completely different. Judges had been figures of privilege within the Ancien Régime, which made them most suspicious for the revolutionaries. At the same time, they enthusiastically adopted the dogmatic concept of the supreme general will by Jean-Jacques Rousseau. In conflating the two the revolutionaries 'invented' the French aversion to having the acts of sovereign legislative assemblies controlled by judges.[291] This suspicion continues today; modern French constitutional discourse does not speak of judiciary power (*pouvoir*), but of judiciary authority (*authorité*). Freedom by (fraternal-political) equality (*liberté, egalité, fraternité*), according to their condensation in Art. 6 Declaration of the Rights of Man and Citizen, had the consequence that the veritable counter-power remained with the French people (Art. 2 and 14 Declaration), represented a priori in the constituent assembly and thus entrusting the constituted legislative assembly with supreme legitimisation.

As the preeminent theorist of the national constituent sovereignty of the nation,[292] and as a major contributor to the September Constitution (1791), Sieyès had gone into hiding during the Terror, before he reentered the political stage in the national convention after 9 Thermidor II (27 July 1794) with his intention, stronger as with other *thermidoriens*, to 'finish the revolution.'[293] In this pragmatic constitutional thinking the constitution was the legal mean to reach this goal. Therefore the draft of a constitutional jury of the 18 Thermidor III[294] was meant as part of the legal instruments to end the Revolutionary Terror.[295] When the work of the 'commission of the eleven' had nearly finished, Sieyès, who was not one of the eleven, presented his draft on the constitutional jury in the constitutional debates of 2 and 18 Thermidor III (20 July and 5 August 1795).

By his concept of national sovereignty, Sieyès had been the first to differentiate the constituent power from the constituted power, in order to explain the decisive process of juridification of sovereignty.[296] Concluding from his paradigms that the

[291]Cf. among others Ky (1926); Sueur (1989); Nicolle (1990); Morabito (2002), 117ff.; Laquièze (2003), 85–102; Maus (2003), 713ff.; Fioravanti (2007); Mestre (2010). Fioravanti's work refers to several Italian authors who have contributed extensively to the discourse surrounding the Constitution. I have benefitted from these contributions largely as a result of Fioravanti's extensive notes. Cf. Di Donato, (2004, 2005); Battaglini (1957); Cappelletti (1968). More recently, Luigi Lacchè (2000–2002), 41–93, (2016), 259–302.

[292]Cf. Müßig, "Juridification by Constitution", in Müßig (ed.) (2016), 18–19.

[293]Cf. the title of Michel Troper's monograph *Terminer la Révolution, La Constitution de 1795* (2006).

[294]'DU JURY CONSTITUTIONNAIRE (AN III)', Archives Nationales 284 AP 4 doss. 8. This is also reproduced (in its original French) in Pasquino (1998), *Sieyès et l'invention de la Constitution en France*, 193ff. and Bastid, Paul (1939), *Les Discours de Sieyès,* 30–47. This, as well as an English translation, appear in this volume in Appendices A and B.

[295]Bronislaw Baczko, "Le contrat social des Français: Sieyès et Rousseau", in Baczko (1997), 332–3, cf. also Baczko (1989), 13ff.

[296]Cf. at length Müßig, "Juridification by Constitution", in Müßig (ed.) (2016), 18ff.

will of the nation itself is always lawful and that it is the law in itself, Sieyès established the inviolability of the constitution against the (constituted) legislative body. The exclusion of any absolutistic political power on the basis of the immanent differentiation of ordinary legislative bodies from constituent assemblies led to a 'superlegality of the constitution' (*superlégalité de la constitution*).[297] If the legislative power could not 'without contradiction and absurdity touch the constitution' ('*sans contradiction et sans absurdité toucher à la Constitution*'), as Sieyès wrote in his report of the third estate (*Compte rendu de Qu'est-ce que le tiers état*?),[298] this necessarily implied the existence of a control institution.

Though he was a moderate Jacobin of the *Girondin* faction, for which he was persecuted during Robespierre's Mountain-led Terror, at no point did Sieyès consider accommodation with monarchists of any stripe. He dismissed attempts by the Friends of the Monarchist Constitution (*Les amis de la Constitution Monarchique*) to reconcile pre-constitutional monarchical prerogative with the Revolution's stated principle of the rights of man and the sovereign nation, and insisted on the a priori undivided sovereignty of nation which brought forth the constitutional monarchy as constituted power just as the ordinary legislative assembly.[299] This constitutional liberalism,[300] built on the differentiation between constitution and ordinary legislation, left the door ajar for a guardian of the constitution, with the explicit function of declaring statutory law to be unconstitutional and the ability to overrule it, without this guardian being necessarily conceivable as judicial body. Taking into account the centrality of Rousseau's 'general will' in Revolutionary ideology, combined with the distrust against any 'heirs' of the *noblesse de robe*, Sieyès did not propose that his drafted constitutional jury would consist of professional judges, but of former members of the constituent assemblies, the legislative bodies, or the Convention.[301]

[297]Pasquino (1998), *Sieyès et l'invention de la Constitution en France*, 94.

[298]*Compte rendu de Qu'est-ce que le tiers état?* (1789), Archives Nationales 284 AP 4 doss. 8. Cited also in Pasquino (1998), *Sieyès et l'invention de la Constitution en France*, 168.

[299]During the trial of Louis XVI before the National Convention, Sieyès was among the 361 deputies who voted for the king's execution. According to some contemporary sources, it was Sieyès' vote that convinced others to similarly vote for death, and he is reported to have said merely 'I am for death!' See Johnson (1812), *An impartial History of Europe*, vol. II, 305.

[300]For Sieyès' constitutional theory, cf. among others Bredin (1988); Rjals (1991), 123–38; Pasquino (1998), *Sieyès et l'invention de la Constitution en France*; Tyrsenko (2000), 27–45; Troper (2001), 265–282; Jaume (2002), 199–221; Michel Troper, "La suprématie de la constitution et le jury constitutionnaire", in Troper (2006), 199–221.

[301]Arts. II-IV Draft of the Constitutional Jury (Year III); see Appendices A, B.

6.1.1 Constitutional Debates of 2 and 18 Thermidor III (20 July and 5 August 1795)

Sieyès' prevailing motive in his interventions before the convention on 2 and 18 Thermidor III (20 July and 5 August 1795) was to reconcile constituent power—as he had established six years earlier in *What is the Third Estate?*—with a subordinate authority to control the constitutionality. The constitutional jury proposal followed the logic which began 1789 with the differentiation between the constituent and the constituted power.[302] On the 2 Thermidor III (20 July 1795) Sieyès presented his ideas on the government and the political constitution:

> In regard to the government and the constitution, unity on its own means despotism, and division on its own means anarchy. Division with the unity gives social guarantee, without which liberty would be only precarious […] Divide, for hindrance of despotism; centralise for avoiding the anarchy […] I only know two systems of the division of powers: equilibrium and competition, or in nearly similar terms, the system of counter-powers and of organised unity.[303]

In response to the Jacobin argument that the representative system was anti-democratic (expressed among others by Hérault de Séchelles and Maximilien de Robespierre), Sieyès employed a celebrated, though prosaic, metaphor of the post. Denying representation would be the same as 'to reserve the right to carry your letters yourself without trusting them to the public establishment [the post office] in charge of conveying them.'[304] He concluded by demanding the institution of a constitutional jury, a political organ more than a juridical one: 'This is the real body of representatives which I demand, with a special mission to judge the reclamations against every infringement onto the constitution.'[305]

In the discourse of 18 Thermidor III (5 August 1795), Sieyès explained the attributions and the organisation of the constitutional jury, organised according his draft in seventeen articles[306] and charged with the control over the legislature about the respect of the constitution: 'The necessity of a constitutional jury', Sieyès asserted in front of the National Convention,

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[302]Cf. also Fauré (1999), 29.

[303]Sieyès, Emmanuel Joseph (1795), Moniteur, 2 Thermidor III, 1236: '*En fait de gouvernement, et plus généralement en fait de constitution politique, unité toute seule est despotisme, division toute seule est anarchie. Division avec unité donne la garantie sociale, sans laquelle toute liberté n'est que précaire.* […] *Divisez, pour empêcher le despotisme; centraliser, pour éviter l'anarchie.* […] *Je ne connais que deux systèmes de division des pouvoirs: le système de equilibre et celui de l'unité organisée*.'

[304]Sieyès, Emmanuel Joseph (1795), Moniteur, 2 Thermidor III, 1236. Cf. also Lescuyer (2001), 355.

[305]Sieyès, Emmanuel Joseph (1795), Moniteur, 2 Thermidor III, 1237.

[306]'*Je demande d'abord un jury de* Constitution*, ou, pour* franciser *un peu plus le mot de jury, et le distinguer dans le son de celui de juré, une jury constitutionnaire.'* Emmanuel Joseph Sieyès, "Opinion de Sieyès sur les attributions et l'organisation du jury constitutionnaire proposé le 2 thermidor, prononcée à la Convention nationale le 18 du même, l'an III de la République", Moniteur, 18 Thermidor III, 1311.

> forms a sort of preliminary question; it does not suffer from difficulty. How in fact could the preview of the legislator accustom itself to the idea of an abandoned constitution, in the very moment of its coming-into-existence? A constitution is a body of obligatory laws or it does not exist; if it is body of laws, one asks oneself where is the guardian, where is the magistrate of this code.[307]

The constitutional jury, or the 'depository keeper of the constitutional act'/ *dépositaire conservateur de l'acte constitutionnel*, as it was named by Sieyès in Art. I of his proposal, 'is to be composed of 108 members, a third of them renewed every year, in the same period as the legislative body' (Art. II).[308] 'The first formation of the constitutional jury', the draft proposed, 'is constituted by the convention by means of a secret ballot, in the manner that a third of its members is chosen among those of the constituent assembly [*la Constituante*], another third among the members of the legislative, and the last third among the members of the Convention [*la Convention*]' (Art. IV).[309] It also stipulated that 'the 36 newcomers each year are to be chosen by the jury itself among the 250 members who have to leave the one or the other of the two councils of the legislative bodies' (Art. III),[310] '[t]he sessions of the constitutional jury will not be open to the public' (Art. V),[311] and 'the decisions of the constitutional jury will bear the name "decision" [*arrêt*].' (Art. VII).[312]

According to Sieyès' 'opinion about the attributions and the organisation of the constitutional jury', the jury had three functions. The first competence was to safeguard the Constitution by functioning as a supreme tribunal for the constitutional order (*tribunal de cassation dans l'ordre constitutionnel*).[313] The second was to perfect the constitution by presenting projects of constitutional revision as an *atelier de propositions pour les amendemens*.[314] The third prerogative of the jury was the most inventive one: it was an equitable constitutional jurisdiction on the basis of natural law as *supplement de juridiction naturelle*, if judgements could not

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[307]Sieyès, Emmanuel Joseph (1795), "Opinion de Sieyès", Moniteur, 18 Thermidor III, 1311.

[308]'They consist of 108 members, a third of whom are annually replaced, and at the same time as the legislative body'/*II est composé de cent huit membres, qui se renouvelleront annuellement pariers, et aux mêmes époques que le corps législatif.*

[309]*La première formation du jury constitutionnaire se fera au scrutin secret par la Convention, de manière qu'un tiers des membres soient choisis parmi ceux de l'assemblée nationale, dite Constituante, un autre tiers parmi ceux de l'assemblée législative, et un autre parmi les membres de la Convention.*

[310]*L'élection du tiers ou des trente-six entrants se fait par le jury constitutionnaire lui-même, sur les deux cent cinquante membres qui doivent, à la même époque annuelle, sortir de l'un et l'autre conseil du corps législatif.*

[311]*Les séances du jury constitutionnaire ne seront point publiques.*

[312]*Les décisions du jury constitutionnaire porteront le nom d'arrêt.* The original French—*arrêt*—most accurately translates to the English 'judgement'. However, in modern terminology, '*judgement*' refers to the first instance jurisdiction', especially in the French context. The modern usage of the term '*decision*' is closer to Sieyès' intention.

[313]Sieyès, Emmanuel Joseph (1795), "Opinion de Sieyès", Moniteur, 18 Thermidor III, 1311.

[314]See Footnote 313.

be issued by ordinary courts due to lacking or to unjust positive law.[315] None of these functions could be exercised on the jury's initiative itself (Art. XVII).[316]

'Jury de Cassation'

The first function of controlling constitutionality was very complex, due to the Rousseauist preference for supreme legislative legitimacy. The acts that fell under the jury's control, according to Sieyès' plans, were the acts of the legislative councils (the Council of Five Hundred and the Council of Ancients), unconstitutional acts regarding matters related to ballots, unconstitutional acts of the primary assemblies, and those of the court of cassation. Art. VIII of the Sieyès project provided for the annulment of unconstitutional legislative acts: 'The acts declared as unconstitutional by the decision of the constitutional jury are null and void.'[317] In any case, the jury could never declare acts to be unconstitutional on its own initiative, but only if asked to do so by any applicant entitled according to Art. VI of the draft: 'The constitutional jury will comment on the violations or the impairments of the Constitution, which will be denounced to them, against the acts, either by the council of ancients, or by the council of five hundred, or by the electoral assemblies, or by the primary assemblies, or by the tribunal of cassation.'[318] Any minority out of the said constitutional bodies and even individual citizen could bring such a denunciation forward.[319] The *jury de cassation* had the legal function of a supreme constitutional court, annulling acts contrary to the fundamental law.[320] It was the expression of a particular vision of the separation of powers,[321] and assured 'the permanent political relevance of a revolutionary impact finds itself beyond the year III.'[322]

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[315]See Footnote 313.

[316]'The constitutional jury cannot issue any decision by its own initiative.' */Le jury constitutionnaire ne peut rendre aucun arrêt du propre mouvement.*

[317]*Les actes déclarés inconstitutionnels par arrêt du jury constitutionnaire, sont nuls et commenon avenus.*

[318]*Le jury constitutionnaire prononcera sur les violations ou atteintes faites à la constitution, qui lui seraient dénoncées contre les actes, Soit du conseil des Anciens, Soit du conseil des Cinq-Cents, Soit des assemblées électorales, Soit des assemblées primaires, Soit du tribunal de cassation.*

[319]Art. VI of the project continues 'When these denunciations will be addressed to them, by the council of ancients, or by the council of five hundred, or individually by the citizens, they adjudicate on a similar denunciation addressed to them by the minority against the majority of one or another of the constitutional bodies mentioned above.'/*Lorsque ces dénonciations lui seront portées, Soit par le conseil des Anciens, Soit par le conseil des Cinq-Cents, Soit par des citoyens en nom individuel, II prononcera sur semblable dénonciation qui lui serait portée par la minorité contre la majorité de l'un ou l'autre des susdits corps constitués.*

[320]Fioravanti (2007), 87–103.

[321]Pasquino (1998), *Sieyès et l'invention de la Constitution en France*, 13.

[322]Morabito (2002), 117.

Sieyès' proposal to establish a constitutional jury contributed—beyond the control of the constitutionality of laws—in an original manner to a transition of the concept of a constitution as mechanism, as the simple distribution of powers, to a constitution as an obligatory rule, supreme above all the others.[323] The consequence of this 'super-legality'[324] of the Constitution was the possibility to annul unconstitutional acts.[325] For Sieyès' contemporaries, though, Paul Bastid identifies 'an incontestable confusion.'[326] Michel Troper has substantiated the probable source of this confusion, noting that the majority of acts addressed as 'unconstitutional' in section one of Art. VI of the project were neither laws nor necessarily legislative acts of the two branches of the legislative body under the Directorate, and therefore unconstitutionality is hard to imagine.[327] The conventionalists as a whole were averse to establishing a power of superior control of that of the legislative assemblies: 'Due to their preference for the predominance of the law,' writes Marcel Morabito, 'the revolutionary exaltation of the representation remained incompatible with any idea of controlling the constitutionality.'[328] For them, the constitution of 1795 provided internal guarantees to protect itself: firstly, by the separation between the councils and the executive power and, secondly, by the fact that the Council of the Ancients could exercise its own control of constitutionality; it could refuse its approval for the acts taken by the council of 500 due to the disrespect for the formes and proceedings previewed in the constitution (Art. 88 of the Directory Constitution 1795).[329]

'Jury de Proposition'

The mastermind of French national sovereignty planned his constitutional jury not only to be the 'guardian and defensor of the constitution',[330] but attributed to the control organ the mandate to improve and perfect the Constitution and the Declaration of the Rights of Man and Citizen, responding to new developments and societal changes.[331] This was meant to restrain the Revolution and to control the a priori unlimited *pouvoir constituant*, represented in 1789 by the French nation, which Sieyès' pamphlet *What is the Third Estate?* declared 'to be the supreme

[323]Clavreul (1982), 163: '*Le jury constitutionnaire exerçait une garantie de la légalité du système de normes.*'

[324]Pasquino (1998), *Sieyès et l'invention de la Constitution en France*, 12.

[325]Papatolias (2000).

[326]Bastid, Paul (1970), Sieyès et sa pensée, 436: '*Un incontestable désordre*.'

[327]Michel Troper, "Sieyès et le jury constitutionnaire", 273.

[328]Morabito (2002), 118.

[329]Cited according to Willoweit and Seif (=Müßig) (2003), 364.

[330]Schmitt, Carl (1931) Der Hüter der Verfassung, 1; Schmitt, Carl (1929) "Der Hüter der Verfassung", *Archiv des öffentlichen Rechts* XVI, 161.

[331]Azimi (1998), 199–221.

master of any positive law.'[332] The revision competence of the jury was a disciplinary restriction of the constituent power. In the words of Michel Pertué,[333] 'the constituent power attributed to the nation in 1789 by Sieyès [as an] unconditioned and unlimited [one] became regulated and more and more restricted in the hands of the constitutional jury of the year III (1795), and afterwards in the hands of the college of conversators of the Consulate Constitution of the Year VIII (*Constitution de l'an VIII*/1799).'[334] The challenge to be tackled by the *spiritus rector* of the constituent sovereignty and its different uniqueness compared to the constituted sovereignty was to bring the constituent power under the legal regime of the normative constitution, without eliminating the differences to the constituted powers.[335] Whereas the latter act only according to the norms of the positive law, the domain of the constituent power is the natural law. To bridge this gap, Sieyès intended a periodical progressive amendment of the Constitution by the jury. The constituent power could then rest with the people, but as a regulated one. In the midst of the discourse of 18 Thermidor III (5 August 1795), which dealt with the rights of future generations, Sieyès claimed the unquestionable right of future generations to make their own constitutional amendments that 'the authentic motives of a political constitution rest with the nation, and especially with the generation which has passed it.' This singularity of the Constitution's origins led, in Sieyès' words, to 'the legal need to provide our constitution with the principle of unlimited perfection, which allows for concession to the needs of every epoch but never for any possibility of a total reproduction or destruction, neither an abandonment by hazard.'[336]

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[332]'*Le maître suprême de tout droit positif.*' Sieyès (1970), 183. Sieyès continues: '*Une nation est indépendante de toute forme; et de quelque manière qu'elle veuille, il suffit que sa volonté paraisse pour que tout droit positif cesse devant elle comme devant la source et le maître suprême de tout droit positif.*' Sieyès, Emmanuel Joseph (1970), *Qu'est-ce que le Tiers état?*, 183.

[333]Pertué (1976), 417.

[334]Adopted on 24 December 1799, the Consulate Constitution established the Consulate and General Napoleon Bonaparte as first consul. After the coup of 18 Brumaire (9 November 1799), this created a statutory justification for the concentration of supreme power in Bonaparte's hands, paving the way for his accession to emperor in 1804. Both 18 Brumaire and the application of the Consulate Constitution are considered the end points of the French Revolution.

[335]On the constituent power cf. in addition to the literature cited in ReConFort I, ed. Müßig (2016), 83ff.; Klein (1996); Negri (1997); Bockenförde (2000); Troper (2003), 101–11; Le Pillouer (2005); Cayla (2006), 249–65.

[336]Sieyès, Emmanuel Joseph (1795), "Opinion de Sieyès", Moniteur, 18 Thermidor III, 1312. The whole quote reads: '*Au surplus, sans vouloir disputer aux générations futures le droit de faire à cet égard, tout ce qui leur conviendra, il est permis, et c'est encore un devoir de remarquer que les véritables rapports d'une constitution politique sont avec la nation qui reste, plutôt qu'avec telle génération qui passe*; *avec les besoins de la nature humaine, communs à tous, plutôt qu'avec des différences individuelles. Ces considérations nous font une loi de donner à notre acte constitutionnel, ainsi qu'on vient de le dire, un principe de perfectionnement illimité, qui puisse le plier, l'accommoder aux nécessités de chaque époque, plutôt qu'une faculté de reproduction ou de destruction totale, abandonnée au hasard des événements.*'.

As the constituent sovereignty rested with the people, the jury could not directly intervene for constitutional reforms; its role was only to make propositions. To avoid popular unrest and upheaval during a period of constitutional reform, the jury had to present every ten years a notebook of constitutional amendments to the legislative councils and primary assemblies (Art. XI, section 1 and 2).[337] The primary assemblies—reunited every year for the election of the people's representatives—could speak themselves in favour of or against the possibility to delegate a temporary constituent power to the actual legislature (Art. XII, section 1).[338] 'If the majority of the primary assemblies said no,' the wording of the draft continued, 'the notebook with amendments will be seen as void and its propositions cannot be reproduced before the following tenth year' (Art. XII, section 2).[339] Art. XII makes it furthermore explicit that the Council of Ancients, if delegated, had no power to make changes to the jury's propositions (section 3).[340] Art. XIII limits the sessions of the council of Ancients exercising constituent power on the primary assemblies' mandate to twelve in total or to two in a decade (section 2).[341] 'There will be, for the sessions of the constituent power, a separated written report, in a particular register, which will be, in the end, solemnly placed in the archives of the constitutional jury' (Art. XIII, section 3).[342] The particularity of

[337]Section 1: 'In the course of each tenth year, starting from year 1800, eight of the Republic, twelfth of the Revolution, the constitutional jury will examine again their opinions registered.'/*Dans le courant de chaque dixième année, à commencer de l'an 1800, huitième de la république, douzième de la révolution, le jury constitutionnaire examinera de nouveau ses avis consignés dans son registre.* Section 2: 'They will create their notebook of propositions in order to improve the constitutional act, and they will officially communicate with the Council of Ancients and that of Five Hundred, in order to receive the greater publicity. This communication will be made three months at least before the primary assemblies are annually held.'/*Il composera son cahier de propositions pour améliorer l'acte constitutionnel, Et il en donnera officiellement communication au conseil des Anciens et à celui des Cinq*-Cents, *afin qu'il reçoive la plus grande publicité. Cette communication se fera trois mois au moins avant la tenue annuelle des assemblées primaires.*

[338]'The primary assemblies will, after having read the notebook of propositions, declare yes or no, if they understand giving the council of Ancients the power to lay them down as rules.'/*Les assemblées primaires, après lecture faite du cahier de propositions, déclareront oui ou non, si elles entendent donner au conseil des Anciens le pouvoir d'y statuer.*

[339]*Si la majorité des assemblées primaires a dit non, le cahier sera regardé comme non avenu, et ses propositions ne pourront être reproduites avant la dixième année suivante*.

[340]'If the majority of the primary assemblies said yes, the constituent power is delegated, by this fact only, to the Council of Ancients, to lay the propositions made down as rules without being able to either amend them or to substitute them with others.'/*Si la majorité des assemblées primaires a dit oui, le pouvoir constituant est délégué, par ce seul fait, au conseil des Anciens, pour statuer sur les propositions faites, sans qu'il puisse ni les amender ni en substituer d'autres.*

[341]'Altogether, they cannot exceed the number of twelve nor that of two per decade.'/*Elles ne pourront excéder le nombre de douze en tout, ni celui de deux par décade.*

[342]*Il y aura, pour les séances du pouvoir constituant, un procès-verbal séparé, sur un registre particulier, qui sera, à la fin, solennellement déposé aux archives du jury constitutionnaire*.

the mandate with constituent power is highlighted in section 1 of the XIII, which declares 'the sessions to be exclusively affected.'[343]

'Jury of Natural Equity'

The third function of the jury was an equitable control—based in the natural law—of the judgements of the ordinary courts. Art. XIV section one of Sieyès' proposal provided that 'every year, at least one-tenth of the members of the constitutional jury, to be taken randomly, will build a jury of natural equity.'[344] This function of an equitable court could only be exercised 'on the official requests of different courts, for having a decision of natural equity in the case that the courts declare not having been able to judge, due to the absence of a positive law which can apply to that, or to being forced to judge only against their conscience, only according to the text of the law' (Art. XIV, section 2).[345] These decisions of natural equity were to be enacted by the relevant tribunal that had made the request in the first place; the constitutional jury could also select other tribunals to enforce the decisions (Art. XV).[346] They 'will be officially communicated, within one month, to the Council of Five Hundred' (Art. XVI).[347] In this way, Sieyès intended that the constitutional jury would function as a court of natural equity, if the ordinary courts identified or believed there to be loopholes or iniquities in positive law.

6.1.2 Communicative Implications of the Jury's Attributions in the Thermidorian Constitutional Debates

'Jury de Cassation'

In regard to the communicative interdependencies of constitutional debates, Sieyès' idea to control the constitutionality of ordinary laws addressed the precedence of constitution. For this legal function of the constitutional jury he relied on jury

[343] 'The sessions at which the council of ancients will exercise the constituent power will be exclusively assigned.'/*Les séances où le conseil des Anciens exercera le pouvoir constituant y seront exclusivement affectées.*

[344] *Chaque année, le dixième au moins des membres du jury constitutionnaire, pris au sort, se formera en jury d'équité naturelle.*

[345] *Cette section sera, en sus des deux attributions précédentes, exclusivement chargée de prononcer sur les demandes officielles qui lui seraient portées par les divers tribunaux, à l'effet d'avoir un arrêt d'équité naturelle sur les cas qu'ils déclareraient n'avoir pu juger, faute de loi positive qui pût s'y appliquer, ou ne pouvoir juger que contre leur conscience, d'après le texte seul de la loi.*

[346] *Les arrêts d'équité naturelle seront exécutés par le tribunal qui aura formé la demande officielle, ou par toute autre, au choix du jury constitutionnaire.*

[347] *Les arrêtés d'équité naturelle seront officiellement communiqués, dans le mois, au conseil des Cinq-Cents.*

members elected by citizens and having already sat in the legislative assemblies, in order to avoid any allusions to a formal court with professional judges. Like old wine in new skins, Sieyès referred back to the prerevolutionary parliamentary right of remonstrance in an attempt to convince his contemporaries of a long-standing French tradition of legally-restrained sovereignty. Literally borrowing from Montesquieu's praise of the French *parlement* in the *Spirit of the Laws* (II 4),[348] the jurors are said to fulfill their conservative function 'with fidelity in the guard of the constitutional deposit' (*avec fidélité à la garde du dépôt constitutionnel*).[349]

The control of the constitutionality of laws was the attribute of Sieyès' planned jury that met with the most acceptance, especially as there were many other commutated proposals. As demonstrated by the research of Marco Fioravanti the *Girondin* Arman-Guy de Kersaint[350] had already proposed a tribunal of censors to control the legislative and the executive in their accordance with the constitution.[351] Condorcet had discussed popular veto as a means of protecting the citizens against legislative arbitrariness,[352] which provided for the dissolution of the legislative assembly if the primary assemblies were against the legislative act.[353] Also, the debate on the Mountain Constitution witnessed proposals to control the constitutionality of legislative acts. Chapter XV of the project of the Mountain Constitution included provisions for a 'national grand jury', though this was rejected.[354]

[348]Charles-Louis de Secondat, Baron de la Brède et de Montesquieu (1994), *De l'Esprit des Lois*, in *Œuvres complètes,* vol. II, 247.

[349]Bastid, Paul (1939), *Discours de Sieyès*, 32.

[350]Armand-Guy Simon de Coëtnempren de Kersaint (1742–1793): Born in Paris (sometimes stated: Le Havre) to a noble family, Arman-Guy de Kersaint followed the example of his father by joining the French Navy at fourteen. He distinguished himself in action, and soon made a name for himself as a result of his bravery and skill. In spite of his upbringing, when the Revolution began he joined the Jacobin Club, and his ideas of social justice were influenced by Thomas Paine. A moderate *Girondin*, he became alarmed at the volatile direction of the Revolution under the influence of the *Montagnard* Jacobins; as a member of the National Convention, he voted against the king's execution and the rising tide of repression. Because of this, he fell under suspicion and, in 1793, was arrested, tried, and executed. Thomas (1915), 1433.

[351]Fioravanti (2007), 89 (n. 16).

[352]Marie Jean Antoine Nicolas de Caritat de Condorcet (1743–1794): The Marquis de Condorcet was born 1743 at Ribemont. He became a mathematician and philosopher and in 1782 was elected a member of the French Academy. Despite his aristocratic background, he was broadly in favour of liberalism and was politically active in this regard; he wrote in favour of American Independence, and published many political treatises. In 1791 he was deputed to the Legislative Assembly and in 1792 he became a member of the Constitution Committee. In 1793, his moderate credentials led to him being denounced as a *Girondin*, and he immediately went into hiding. In April 1794, he was discovered, arrested, and imprisoned. Rather than facing the guillotine, Condorcet instead took poison. Thomas (1915), 698; Fioravanti (2007), 89 (n. 17).

[353]Fioravanti (2007), 89 (n. 18).

[354]Fioravanti (2007), 89 (n. 19).

Nevertheless, Marie-Jean Hérault de Séchelles,[355] the main redactor of the Constitutional Act of 1793, positioned himself in favour of a protection against 'oppression by the legislative body',[356] and found himself in the company of Robespierre.[357] All these proposals, together with *le Balancier politique*[358] and the *Articles proposés pour la réforme de la Constitution 1793*,[359] accepted the superiority of a control organ not democratically legitimised and seemed to have prepared the path for the legal attribution of cassation of unconstitutional acts in Sieyès' drafted jury.

'Jury de Proposition'

For the revision competence, the communicative readiness was different. Fioravanti notes that the problem of constitutional revision was appreciated by the contemporaries of the Revolution,[360] but none of them had Sieyès' clarity to differentiate the constituent process of juridification by constitution from the ordinary legislative proceedings within the constituted legislative assembly. Sieyès explained the revision or amendment function of the jury by contrasting it with the permanent subliminal dangers of revolutionary turmoil that could result from radical constitutional changes. As an incremental policy of reform, rather than one employing great leaps, Sieyès' constitutional jury would rely on decennial progressive amelioration to secure the Revolutionary *acquis* of 1791 against recidivism, but also against overruling. Sieyès did not want to see the convention, like a figure from old mythology, constantly reborn, because this would invite danger. 'Will we amuse ourselves by saying, like the phoenix, that it [the convention] will rise like a phoenix out of its ashes', he asked rhetorically. '[T]he rebirth of the phoenix is a chimaera and the periodical return of a convention can be a real calamity.'[361] The revision function of the proposed constitutional jury, however, would avoid the alternative solution of periodical conventions, which seemed to him at best naïvely utopian, and at worst dangerous. The proposed amendment, or more exactly the

[355]Marie-Jean Hérault de Séchelles (1759–1794): Born to an aristocratic family, Hérault de Séchelles worked as a lawyer. Joining the Jacobin Club on the advent of Revolution, he was elected to the Legislative Assembly in 1791, where he became the leader of the Jacobins. In 1793, the proscription of the *Girondins* led to his ascension to the presidency of the convention; in this role, he penned the "Constitution of 1793", and also joined the Committee of Public Safety. However, his political disagreements with Robespierre and his clear popularity and power made him a target of the Terror. Denounced by Robespierre, he was arrested and, along with Robert Danton, executed by beheading. Thomas (1915), 1268.

[356]Fioravanti (2007), 89 (n. 21).

[357]Fioravanti (2007), 89 (n. 20).

[358]Fioravanti (2007), 89 (n. 22).

[359]Fioravanti (2007), 89 (n. 23).

[360]Fioravanti (2007), 88–9 (n. 9–14).

[361]Bastid, Paul (1939), *Discours de Sieyès*, 38.

proposed perfection of the Constitution, rewritten every ten years by the jury, was planned to be presented to the primary assemblies. The assembly members would then have the ability to grant or not to grant the legislative body the mandate to exercise constituent power, limited, in this case, to the simple acceptance or to the refusal of the proposition of the amendment. This was Sieyès' 'project of amelioration of the constitutional act' (*projet d'amélioration de l'acte constitutionnel*).[362] This complex procedure aimed, on the one hand, to involve the citizens in the process of revision and, on the other hand, to separate the responsible organs in charge of the revision's proposition and its ratification. By his plea for partial changes at regular intervals, Sieyès communicated the singularity of the constituent assembly: any repetition carried in itself the risk of radical transformation, a vocabulary far too familiar to the contemporaries of the Thermodorian debates.

'Jury of Natural Equity'

The idea of a 'natural jurisdiction as equitable supplement of the positive jurisdiction' (*supplément de juridiction naturelle aux vides de la juridiction positive*)[363] was the attribution of the planned constitutional jury that challenged the contemporaries most. It raised the constitutional jury not only to an institutional standing as a court, but in doing so raised concerns that it was little more than a new edition of the 'arbitrary jurisprudence' of the *Ancien Régime* and its denounced cohorts of 'commentators and interpreters.'[364] Being inspired by the English common law, Sieyès had drafted the equitable function of the constitutional jury[365] and tried to communicate its supplementary character by the prerequisite that cases could only be heard before it if they were officially referred to it by other courts. This would occur if these other courts declared themselves incapable of adjudicating, owing to the absence of applicable positive law, or if such judgement would occur contrary to the 'conscience' of the court, only according to the text of the law (*exclusivement chargé de se prononcer sur les demandes officielles qui lui seraient portées par les divers tribunaux, à l'effet d'avoir un arrêt d'équité naturelle sur les cas qu'ils déclareraient n'avoir pu juger, faute de loi positive qui pût s'y appliquer, ou ne pouvoir juger que contre leur conscience, d'après le texte seul de la loi*).[366] Continental Europe had typically understood 'equity' to be equivalent to *aequitas*, and thus the purview of God. Mercy, in this understanding, was not just a category of human law but divine will. Therefore, by attributing equity to his constitutional jury, Sieyès presumed that the jury would hold supreme authority over the ordinary

[362]Bastid, Paul (1939), *Discours de Sieyès*, 39.
[363]Bastid, Paul (1939), *Discours de Sieyès*, 40.
[364]Gauchet (1995), 179.
[365]Fioravanti (2007), 94.
[366]Bastid, Paul (1939), *Les Discours de Sieyès*, 46–7.

courts.[367] This, however, could not be inferred; whereas Sieyès pretended a simple application of equity in the mere English correction manner, the vague character of natural equity was immediately assumed to be a pass for excessive, even arbitrary power.[368]

Analysing the Thermodorian debates, it is evident that this competence of natural equity enshrined in the proposed constitutional jury might well have been the decisive issue that led to its unanimous rejection on 25 Thermidor III (12 August 1795).[369] All members of the Convention seemed to have gathered behind Antoine-Claire Thibaudeau,[370] the Mountain deputy and former member of the Committee of Public Safety. Thibaudeau's speech before the Assembly on 24 Thermidor III (11 August 1795)[371] was symptomatic of the dismissive atmosphere against the project of the constitutional jury. Thibaudeau opposed two models of 'limiting the power of the organs of the state' (*limitation du pouvoir des organes de l'État*)—essentially, the models of 'rule' and 'balance'[372]—when concluding the lack of utility of constitutional control. He preferred, as he suggested vividly, 'the liberal constitutionalism of the counterpowers.' Thibaudeau continued:

> If one examines the result of their researches [that of the publicists which have been interested in the separation of the powers] one will see that they have found two types of means to contain the powers, the ones which are external for them and the others which are inherent for them [to the organization even of the powers]. Among the first ones, one can

[367]Müßig (2013b), 23–65.

[368]Troper, "Sieyès et le jury constitutionnaire", 281.

[369]Moniteur Universel, Reímpression de I'Ancien Moniteur (1842), vol. XXV, 489ff.

[370]Antoine-Claire Thibaudeau (1765–1854): Thibaudeau was born in 1765 to the family of a prominent lawyer in Poitiers. Admitted to the bar in 1787, he was an enthusiastic political activist; after accompanying his father to the Estates General in Versailles in 1789, he set up a local revolutionary club in Poitiers. In 1792 he was appointed to the National Convention, in which he —like Sieyès—voted for the execution of Louis XVI. In 1796 he rose to the presidency of the Council of Five Hundred. He maintained his prominence after the Republic departed along the imperial path. In 1808 he was elevated to the title of 'count', and supported Napoleon during the Hundred Days campaign in 1815, but went into exile upon his defeat, only returning after the July Revolution in 1830. Three and a half decades later, Napoleon's nephew, Napoleon III (Louis-Napoleon Bonaparte) would appoint him to the Senate. Thibaudeau died in 1854, having served under the *Ancien Régime*, the First Republic, the First Empire, the Second Republic, and the Second Empire. Thomas (1915), 2304.

[371]Thibaudeau's speech was reproduced in the *Moniteur* newspaper. He began by declaring: '*Sieyès avait imaginé, sous le nom de Jurie constitutionnaire, un corps de censeurs qui, supérieur à tous les pouvoirs, devait preserver la Constitution de toute atteinte et y proposer des reformes. Cette institution fut la seule partie de son projet prise en consideration. La commission voulut l'accommoder à son plan de Constitution et la proposa à la Convention. La jurie y trouva des défenseurs et des adversaires. Je la combattis (le 24 thermidor), et elle fut rejetée à la presqu'unanimité. Elle me parut une superfétation inutile et dangereuse.*' Thibaudeau, Antoine-Claire (1795), Moniteur, 24 Thermidor III, 1239ff. (Reproduced in *Moniteur Universel, Reímpression de l'Ancien Moniteur,* vol. XXV, 484 and 487–9). Cf. also Thibaudeau Antoine-Claire (1824), Mémoires sur la Convention et le Directoire, 186.

[372]For the distinction between 'rules' and 'balance', see Manin (1989), 372–89.

> classify the appeal to the people, the censors, or any other body established for judging the infractions of the constitution.[373]

After rejecting the idea of the appeal to the people (*l'appel au peuple*),[374] Thibaudeau examined the question posed at the assembly by Sieyès:

> Let us now see if a body instituted above the public powers, for examining their acts, as he [Sieyès] proposes, is capable of guaranteeing their independence and integrity of the constitution, and I immediately pose myself this question: if the constitutional jury, the functions of which will be determined by the constitution, exceeds the limits thereof, who will suppress their usurpation?

According to Thibaudeau no answer could be found to the question who supervises the jurors:

> I admit that I am searching for an answer but can't find anything satisfying […] I would be justified in asking that supervisors be given to this jury and this gradual surveillance will be understood ad infinitum. Thus, [this reminds me of] the people of the Indies, they say that they commonly believe that the world is carried by an elephant and this elephant by a turtle; but when they arrive at asking on what the turtle rests, goodbye erudition.[375]

Subsequent to this criticism, Thibaudeau arrived at exposing his model of the 'guarantee of the limitation of the powers' (*garantie de la limitation des pouvoirs*):

> The most sure and natural guardians of the whole constitution are the depositary bodies of the powers, then all the citizens. […] To prevent the confusion or the usurpation of the powers, one must give to them who exercise these powers means that sufficiently resist the attempts directed against them, that they are forced to respect each other by the feeling of their force and their dignity. In the organisation of the government each of these parts have

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[373]Thibaudeau, Antoine-Claire (1795), Moniteur, 24 Thermidor III, 1239ff.: '*Si l'on examine le résultat de leurs recherches* [celles des publicistes qui se sont intéressés à la séparation des pouvoirs], *on verra qu'ils ont trouvé deux sortes de moyens de contenir les pouvoirs, les uns qui leur sont extérieurs*, *les autres qui leur sont inhérents* [à l'organisation même des pouvoirs]. *Parmi les premiers, on peut classer l'appel au peuple, des censeurs, ou tout autre corps établi pour juger des infractions à la constitution.*'.

[374]Thibaudeau, Antoine-Claire (1795), Moniteur, 24 Thermidor III, 1239ff.: '*On sait combien il est dangereux, ou au moins illusoire, de soumettre des questions constitutionnelles à la décision d'une grande nation; ce sont des épreuves qu'on ne tente pas souvent, sans compromettre l'ordre social et la tranquillité publique*.'

[375]Thibaudeau, Antoine-Claire (1795), Moniteur, 24 Thermidor III, 1239ff.: '*Voyons maintenant si un corps institué au-dessus des pouvoirs publics, pour examiner leurs actes, comme on propose, est capable de garantir leur indépendance et l'intégrité de la constitution, et je me fais sur-le-champ cette question: Si le jury constitutionnaire, dont les fonctions seront déterminées par la constitution, en passe les limites, qui est-ce qui réprimera son usurpation? Je vous avoue que j'ai beau chercher une réponse, je n'en trouve point de satisfaisante.* [...] *Ainsi chez un peuple des Indes la croyance vulgaire est, dit-on, que le monde est porté par un éléphant, et cet éléphant par une tortue; mais quand on vient à demander sur quoi repose la tortue, adieu l'érudition*.'

> to be established and posed in such a manner that they keep all the others at their places; one must oppose the ambition to the ambition.[376]

With the paradox of the elephant and the turtle, Thibaudeau asks anew the old question: who watches the watchers (*quis custodiet ipsos custodes*?), only to conclude that there could be no reasonable, erudite solution to this intractable problem.[377]

6.2 *Defeat of Sieyès' Jury Proposal and Its Consequences on the French Constitutional Jurisdiction*

Thibaudeau was only one voice in the Convention against Sieyès' project. The lawyer Joseph Eschassériaux,[378] for example, was better disposed towards the constitutional jury than Thibaudeau, but he too rejected the function of natural equity, declaring it 'useless in our system of civil legislation, and dangerous in politics.'[379] Others, including Louis-Marie de La Révellière-Lépeaux,[380] Denis

[376]'*Les gardiens les plus sûrs et les plus naturels de toute constitution sont les corps dépositaires des pouvoirs, ensuite tous les citoyens.* […] *Pour prévenir la confusion ou l'usurpation des pouvoirs, il faut donner à ceux qui les exercent des moyens tellement suffisants pour résister aux tentatives dirigées contre eux, qu'ils soient forces à se respecter mutuellement par le sentiment de leur force et de leur dignité. II faut que dans l'organisation du gouvernement chacune de ses parties soit établie et posée de manière à retenir toutes les autres dans leur place; il faut, pour ainsi dire, opposer l'ambition à l'ambition.' (Emphasis mine.)* This expression paraphrases James Madison's doctrine of the separation of powers. Madison, James, *Federalist No. 51,* in Hamilton, Madison, and Jay (1961), *The Federalist Papers,* 322: 'Ambition must be made to counteract ambition.' Even so, while the American constitutional system was the first to introduce the control of the constitutionality of laws, this adoption has remained elusive for the French, up to and including within the current Fifth Republic.

[377]Thibaudeau, Antoine-Claire (1795), Moniteur, 30 Thermidor III, 1330: '*Ainsi chez un peuple des Indes, la croyance vulgaire est, dit-on, que le monde est porté par un éléphant, et cet éléphant par une tortue; mais quand on vient demander sur quoi repose la torture, adieu l'érudition*.'

[378]Joseph Eschassériaux (1753–1823/24): Born in 1753 near Saintes, Eschassériaux quickly became involved in politics, entering the *parlement* of Bordeaux in the 1770s. Elected to the Convention in 1792, he was an active member until 1795. He took up a position in the *Tribunat* in 1800 (being appointed in 1799), and served until 1804. Thomas (1915), 930.

[379]Eschassériaux, Joseph (1795), *Moniteur*, 30 Thermidor III, 1329.

[380]Louis-Marie de La Révellière-Lépeaux (1753–1824): Born in the Vendée in 1753, (de) La Révellière-Lépeaux became a lawyer as well as a political activist. A moderate republican, he nevertheless voted for Louis XVI's execution, though he sided with the *Girondins* when they were purged by the Mountain Jacobins. Because of this, he was also condemned to death, but he was able to escape and evade capture. In 1795, after the fall of Robespierre, he returned to the National Convention, became a member of the Executive Directory, and rose to president of the department for science, morals, and religion. He died in 1824. Thomas (1915), 1492.

Toussaint Lesage,[381] and Jean-Baptiste Louvet de Couvray,[382] also intervened in the Convention. According to Louvet de Couvray on 30 Thermidor III (17 August 1795), the control of the constitutionality was already present in the Constitution of the Year III itself, given the obligation 'imposed on the executive power to annul the acts of its subordinates which are unconstitutional and in regard with this obligation it [the executive] is responsible, as it is for the infringements that it could committed itself to the constitutional act.'[383]

Though Sieyès' ideas of a constitutional jury were roundly defeated in the discourses of 1795, the concept nevertheless found its way into the Consulate Constitution of the Year VIII (1799),[384] in the form of the College of Conservators (*Collège des conservateurs*), later the Conservatory Senate (*Sénat*).[385] This constitution replaced the centrality of the legislative power as characteristic for the revolutionary tradition with the primacy of the governmental function,[386] and therefore made the control of constitutionality more a political than a juridical question. As Paul Bastid has demonstrated, '[considered] under its political aspect, the jury or the college represented a kind of great revolutionary academy, where the traditions of 1789 became seen to be piously conserved and maintained.'[387] This

[381]Denis Toussaint Lesage (1758–96): Toussaint Lesage was born in Chartres in 1758, and took up law. He was elected to the Convention in 1792 and served until 1795. A member of the *Girondin* faction, he was generally progressive in his view that the Revolution should alleviate poverty and, though he voted to find Louis XVI guilty of treason and for him to be condemned to death, he also wanted him pardoned. The rise of the Mountain faction and the purging of the *Girondins* sent him into hiding, but maintained a strong reputation and, upon his return in 1795, was appointed to the Council of Five Hundred. He died unexpectedly in 1796, during a sitting of the Council. Assemblée Nationale (2017), "Denis Toussaint Lesage".

[382]Jean-Baptiste Louvet de Couvray (1760–97): Born in Paris in 1760, Louvet first made a name for himself as an author with revolutionary tendencies. In 1792 he was elected to the Convention as member of the *Girondins*; that year, he attacked Maximilien de Robespierre, Jean-Paul Marat, and other important *Montagnards*, in a prominent speech. This led to his proscription in 1793. He escaped Paris, returning in 1794 but only coming out of hiding after Robespierre's downfall. By 1795 he had been rehabilitated, that he not only returned to the Convention, but became a member of the Council of the Five Hundred. He was to take up a government position in Palermo, but he died in 1797 before accepting the post. Thomas (1915), 1586.

[383]Louvet de Couvray, Jean-Baptiste (1795), Moniteur, 30 Thermidor III, 1328.

[384]For the 1799 Constitution cf. Bourdon (1942); Ponteil (1954); Pertué (1989), 286–7; Timbal and Castaldo (2000), 521–5.

[385]Set up under the Consulate Constitution of the Year VIII following the coup of 18 Brumaire, the *Sénat conservateur* ('Conservative Senate') met in the Luxembourg Palace since 1799. As core feature in Napoleon's regime, competent for the supervision over the survival of the Constitution, it convened until the Bourbon Restoration of 1814. This first Senate was staffed with only sixty *inamovible* (immoveable, i.e. permanent) members, at least forty years old; two supplementary members were called upon every year for ten years, amounting to twenty supplementary members.

[386]Pertué (1989), 286: '*Tournant le dos à la tradition révolutionnaire, la constitution de l'an VIII confiait exclusivement la proposition des lois au gouvernement.*'

[387]Bastid (1970), 445.

shift away from a legal understanding towards a more political constitutionalism was also indicated by the renaming of Sieyès' jury as a 'college' and 'senate.'[388]

The college or senate as the *a priori* highest organ in the constitutional hierarchy was composed of eighty members, both under the name of the college and the senate; for becoming member it was necessary to be at least forty years old. The choice of members was less free because the senate was obliged to choose among three candidates presented, one by the legislative body (*corps législatif*), the second by the *tribunat*,[389] and the third by the first consul; furthermore, if the same candidate was presented by all three of them, the Senate had to accept him.

Art. 21 of the 1799 Constitution mandated the Senate with the control of constitutionality of laws and governmental acts,[390] but the control authority was limited in Art. 29 to non-binding recommendations. The Senate's opinions on the unconstitutionality 'do not have a necessary consequence nor obliges any constituted authority to a deliberation' (Art. 29).[391] This was the negation of the jury and the end of Sieyès' project, in the very moment where it seemed to be realised. The role of the Senate, namely to control the respect of the constitution and to guarantee the constitution's superiority in relation to other norms via a preventive control (Art. 37),[392] remained theoretical. In practice, the disposition of Art. 21 had no effect: on the one hand, the Senate could not decide all alone and the *tribunat* was hesitant in entering any conflict with the government; on the other hand, no governmental act was ever revoked by the Senate. One historian has correctly remarked that, '[u]nder the consulate and under the two empires, one established a senate as guardian of the constitution. But this guardian was always a docile instrument between the hands of the first consul and the emperor.'[393]

Therefore, the control of constitutionality of laws—theorised by Sieyès in Year III and constitutionalised in Year VIII—as an important and perhaps the most innovative part of the Consulate Constitution, was in practice never a functional element, and its defeat represented the first and the last attempt to create in France a neutral power of a political-jurisdictional nature.[394] Even today, the refusal of

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[388]Jaume (2002), 129: '*Bien plus ou bien autrement qu'une Cour constitutionnelle, ce jury est un gardien de la République*'.

[389]The *Tribunat* assumed some of the functions of the Council of Five Hundred, but its role consisted only of deliberating projected laws before their adoption by the *Corps législatif*, with the legislative initiative remaining with the Council of State.

[390]'*Il* [le Senat conservateur] *maintient ou annule tous les actes, Constitutions qui ont régi la France qui lui sont déférés comme inconstitutionnels par le tribunat ou par le gouvernement.*' *Constitutions qui ont régi la France*, ed. Tripier (1879), 171.

[391]*Constitutions qui ont régi la France*, ed. Tripier (1879), 173.

[392]'*Tout décret du corps législatif, le dixième jour après son émission, est promulgue par le premier consul, à moins que, dans ce délai, il n'y ait eu recours au Senat pour cause d'inconstitutionnalité. Ce recours n'a point lieu contre les lois promulguées*.' *Constitutions qui ont régi la France*, ed. Tripier (1879), 174.

[393]Ky (1926), 185.

[394]Lacchè (2016), 261–2.

Sieyès' ideas continues to have an effect. The law as expression of the *volonté générale*, issued by a sovereign legislative assembly, was also the basis of the 1958 Constitution of the Fifth Republic; this introduced the Constitutional Council (*Conseil constitutionnel*),[395] but the constitution itself is only very reluctantly exposed to control of constitutionality embodied in the *Conseil*, as the priority question of constitutionality expressed in Art. 61-1 demonstrates. In Art. 89, the 1958 Constitution expressly forbids constitutional revision, because the people are held to be continuously constituent (*le peuple constituant toujours*), and there is no control of constitutionality of constitutional amendments. It is, therefore, unsurprising that there is no scholarly consensus as to the precedential role played by Sieyès' draft in relation to modern constitutional courts.[396]

The unanimous refusal of Sieyès' draft in the Convention was introduced by Thibaudeau's statement that 'one must oppose the ambition to the ambition.' In doing so Thibaudeau echoed James Madison's contention that '[a]mbition must be made to counteract ambition.'[397] Though Madison and Thibaudeau seem here to agree on the issue of the separation of powers, the paradox remains that, at the end of the eighteenth century, the American constitutional system was able to introduce a control mechanism for the constitutionality of the laws—the first of its type. France, on the other hand, found itself unable to countenance this control, or to reconcile it with the nature of constitutionalism. Thus, while constitutional control remains a hallmark of the American political system, and has been so since the time of Madison, the modern French Fifth Republic, like the First, still views such controls with suspicion and reluctance.

7 Avenues of New Constitutional Research: Sketching Germany, 1848–9

Reconsidering constitutional formation, it is clear that the early period of European constitutionalism was characterised by the establishment of constitutional normativity. This establishment adapted the different ideas of the American and French Revolutions, though this was hardly a straightforward process. As Goethe's *Zahme Xenien* poetically suggested, the Old World's transition to the new juridification of the political order was always destined to be significantly more complex than that of the (relatively) clean slate of North America. A key example of this complexity was

[395]In lieu of many: Avril (2005); especially on the *légicentrisme de la culture juridique française* and the distrust of judges, Hourquebie (2004).

[396]In contrast to the majority assessment, as provided by Bastid, Gauchet, Clavreul, and Bredin (among others), Michel Troper points out that the constitutional jury proposed by Sieyès is significantly different from the constitutional courts that we know today. Troper, "Sieyès et le jury constitutionnaire", 272; cf. also Fioravanti (1999), 117.

[397]Madison, James, *Federalist* No. 51, in Hamilton, Madison and Jay (1961), *The Federalist Papers*, 322.

the struggle for national unification in Germany during the revolutionary years of 1848–9. On the one hand, German theorists and activists did not exist in a historical vacuum, and could draw upon the examples and lessons of both the United States and France.[398] On the other hand, half a century after the efforts of Hamilton and Madison in the United States, and Sieyès in France, the constitutional debates of St. Paul's Church occurred within the context of a substantive politicisation of the broad population, creating a public discourse of constitutional legal matters in newspapers and pamphlets.

French theorists tended to view fundamental laws as philosophical truths. The German protagonists of imperial constitutionalism, on the other hand, relied on legal techniques against the complicated and irreconcilable backdrop of liberal claims for an unified government backed with popular representation and democratic claims for popular representation, together with the demands of the Prussian and Austrian Ultras, the Hegelian Left and the *Junge Deutschland* national literary movement, and political Catholicism.[399] By means of a statute the National Assembly proclaimed the 'Fundamental Rights of the German People' (*Grundrechte des deutschen Volkes*) and provided for their immediate application disregarding all the unsolved questions in the constituent St. Paul's Church assembly. The Act Relating to the Fundamental Rights of the German People (*Reichsgesetz betreffend die Grundrechte des deutschen Volkes*) was proclaimed on 27 December 1848 due to the National Assembly's resolution six days before, months before the Frankfurt Imperial Constitution of 28 March 1849, coming into force on 17 January 1849 before being abrogated by federal decision on 23 August 1851. Prussia, Austria, Bavaria, and Hanover refused the publication of the fundamental rights.

Recent research, conducted under the auspices of the ReConFort project by Franziska Meyer (University of Passau) and Joachim Kummer (Free University of Berlin), has demonstrated that the public interest surrounding the juridification of the German national unification movement extended well into the legal aspects and challenges facing the St. Paul's delegates.[400] This public engagement with the issue of constitutionalism was facilitated by the publication of numerous newspapers and pamphlets, and broadly addressed three themes: the aforementioned juridification, supremacy, and revision.[401]

[398]Cf. fundamentally Dippel (1994), 24ff.

[399]Stolleis (2001), 138.

[400]Franziska Meyer and Joachim Kummer, per "Constitutional Precedence as Keystone of Modern Constitutionalism", Royal Flemish Academy of Science and Art, 14 March 2016.

[401]http://sources.reconfort.eu.

7.1 *Juridification Matters in the Public Sphere Around the Constituent St. Paul's Church Assembly*

The differentiation between constitution and ordinary law was addressed in the *German Constitutional Newspaper* (*Deutsche constitutionelle Zeitung*) as basic legal framework and detailed singular provisions. In an article comparing the constitutions of Belgium and the United States to the constitution of Bavaria, an author for the paper distinguished 'a well drafted constitution [which] should only regulate fundamental principles and not every detailed legal question' from the ordinary law.[402] The *People's Friend* (*Volksfreund*) claimed the constituent power for the people instead for the monarch 'because it is the most important law.'[403] Conversely, the *National-Newspaper* (*National-Zeitung*) built the new order on the unification more than on the constitution: 'The constitution is necessary, but the statal unification gives a new quality of legal bonding to the powers.'[404] In the same vein, the criticism of the written crystallization of the constitution in a single document used the unwritten British constitutional framework as its exemplar, arguing that its foundation 'on a solid political custom is far stronger than any written text'.[405]

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[402]"Zur Verfassungsfrage Deutschlands", *Deutsche constitutionelle Zeitung*, No. 294, 4 November 1848. This idea of a regulation only of 'fundamental principles' was established in the final form of the *Reichsverfassung* (1849). Many detailed questions were left open, including those regarding the suspension of fundamental rights (Art. 197 Section 2) as well as constitutional complaint (Art. 126g). The *Deutsche constitutionelle Zeitung*, a centre-left newspaper, was published from 1 January 1848 until 7 October 1849 in Augsburg and Munich.

[403]"Die von der Regierung 'von Gottes Gnaden' dem Volke angebotene Verfassung", *Der Volksfreund*, No. 27, 23 December 1848: '*Eine solche Verfassung ist das wichtigste Gesetz des Staates, sie ist das Staatsgrundgesetz, und da in einem constitutionellen Staate das Volk die gesetzgebende Gewalt hat, so kann natürlich nur das Volk durch seine Vertreter das wichtigste alle Gesetze geben, nie die Regierung von Gottes Gnaden.*' *Der Volksfreund*, which was published in Bielefeld by Rudolf Rempel and Gustav Adolf Wolff, was issued from 10 June 1848 until 12 July 1850. The newspaper championed republican and pro-revolutionary ideas. See, for instance, "Die Republik in Vergleichung mit den monarchistischen Verfassungsformen", *Der Volksfreund*, No. 5, 3 February 1849; "Revolution", *Der Volksfreund*, No. 10, 10 March 1849.

[404]"Die Deutsche Verfassung", *National-Zeitung*, supplement to No. 36, 8 May 1850: '*Die Gerechtigkeit, welche bisher für die einzelnen Staaten immer nur eine kraftlose Idee blieb, wird so zu einer concreten Macht (wir wollen so die Reichsgewalt im Gegensatz zur einzelnen Staatsgewalt nennen), und die den Völkern bisher nur durch die Verfassungs-Urkunde gebotene papierne Bürgschaft für die Gerechtigkeit wird eine reelle*.' The *National-Zeitung* was founded in 1848, as a consequence of the revolutionary events. The first proprietors and correspondents were generally cosmopolitan Berlin liberals—politicians, intellectuals, authors, and state officials. The newspaper published its political program in its first edition, in which it favoured a constitutional monarchy based upon democratic principles and institutions. By 1850, the *National-Zeitung* had some of the highest circulation figures in Berlin. With the failure of the revolutions, the paper became more moderate, and continued to enjoy a signifiant readership, until it was wound down in 1938. Kahl (1972), 177–80.

[405]"Ueber constitutionelle Garantien und Ministerverantwortlichkeit", Deutsche allgemeine Zeitung, No. 338, 3 December 1848: '*Nach den Erfahrungen, welche mit den s.g. papieren*

The juridification by constitution was further reflected by reporting on the oath to be taken by the king, the ministers, parliamentarians, and the military on the constitution.[406] The communicative message of the obligatory oath taken on the constitution before entering into office was twofold. On the one hand, it raised the prospect that all political power could only exist as constituted power. On the other hand, it was a solemn promise to respect the constitution. The latter was noted as being fragile,[407] owing to the lack of a legal consequence in its enforcement.[408] Consequences for the breach of oath were left to the regulation by the practical custom. Referring to the oath of Charles X of France, the constitutional oath of the king, in particular, was considered to be easily compromised.[409]

Of primary importance was the potential conflict between the oath sworn on the constitution by the military and the obligations to the supreme command of a

Verfassungen, d.h. mit Constitutionen und Charten, welche das ganz organische Gesetz eines Reiches umfassen, bisher gemacht worden sind, überrascht es einigermaßen, daß die Völker noch immer geneigt sind, darin die Gewähr für Freiheiten und volkstümliche Regierung […] *erblicken.* […] *Sieht man in Europa sich nach Ländern um, wo die verfassungsmäßige Freiheit die tiefsten Wurzeln geschlagen hat, so bleibt nur der Blick auf Großbritannien haften; doch nehmen die Schweiz in einem verwandten Sinn und das verjüngte Belgien* […] *daneben eine sehr achtbare Stelle ein*.' The *Deutsche allgemeine Zeitung* was published in Leipzig by Heinrich Brockhaus from 1 April 1843 until 31 December 1879. Politically it belonged to the liberal spectrum. Berbig (2000), 29. The incapability of the written constitution was also emphasized by the work of a contemporary, anonymous Bavarian author: *Die Grundrechte und die Reichsverfassung für Deutschland, beleuchtet von einem Bayer* (Augsburg: 1849), 74: '*Mit einer papiernen Verfassung hat man kein Reich. Papieren aber ist jede Verfassung, die nicht auf das Recht gebaut ist; denn Gesetze sind als solche aber noch nicht Recht. Das Recht fordert bei jeder Societät, daß die Interessen des einen Theilnehmers nicht durch das Uebergewicht des Anderen bewältigt werden können; nur in diesem Falle wird ein gemeinschaftliches Interesse verfolgt werden können*.'

[406]For members of parliament: Art. 113; for ministers: Art. 191; for the head of state: Art.190. *Frankfurter Reichsverfassung* (28 March 1849), cited according to Willoweit and Seif (=Müßig) (2003), 562–88.

[407]"Zur Verfassungsfrage Deutschlands XI", *Deutsche constitutionelle Zeitung*, No. 45, 22 February 1849: '*Man hätte* […] *noch einen kleinen Zusatz erwarten sollen, etwa den, daß alle mit der Reichsverfassung in Widerspruch stehende Gesetze* […] *an und für sich aufgehoben und ungültig seien, sobald die Reichsverfassung in Kraft trete*.' See also: "Die Gewähr der Reichsverfassung", *Deutsche Reichstags-Zeitung*, No. 28, 2 February 1849. The *Deutsche Reichstags-Zeitung* was published from 21 May 1848 until 2 April 1849 in Bonn by Robert Blum, Georg Günther, and Wilhelm Schaffrath. Politically it belonged to the left. It frequently issued and supported the pamphlets of the democratic *Centralmärzverein* (Central March Association), and was sceptical towards the Frankfurt Assembly's practice. See, for example, "Des deutschen Volkes Mandat an seine Vertreter I", *Deutsche Reichstags-Zeitung*, No. 133, 22 October 1848; "Stimmen aus dem Lande gegen die Erschaffung eines deutschen Kaisers", *Deutsche Reichstags-Zeitung*, No. 12, 15 January 1849.

[408]Schmidt (2000), 150.

[409]This article also draws a comparison to the oath of Charles X of France (1757–1836), who pursued 'unconstitutional politics.' "Zur Verfassungsfrage Deutschlands XI", *Deutsche constitutionelle Zeitung*, No. 45, 22 February 1849.

federal state.[410] This originated in the simple fact that, though the St. Paul's debates concerned the German 'nation', the practical institutions of governance remained the purview of the federal states. This meant that the German armies were answerable not to the nation—as, indeed, there was no national German army—but to their individual states, such as Prussia, Hanover, Bavaria, and Württemberg. Therefore, if the military sworn to uphold a particular command and to serve a particular state had to pledge loyalty to the *national* constitution, it would be caught between two camps. If a federal state were to raise its military forces against the imperial constitution, to which oath would the military pledge its loyalty: the nation and its constitution, or the federal state?[411] In the same vein, the Prussian politician and minister of finance, David Justus Ludwig Hansemann, argued 'that the oath of the military [on the Constitution] would be a threat to its discipline.'[412] Whether this intractable problem could, in fact, be resolved ultimately became a moot point; as the Imperial Constitution was never enacted, the fundamental test of the loyalty and discipline of the armies never came to pass. Nonetheless, as Hansemann had alluded, at the heart of the military issue was a basic and vital question of precedence, and what the Imperial Constitution (or, indeed, *any* constitution) represented in terms of vested power.

[410]The solution envisaged in Art. 11 of the Frankfurt *Reichsverfassung*, which eliminated the supreme command of the federal states, did not come into force. § 11 stated: '*Der Reichsgewalt steht die gesammte bewaffnete Macht Deutschlands zur Verfügung.*'.

[411]"23. Oktober", *Deutsche Reform*, No. 8, 24 October 1848: '*Bei einer solch doppelseitigen Verpflichtung wird nämlich die Armee aus einem gehorchenden in einen beurtheilenden Körper verwandelt; denn selbst urtheilen und sich mit der Politik befassen, wird jede deutsche Armee müssen, wenn sie bei Konflikten zwischen der Reichsgewalt und den Einzelregierungen ihre Pflicht erkennen will.*' The Berlin newspaper *Deutsche Reform* was founded in 1848. A conservative newspaper, it had the aim of protecting the constitutional monarchy against liberal democracy and anarchy. The government supported the newspaper monetarily, while the paper published articles written by the government. In spite of this (or perhaps because of it), the readership was very small. In 1849, the newspaper was reformed and removed from the government strategy, but still did not succeed; it folded in 1851. Berbig (2000), 40–1.

[412]Hansemann, David (1849), Die Deutsche Verfassung, 8. David Hansemann was an important German merchant. Born in 1790 as the youngest son of a pastor in Finkenwerder, he entered commerce at just fifteen years old. In 1817 he founded his own company and succeeded to gain certain prosperity. This way he was able to spend the following time on his interests in insurance and social politics, railways, and banking. He founded an insurance company, a credit institute, and a railway company. He held several public offices, including the presidency of the local chamber of commerce and the city council. Hansemann was known for his liberal ideas, which often stood in conflict with the public offices In March 1848, following the outbreak of revolution across the region, he became the Prussian finance minister. He held this position only until September, when the rising tide of radical democrats led to his resignation. Hansemann himself was a German unificationist who supported a federalised 'Greater German' (*großdeutsch*) solution —the unification of the German states, including Austria, with a strong devolution of powers to the individual states. At the beginning of the 1850s, he withdrew from politics and founded a credit cooperative. He died in 1864 in Schlangenbad. "Hansemann, David", Neue Deutsche Biographie (1966), 7: 626–9.

7.2 Supremacy Matters in the Public Sphere Around the Constituent St. Paul's Church Assembly

The introductory statute to the Act Relating to the Fundamental Rights of the German People (hereafter Fundamental Rights Act; 1848)[413] ruled that every federal law contradicting the fundamental law act was either immediately null and void, or else must be amended within a certain period of time. The fundamental laws were communicated as obligatory legal standards to be complied with by the federative governments while also setting the legal requirements to change singular legal structures accordingly.[414] Most prominently, Art. 2 of the Fundamental Rights Act attracted journalistic attention by abolishing the estates' privileges. Liberal newspapers, such as the *Deutsche constitutionelle Zeitung*, even demanded the closing of the first chamber of Bavaria, which acted as a legislative body of hereditary privilege similar to the British House of Lords.[415] As an expression of noble entitlement, the first chamber could no longer be tolerated under Art. 2 of the Fundamental Rights Act.

What was particularly remarkable was the liberal linguistic turn away from seeing the Fundamental Rights Act as a protective right, and instead conceptualising it as an active measure to be wielded to change the structure and law of the federal states. This, however, did not occur without opposition, and conservative protest was widespread. The *New Munich Journal* (*Neue Münchener Zeitung*), for instance, argued that fundamental laws were not immediately effective; instead, they had to be approved by the federative government and parliament respectively. For conservatives, such an implementing approval was the only constitutional way to introduce the fundamental laws into a federal state.[416] This amounted to a constitutional understanding not as a paramount law but rather as a mere societal contract.

The nullification of anterior law started as a matter of course. The National Assembly already agreed in May 1848 that a law contradicting the constitution was

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[413]The *Reichsgesetz betreffend die Grundrechte des deutschen Volkes*, proclaimed on 27 December 1848, came into force on 17 January 1849.

[414]This is made clear by the introductory act to the fundamental law. In Arts. 3, 4, and 5 the federal governments are told to amend themselves according to the fundamental laws.

[415]"Die deutschen Grundrechte und die bayrische Volksvertretung", *Deutsche constitutionelle Zeitung*, No. 38, 14 February 1849: '*Das Einführungsgesetz zu den deutschen Grundrechten verordnet deshalb die Abänderung eines derartigen Zweikammernsystems, und setzt hierfür eine Frist von 6 Monaten fest* […] *Also zuerst hinweg mit dieser s.g. ersten Kammer!*'.

[416]"Die Grundrechte", *Neue Münchener Zeitung*, No. 99, 27 April 1849: '*Keineswegs soll hiermit übrigens die Einführung der Grundrechte in Bayern bekämpft werden; diese soll und wird geschehen auf verfassungsmäßigem Wege unter Mitwirkung und Zustimmung des Landtages und der Regierung und so, wie von diesen für das Land möglich, zuträglich anerkannt wird*.' The *Neue Münchener Zeitung* existed from 1848 until 1855 (anew: 1856–1862). The newspaper was founded on suggestion of King Maximilian II; as a result, it relied on the Bavarian government for both its financial support and its content. Kohnen (1995), 154.

null and void.[417] Art. 30 of the draft constitution went so far as to state explicitly that '[e]very resolution, federal law or treaty between federal states, are void, insofar as they contradict the National Constitution.'[418] The Frankfurt Imperial Constitution (*Reichsverfassung*; 1849), however, lacked legal consequences for laws contradicting the constitution. The relevant Art. 194 simply stated 'that the ordinary law must not contradict the national constitution.'[419] Despite the hierarchisation of constitution and statutes, an explicit nullification of contradictory statutes was missing. Centre-left newspapers criticised this oversight, and justified their demand of the nullification with comparative arguments, though these often included inaccuracies and mischaracterisations.[420] So, for example, the *Free People's Gazette* (*Freie Volksblätter*) reported that the Belgian Constitution (1831) allowed state officials to refuse the execution of laws they thought to be issued unconstitutionally.[421] In fact, the relevant provision—Art. 107—only referred to judges, and no other officials.

The public interest in the establishment of a constitutional jurisdiction and the introduction of a judicial review corresponded with the prominence of judicial administration and legally established courts within liberal legal thought. Deeply influenced by Immanuel Kant's formulation of the liberal state under the rule of law, Paul Johann Anselm von Feuerbach's essay on the Bavarian court

[417]"Die deutsche Einheit", *National-Zeitung*, No. 63, 5 June 1848: '*Die deutsche Nationalversammlung hat am 27. Mai mit einer entschiedenen Mehrheit nach Wernhers Antrag beschlossen: die deutsche National-Versammlung, als das aus dem Willen und den Wahlen der deutschen Nation hervorgegangene Organ zur Begründung der Einheit und der politischen Freiheit Deutschlands, erklärt, daß alle Bestimmungen einzelner deutscher Verfassungen, welche mit dem von ihr zu gründen den allgemeinen Verfassungswerke nicht übereinstimmen, nur nach Maßgabe des letzteren als gültig zu betrachten sind – ihrer bis dahin bestandenen Wirksamkeit unbeschadet.*'.

[418]*Entwurf des deutschen Reichsgrundgesetzes, der Hohen deutschen Bundesversammlung als Gutachten der siebzehn Männer des öffentlichen Vertrauens überreicht am 26. April 1848*, Frankfurt am Main, 1848, Art. 30, 22: '*Alle Bundesbeschlüsse, Landesgesetze, und Verträge zwischen einzelnen deutschen Staaten sind, insoweit sie mit einer Bestimmung des Reichsgrundgesetzes im Widerspruch stehen, hiermit außer Kraft gesetzt.*'

[419]*Verfassung des Deutschen Reiches vom 28. März 1849*, Art. 194: '*Keine Bestimmung in der Verfassung oder in den Gesetzen eines Einzelstaates darf mit der Reichsverfassung in Widerspruch stehen.*' Cited in Willoweit and Seif, *Europäische Verfassungsgeschichte*, 587.

[420]"Zur Verfassungsfrage Deutschlands XI", *Deutsche constitutionelle Zeitung*, No. 45, 22 February 1849: '*Man hätte* […] *noch einen kleinen Zusatz erwarten sollen, etwa den, daß alle mit der Reichsverfassung in Widerspruch stehende Gesetze* […] *an und für sich aufgehoben und ungültig seien, sobald die Reichsverfassung in Kraft trete.*'

[421]"Das konstitutionelle System in Deutschland", *Freie Volksblätter*, No. 77, 13 October 1848: '*Er beruft sich auf Belgien, wo nach der Verfassung jeder Beamte befugt ist, ein Gesetz unvollzogen zu lassen, dass ihm verfassungswidrig verordnet scheint.*' The *Freie Volksblätter* (from April until October 1848) or *Freie Blätter* (from October 1848 until January 1849) was a democratic newspaper printed in Cologne and Mülheim. Melis (1998), 301.

constitution[422] and its unaffectedness by means of ministerial and cabinet regulations defined the court constitution as the 'exterior appearance' of justice and the essence of the liberal rule of law state.[423] In Feuerbach's words, the court constitutional legal reservation correlated to the legal commitment of the adjudicating power: 'If this court constitution does not by itself exist as a law but as a simple regulation, then the judiciary in its most interior circle is made dependent on a non-statute as the highest fundamental rule.'[424] Any regulatory competence of the executive in regard to the court constitution would nip judiciary independence in the bud, as then the legal validity of judicial actions would not alone be measured by laws but also by executive orders.[425] As opposed to the Rousseau-inspired super-elevation of the general will and the French distrust against judges, German liberal writers, such as Klüber, Mittermaier, Pfeiffer, and Zachariae, were interested in the court constitutional legal reservation as prerequisite of judicial independence[426] and of the justiciability of subjective rights.[427]

The plea for the introduction of the constitutional complaint was an obvious step. For the activists, the next obvious step was to publish this plea in newspapers and pamphlets. The Württemberg political scientist Robert von Mohl, a member of the Frankfurt Parliament, argued in the *German Newspaper* (*Deutsche Zeitung*) that the fundamental rights of each citizen should be secured by an independent and

[422]Paul Johann Anselm von Feuerbach, *Kann die Gerichtsverfassung eines constitutionellen Staates durch bloße Verordnungen rechtsgültig geändert werden*? in Feuerbach, Paul Johann Anselm von (1833), Kleine Schriften vermischten Inhalts, 178–228.

[423]Feuerbach (1833), *Gerichtsverfassung*, 185 (for the 'exterior appearance'), 193 (for the 'foundation of the legal status in the state').

[424]Feuerbach (1833), *Gerichtsverfassung*, 199.

[425]Feuerbach (1833), *Gerichtsverfassung*, 198–200.

[426]Klüber, Joahnn Ludwig (1840) *Öffentliches Recht des Teutschen Bundes*, chap. X (*Justizhoheit*), § 366, 562–3; § 373, 571–2. Klüber previously discussed judicial independence in the third edition of *Öffentliches Recht* (Erlangen: 1831) at chap. X (*Justizhoheit*) § 373, 521–2. For the court constitutional legal reservation, Klüber cites Feuerbach: Klüber, *Öffentliches Recht* (1840), chap. X § 366, 565 (n. k); *Öffentliches Recht* (1831), chap. X § 366, 515 (n. k). Cf. also Pfeiffer, Burkhard Wilhelm (1831), Practische Ausführungen aus allen Theilen der Rechtswissenschaft, vol. III, 274–5: 'As in general the independence of the administration already requires permanent courts being appointed with an independent authority who may only be deprived of the once assigned legal matters in general and by statute…Since Cabinet justice appears especially reprehensible, then with respect to the safety of the administration of justice, the state legal claim is: that nobody is deprived of his ordinary judge […] It is precisely this fundamental principle that excludes all kinds of special courts and commissions.'

[427]Klüber elaborates on this reservation in a separate point (VIII) at Klüber (1840), chap. X § 366, 562. His definition of the court constitution (Klüber (1840), chap. X § 366, 564) is based on the one provided by Feuerbach: 'The court constitution (*Court Organisation*) is the certain order of the courts with the goal to influence their composition, the extent of their effect, and their relationship amongst each other. Its destiny is precisely to give power to the judiciary in its organ, as one of the first and fundamental parts of every state order, in order to assure the effect of the idea and the rule of the law in its entirety in the territory'.

permanent constitutional court.[428] Its competences should among others include a constitutional complaint.[429] This frequent liberal demand was combatted by the state governments,[430] also using the newspapers as medium. They proposed that a query should first be raised in a federal parliament by a sitting member; only if this failed would the representatives be entitled to appeal to the constitutional court.[431] In this version, power would be vested in the political process through the representatives in the parliament; no ordinary citizen would ever be allowed to appeal to the constitutional court personally. Ultimately, though, this obstructive position was not successful. Instead, the St. Paul's delegates wrote § 126g and § 126h into the Imperial Constitution. These sections provided for the constitutional complaint of citizens to the planned 'Constitutional Court.'[432] § 126g determined that 'law suits of German citizens against the infringement of their rights guaranteed by the constitution' had to be ruled by the Imperial Court (*Reichsgericht*).[433] The most important textual template was the provision in Title VII, § 21 of the Bavarian Constitution of 1818, which granted citizens the right to appeal 'to the assembly of estates against the infringement of constitutional rights.'[434] However, this did not allow for a constitutional complaint, rather for a petition in regard to a lawful administration.[435]

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[428]Cf. fundamentally Dippel (1994), 24ff. In regard to Robert von Mohl further references at Stolleis (2001), 172ff.

[429]"Der Deutsche Reichstag III", *Deutsche Zeitung*, No. 88, 28 March 1848: '*Dann aber zweitens nicht minder nöthig, daß das Reich eine gesetzliche, wirksame Hilfe gegen die Beeinträchtigungen dieser Rechte, im einzelnen Staate gewähre; somit in unabhängiges, zahlreiches, beständiges Bundesgericht, bei welchem Ständeversammlungen die Minister anklagen, die einzelnen Bürger, welche auch in letzter Instanz im engern Vaterlande Unrecht in staatsrechtlichen Befugnissen zu erdulden glauben, Gerechtigkeit verlangen können*.' The *Deutsche Zeitung* was published from 1 July 1847 until 30 December 1850 by Georg Gottfried Gervinus. Its political position was moderate liberal. It dismissed any radical revolutionary ideas and mostly advocated the hereditary monarchy. See for example "Die Deutschen Reformen", *Deutsche Zeitung*, No. 82, 22 March 1848; "Die Empörung im Seekreis", *Deutsche Zeitung*, No. 108, 18 April 1848; "Republikanischer Jesuitismus", *Deutsche Zeitung*, No. 117, 27 April 1848. See also "Die Bundesverfassung", *Deutsche Zeitung*, No. 89, 29 March 1848; "Der Entwurf der Reichsverfassung III", *Deutsche* Zeitung, No. 309, 21 November 1848.

[430]*Deutsche Reform*, supplement to No. 172, 5 March 1849.

[431]*Deutsche Reform*, supplement to No. 172, 5 March 1849.

[432]The exact competences of the planned constitutional court were intended to be regulated by ordinary law.

[433]Cf. among others Faller (1974), 827–55.

[434]Bavarian Constitution 1818, Title VII, §21: '*Jeder einzelne Staatsbürger, so wie jede Gemeinde kann Beschwerden über Verletzung der constitutionellen Rechte an die Stände-Versammlung, und zwar an jede der beyden Kammern bringen, welche sie durch den hierüber bestehenden Ausschuß prüft, und findet dieser sie dazu geeignet, in Berathung nimmt. Erkennt die Kammer durch Stimmenmehrheit die Beschwerde für gegründet, so theilt sie ihren diesfalls an den König zu erstattenden Antrag der andern Kammer mit, welcher, wenn diese demselben beystimmt, in einer gemeinsamen Vorstellung dem Könige übergeben wird.*' Seydel (1885), 30–56. See also Stourzh (2011), 157–79, especially 168–70.

[435]Ruppert and Schorkopf (2015), 1411 with further references.

Even if the reasons for Sieyès' caution with the choice of the constitutional jurors were not applicable to the Frankfurt constitutional debates, there was a particular public interest in the question of how constitutional judges would be elected. Mohl proposed a court with judges and a jury, both of them consisting of members of the parliament. He wanted the judges to be elected by the parliament. The jury of the court should not be elected but rather chosen by lots. For him it was self-explanatory that the king should have no say in the election of the judges and the jury.[436] Adolph Bach, an otherwise unknown author, preferred the judges to be elected by other judges of lower courts.[437] He also argued that no one should be able to control them.[438] A third voice, a professor of philosophy by the name of Braniß, voted for the judges to be elected by the courts and faculties of law.[439] Despite this vivid discussion around the constituent assembly, the goals of the debates inside its chamber were rather meagre in this respect. In the final analysis, § 128 of the Imperial Constitution held the organisation of the courts to be a matter of ordinary and not constitutional law.[440]

The failure of the Imperial Constitution specifically, and the Frankfurt Assembly as a whole, often distracts from developments further south. But Frankfurt was not the only centre of debate, negotiation, and compromise during this period of European upheaval. In Austria, the so-called 'Kremsierer Constitutional draft' (1848–9) held the provision that the highest imperial court should be the only competent instance for 'lawsuits for compensation due to the infringement of constitutional rights by an official act of state employees.'[441] This draft was not present in the analysed public discourse around the St. Paul's Assembly, and it was

[436]"Der Deutsche Reichstag IV", *Deutsche Zeitung*, No. 89, 29 March 1848: '*Das eine Ausnahme, von dem Grundsatze, der Kaiser habe die sämtlichen Reichsbeamten zu ernennen, hinsichtlich der Mitglieder des Reichstages zu machen ist, bedarf, wohl keiner Ausführung.*'

[437]Bach, Adolph (n.d.), Umriß einer Staatsverfassung für Deutschland, 22l: '*Es möge* […] *die Einladung ergehen, zum Behufe der Bildung des höchsten Reichsgerichts, einen Collegen aus der Mitte* […] *ohne alle äußere Einwirkung zu wählen.*'

[438]Bach, Adolph (n.d.), Umriß einer Staatsverfassung für Deutschland, 9: '*Deutschlands höchstem Gerichtshofe* […] *kommt ausschließlich die oberste Aufsticht und Controlle über sämtliche Gerichte des Reiches zu und darf selbst nicht unter der Bevormundung und Instructions-Befolgung eines Staatsmannes stehen.*'

[439]Braniß, Christian Julius (1848), Nationalverfassung und preußische Constitution, 32: '*Den Wahlact vollziehen in den einzelnen Staaten nicht die Kammern, sondern die Obergerichte und die Justizfakultäten.*' Christian Julius Braniß was a German philosopher, born in 1792. He worked as a professor in Breslau, and was influenced by Steffens and Hegel. Drawing from these, he created his own philosophical system, differentiating between the philosophy of idealism or metaphysics and 'real' philosophy. He died in 1873 in Breslau. "Braniß, Christian Julius", Allgemeine Deutsche Biographie (1903) 47: 184.

[440]*Verfassung des Deutschen Reiches* (28 March 1849), § 128: '*Über die Einsetzung und Organisation des Reichsgerichts, über das Verfahren und die Vollziehung der reichsgerichtlichen Entscheidungen und Verfügungen wird ein besonderes Gesetz ergehen.*' Cited in Willoweit and Seif (=Müßig) (2003), 579.

[441]Die österreichischen Verfassungsgesetze mit Erläuterungen, ed. Bernatzik (1911), 129 *'§ 140. Das Oberste Reichsgericht hat als einzige Instanz das Richteramt auszuüben: 1. bei Klagen auf*

not before the Austro-Hungarian Compromise of 1867 that an individual constitutional complaint was introduced in Austria. Regarding the establishment of an imperial court, the Austrian Fundamental Law attributed to this court the competence for 'complaints of citizens on the infringement of their political rights guaranteed by the constitution' (after the exhaustion of all legal measures provided by the administrative law).[442] However, the verdicts of this imperial court had no annulling effect, but instead were only declarative. The detailed drafting of the Austrian imperial court (excluding the Hungarian territories of the Austro-Hungarian Empire) was left to the implementing law of 18 April 1869,[443] which coincided with the court coming into life. § 17 of the implementing law regulated the proceedings of the individual constitutional complaint and made the legal nature of the genuine complaint explicit in § 35, providing for the wording of the ruling that citizens' rights were infringed.[444]

7.3 *Revision Matters in the Public Sphere Around the Constituent St. Paul's Church Assembly*

In regard to constitutional amendments, the St. Paul's Constitution imposed the right to amendment proposals to the king and to both houses of the parliament.[445] Newspapers or pamphlets did not discuss this topic, as the right to initiate for both powers had been generally accepted. The constitutional draft presented on 26 April 1848 by the committee of seventeen under Friedrich Christoph Dahlmann also included the same regulation.[446] Rather, the *procedure*, or the means by which amendments would be enacted, attracted more interest. For some newspapers, like the *Deutsche constitutionelle Zeitung*, juridification by constitution was an

Genugtuung wegen Verletzung konstitutioneller Rechte durch Amtshandlungen der Staatsbediensteten (§138).'

[442]Art. 3b, *Staatsgrundgesetz über die Einsetzung eines Reichsgerichtes* 21 December 1867, in *Die österreichischen Verfassungsgesetze mit Erläuterungen*, Vol. II, 428: '*Artikel 3. Dem Reichsgerichte steht ferners die endgültige Entscheidung zu:* […] *b) über Beschwerden der Staatsbürger wegen Verletzung der ihnen durch die Verfassung gewährten politischen Rechte, nachdem die Angelegenheit im gesetzlich vorgeschriebenen administrativen Wege ausgetragen worden ist*.'

[443]"Gesetz von 18. April 1869", *Reichsgesetzblatt für das Kaiserthum Österreich*, No. XXII, 1869, 167.

[444]In this respect, Austria is considered to have had a pioneering role in continental Europe. Hereto at length: Stourzh (1985, *passim*).

[445]*Verfassung des deutschen Reiches* (28 March 1849), § 80: '*Der Kaiser hat das Recht des Gesetzvorschlages.* […]/§ 99. *Das Recht des Gesetzvorschlages, der Beschwerde, der Adresse und der Erhebung von Thatsachen, so wie der Anklage der Minister, steht jedem Hause zu*.' Cited in Willoweit and Seif (=Müßig) (2003), 571.

[446]*Entwurf des deutschen Reichgrundgesetzes* (26 April 1848), § 8, 12–13: '*Dem Kaiser* […]. *Das Recht des Vorschlags und der Zustimmung zu den Gesetzen, theilt er mit dem Reichstage*.'

irreversible truth once a constitution had come into force. This was similar to Sieyès' concept of constitutionalism; the transformation from *pouvoir constituant* to *pouvoir constitué* was understood as one-way track and, providing that it was passed in a constitutional way, could not be overturned without risking a revolution.[447] The same could be heard from Heinrich von Gagern, president of the National Assembly, when he called in April 1849 for an adherence to the Constitution 'not because the constitution would be perfect or he would be totally convinced by all of the provisions, but the constitution itself determines the procedure for modifications which has to be observed.'[448] Such a statement is embedded in the legal understanding of constitutional precedence; the ratified constitution stood above all, and even a complete modification could only be done in the way the constitution describes. It had to be observed, even if it did not fulfil all of its expectations.

In regard to the modifying quora and majorities, the St. Paul's Constitution determined in Art. 196 that two-thirds of the members had to be present at the voting and a majority of two thirds has to be achieved. These requirements had to be complied with in both chambers.[449] Many pamphlets advocated for a two-third majority as well,[450] whereas the constitutional draft of the seventeen demanded a quorum of three-quarters to modify the constitution.[451] The two-thirds quorum and

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[447]"Die Einführung der Grundrechte", *Deutsche constitutionelle Zeitung*, No. 9, 11 Januar 1849: '*Viel schwerer wird man dasjenige antasten, was auf verfassungsmäßigem Wege festgestellt und zum Gesetz erhoben ist und wird es nicht versuchen, ohne die Revolution aufs Neue und in ihren letzten Konsequenzen hervorzurufen. Darum betrachten wir es als eine Thatsache von hohem Werthe, daß die Vertreter des deutschen Volkes die wichtigsten durch die Märzerhebung gewonnen Grundrechte desselben durch eine in Gesetzform erlassene magna charta verbrieft* […] *haben*.'

[448]"Frankfurt a.M. 11. April", *Deutsche Reform*, No. 236, 13. April 1849: '*Gagern: Etwa 80 Mitglieder von der Rechten und dem Centrum der National-Versammlung, unter ihnen auch Mohl und ich, haben schriftlich erklärt, fest an der Verfassung zu halten, nicht, weil alle Punkte mit unserer Überzeugung übereinstimmten, sondern, weil jeder einzelne hier Opfer bringen musste, um in der National-Versammlung etwas zu schaffen. Von der Verfassung darf nichts geändert werden, als auf dem Wege, den die Verfassung selbst vorzeigt.*'

[449]*Verfassung des deutschen Reiches* (28 March 1849), § 196: '*Abänderungen in der Reichsverfassung können nur durch einen Beschluss beider Häuser und mit Zustimmung des Reichsoberhauptes erfolgen. Zu einem solchen Beschluss bedarf es in jedem der beiden Häuser: 1. Die Anwesenheit von mindestens zwei Dritteln der Mitglieder; 2. Zweier Bestimmungen, zwischen welchen ein Zeitraum von wenigstens acht Tagen liegen muss; 3. Einer Stimmmehrheit von wenigstens zwei Dritteln der anwesenden Mitglieder bei jeder der beiden Abstimmungen. Der Zustimmung des Reichsoberhauptes bedarf es nicht, wenn in drei sich unmittelbar folgenden ordentlichen Sitzungsperioden derselbe Reichstagsbeschluss unverändert gefasst werden*.' Cited in Willoweit and Seif (=Müßig) (2003), 587–8.

[450]Achanier (n.d.), Entwurf zu einer deutschen Verfassung, § 10, 7: *'Es kann an der Verfassung nur dann eine Abänderung gemacht werden, wenn solche von der Bundeskammer und dem Senat mit einer Majorität von 2/3 der Stimmen* [beschlossen wird].'

[451]*Entwurf des deutschen Reichgrundgesetzes* (26 April 1848), § 29, 21–2: '*Zu Abänderungen des Reichsgrundgesetzes ist die Übereinstimmung des Reichstags mit dem Reichsoberhaupte, in jedem Hause die Anwesenheit von wenigstens Dreiviertel der Mitglieder und eine Stimmenmehrheit von Dreiviertel erforderlich*.'

majority earned some critics. The *Deutsche constitutionelle Zeitung* viewed quorum provisions as too complicated at best, and constitutionally dangerous at worst; in the case of minority parties that could not hope to achieve quorum, the paper argued, disillusionment with the process could lead to these parties pursuing extrajudicial means to enact constitutional amendment, including rioting and revolution.[452]

Another branch of criticism was followed by David Hansemann, the Prussian minister of finance, who played a pivotal role in Prussian politics during the revolutionary years of 1848–9. In response to the proposal that the Prussian king should accept the united German crown and modify the constitution afterwards, Hansemann declared that this would set a dangerous precedent, because the constitution could be modified later in a more liberal and republican way.[453]

The royal veto on constitutional amendments was a bastion for royalists. At the other end of the line one, several municipalities petitioned the National Assembly in March 1849 that the executive should be excluded from participating in the process of constitutional revision.[454] The non-integration of the crown into the amendment process was not a position held by the majority, and the Imperial Constitution included the king's right to a suspensive veto on constitutional amendments or modifications. 'Suspensive' meant, in this case, that the parliament could overcome the veto of the king in three successive sessions.[455] This was a thorn in David Hansemann's side. According to him, it revealed the 'true' constituent intention to establish a republic 'hiding behind the title of a monarchy.'[456] Because of this, the Prussian government insisted on an absolute veto, which it believed was necessary in the enacting, abolishing, and amending of law.[457]

The voices in favour of a suspensive veto met in their assessment for a necessary balance between parliament and monarch. The issue of a veto had been raised in the pages of the *Deutsches Volksblatt* as early as December 1848, in which the author pointed out that the question of the veto was neither a question of the divine right of kings nor liberty, but rather a simple question of power. Indeed, the parliamentarian Friedrich Dahlmann had defended the instrument of the veto in the German

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[452]"Zur Verfassungsfrage Deutschlands XI", *Deutsche constitutionelle Zeitung*, No. 45, 22 February 1849.

[453]Hansemann, David (1849), Die deutsche Verfassung, 63–4.

[454]"Adressen an die Nationalversammlung in Betreff der Oberhauptsfrage und der Verfassung", *Deutsche Reichstags-Zeitung*, No. 66, 19 March 1849: '*Veränderungen in der Verfassung des Reichs wie der Einzelstaaten dagegen der Zustimmung der Exekutivgewalt gänzlich entnommen.*'

[455]*Verfassung des deutschen Reiches* (28 March 1848), § 196, in Willoweit and Seif (=Müßig) (2003), 587–8.

[456]Hansemann, David (1849), Die deutsche Verfassung, 64.

[457]"Deutschland, Frankfurt am Main", *Deutsche Reform*, No. 172, supplement, 5 March 1849: '*§ 18 Es muss darauf bestanden werden, dass das Bundesoberhaupt das Recht des absoluten Veto habe. Demgemäß würde § 18 etwa wie folgt zu fassen sein: Zur Erlassung, Auslegung, Aufhebung oder Abänderung von Bundesgesetzen ist die Übereinstimmung des Bundsoberhauptes, des Staatenhauses und des Volkshauses erforderlich.*'

National Assembly by saying that England's political situation would be better if the instrument of the veto would nowadays not be practically impossible. There was no other option than implementing a veto—the examples of Norway and North America showed that the alternative would be only a delay of requests.[458] The instrument of the veto was also generally supported by the *National-Zeitung*. One correspondent to this newspaper disapproved of an absolute veto, on the grounds that it would in fact weaken, rather than strengthen, the position of the king. Again, the English example was pertinent, as the monarchy's power of absolute veto had become so impractical that it had fallen into complete disuse. On the other hand, the example of Norway showed that a suspensive veto provided a reasonable avenue to deal with overhasty decisions of the parliament. In this argument, though, the newspaper distinguished between the territorial states and the federal state. In the territorial states, the king should have the right of a two-times suspensive veto, while in the federal state the king should just hold the right for a single suspensive veto. The reason for this lay in the position of the king and the role he played in the body politic. In the federal state, the king would not be the sovereign; rather, he would simply be the highest executive organ.[459]

This opinion was also followed by Johann Gottlieb Kuechler, who also argued that an absolute veto damaged the venerability of the king. An absolute veto implied that the dignity and will of the people could be disregarded by the king using an arbitrary prerogative. In doing so, it therefore alienated the person of the king from the will of the population, thereby affecting the prestige of his position, and the love and esteem in which he was held. The absolute veto, in other words, was not a symbol of the dignity of the king. Kuechler's solution, like that of the proprietors of the *National-Zeitung*, was the suspensive veto, which would confirm the king's position as the highest power in the state, while also ensuring that this power was subject to existing laws that the king has to observe. The examples of

[458]"Frankfurt 14. Dez", *Deutsches Volksblatt, eine politische Zeitung*, No. 206, 17 December 1848: '*Das Veto ist in England seit der Königin Anna nicht angewendet, allein es würde in mancher Beziehung besser stehen, wenn dessen Anwendung durch die Verhältnisse nicht praktisch unmöglich geworden wäre.* […] *Es ist keine Freiheits- oder Gottes-Gnaden-Frage, sondern eine Machtfrage*.' The *Deutsches Volksblatt* was a political newspaper, catering to the Catholic population of the Kingdom of Württemberg. It existed from 1848 until 1935/1965.

[459]"Die Deutsche Verfassung IV", *National-Zeitung*, No. 40, 12 May 1848: '*Wie Englands Beispiel beweist* […] *ist bei dem jetzigen Stand der Dinge das absolute Veto nur ein nominelles, in der That nicht ausübbares Recht* […] *Hiergegen sichert das supensive Veto der Krone, welches bei seiner Ausübung das Volk nicht verletzt, und daher, wie Norwegen zeigt, zum Heile des Landes angewendet* [werden] *kann und angewendet wird*. […] *Ein zweimaliges Veto sichert der Krone somit eine größere Macht, und erhält vollkommen die organische Verbindung zwischen der gesetzgebenden und der ausübenden Gewalt*. […] *Der Kaiser ist nicht der Träger der Rechtsidee, nicht der Souverain, sondern nur die ausführende höchste Behörde*.'

North America, Norway, and Brazil had amply demonstrated that the suspensive veto was both useful and reasonable, and made hasty and ill-considered decisions (both on the part of the legislature and the executive) impossible.[460] Thus, as Kuechler conceived it, the suspensive veto served a dual purpose. Pragmatically, it offered a reasonable monarchical check and balance to parliamentarianism, much as the constitution itself was a popular check and balance on monarchical power. Beyond this, it would help to cement the image of the king as a benevolent but not omnipotent leader, working in the best interests of his subjects.

The purpose of the ReConFort project has been to investigate European constitutional heritage. However, in this sketch of the German case study, the project has also opened new avenues of research and inquiry. The American and French discourses are necessary for understanding the contributions in this volume regarding the Belgian, Italian, and Polish case studies, but even in the necessarily brief discussion of the German example presented here, it is clear that there are heretofore unrecognised patterns of continuity and conformity, as well as adaptation to local conditions. The American 'invention' of the judicial review and the French reluctance to limit the legislative consent representing the continuous sovereignty of the people provided European formulations of constitutional precedence with both positive and negative poles; what Hansemann, Gagern, and their compatriots in the St. Paul's Assembly demonstrated was that there was still a spectrum in between those poles, in which political and judicial actors and constitutional theorists would attempt to set their own course. The form that this course took, and the influences upon it, provide us with further insight into the development of Europe's 'community' of constitutionalism, and it is these elements that promise and afford further opportunities for research.

8 Conclusion

In 1782, Charles Thomson found inspiration in Virgil's *Eclogue IV*, when he sketched his unfinished pyramid and proclaimed the *Novus Ordo Seclorum* for the newly-founded United States of America. Thomson's choice of expression implied a clean break from Europe and the birth of a new society unencumbered by Europe's old iniquities. Four decades later, Johann Wolfgang von Goethe believed that America's 'new order' had succeeded, when he lamented Europe's continued 'useless remembering and unrewarding strife.'

[460]Kuechler, J. G. K. E., (1850), Über die Reichsverfassungsfrage und das Reichswahlgesetz, 43: '*Das Recht des absoluten Veto ist aber zur Erhaltung der Würde des Reichsoberhauptes nicht nur unnöthig, sondern es kann jenes Recht auch diese Würde und das Ansehen des Reichsoberhauptes die Liebe und Anhänglichkeit zu demselben, und damit auch dessen Wirksamkeit bis aufs Äußerste gefährden, während das Suspensivveto in den nordamerikanischen Freistaaten, dem Königreich Norwegen und dem Kaiserreich Brasilien sich nicht nur als ganz unschädlich gezeigt, Ueberstürzungen unmöglich gemacht* […] *als angemessen und nützlich erwiesen hat*.'

As it turns out, neither was entirely correct. The 'new order' ushered in an unprecedented constitutional experiment, but one which borrowed liberally from the precedent of the Old World. Nor—in spite of Goethe's pessimism—was Europe unwilling (or unable) to learn. Remembrance, in this case, was hardly as 'useless' as Goethe imagined, and constitutional theorists and practitioners of nineteenth-century Europe looked to historical examples for their own inspiration. This amounted not necessarily to a preoccupation, but more to a desire to avoid the mistakes of the past by learning from them. Emmanuel Joseph Sieyès and Antoine-Claire Thibaudeau, for example, were opponents whose clashes in the French National Convention appear to have been irreconcilable; certainly, they were never able to resolve these differences before the Revolution was overtaken by Bonapartism and embarked on a new course. However, though their approaches differed, fundamentally they were addressing the same questions: who does a constitution serve? How does it do so? How can the integrity of the constitution be maintained? Most ambitious of all: what is a constitution in the pantheon of law and order, politics and society? These were the same questions posed to and by James Madison, Alexander Hamilton, and the American constitutionalists at the end of the nineteenth century, and they were the same questions debated in St. Paul's Church in Frankfurt in 1848 and 1849. Though the specific circumstances and contexts have changed, they are also, at a basic level, the questions facing western liberal democracy as a whole, and the European Union in particular, as we near the end of the first fifth of the twenty-first century.

If we return to Virgil's *Eclogue*, we find not just an appeal to a 'new order of ages', but also the prophecy of the Cumaean Sibyl:

> Now the last age by Cumae's Sibyl sung
> Has come and gone, and the majestic roll
> Of circling centuries begins anew:
> Justice returns, returns old Saturn's reign,
> With a new breed of men sent down from heaven.
> Only do thou, at the boy's birth in whom
> The iron shall cease, the golden age arise.[461]

Thomson believed Virgil's words to be an appropriate conception of his new society; here, too, the Sybil's prognosis appears prophetic in light of the challenges facing the European Union today. Thomson's unfinished pyramid, in its original iteration, symbolised the absence of the monarch in the new American system, but it can also be read as an indicator, in the words of Barack Obama, that '[t]he unfinished work of perfecting our union falls to each of us.'[462] This sentiment is as applicable to Europe as it is to the United States.

[461]Virgil, "Eclogue IV", in Virgil (2005), 11.

[462]Obama's Letter To His Daughters.

The enduring lesson of ReConFort is not one of 'useless remembering', as Goethe has phrased it in his poem *To the United States*, but rather that remembering serves a purpose in opening a window on to the challenges and opportunities faced by the European Union now and in the future. The individual member states of the Union have their own, unique contexts and complexities. Yet it is *also* true that European constitutionalism shares certain commonalities—even when that definition of 'Europe' extended to settlement away from the Old World, and even when that constitutionalism was a concerted attempt to break away from Europe. By acknowledging these commonalities, and by investigating their histories, ReConFort provides a greater framework for understanding the present day. In this way, ReConFort is a further stone in the gradual construction of Europe's own incomplete pyramid and, it is to be hoped, a contribution to the 'unfinished work of perfecting our union.'

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The Development of Constitutional Precedence and the Constitutionalization of Individual Rights

Gerald Stourzh

Contents

Abstract The first part concentrates on the emergence in England of "fundamental laws" in the sense of individual rights, the "liberties and properties" of Englishmen. I also show how notably in the case of the notorious "Septennial Act" of 1716, criticism that Parliament violated the "constitution" was expressed, and how about three decades later in the writings of Bolingbroke the word "unconstitutional" was born, gaining wide currency in the North American polemics against the British Parliament prior to independence. In the second part I concentrate on one of the most important aspects of early modern western constitutional history, the dissociation—in North America—of the "higher" positive law of constitutions as opposed to the

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inferior "normal" law of legislatures, at the same time also relativising the supreme character of "law" in the writings of Hobbes and Rousseau, and closely connected to this development, the upgrading of many individual rights to "constitutional rights", in other words, their constitutionalisation. In the third part I concentrate on two judgments of the U.S. Supreme Court throwing into particularly sharp relief the superiority of constitutional law vis-à-vis ordinarily legislature-made law: the first, long famous, is Marbury v. Madison of 1803, and the second one, Obergefell v. Hodges of 2015, is fast becoming one of the landmark cases of human rights protection, with the Court stating: "An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." In the fourth part I concentrate on the development, in Europe, of the only direct connections between individual persons and human rights enshrined in the highest law of the land or even beyond: first, the "Verfassungsbeschwerde" (constitutional complaint) first developed in Austria, particularly successful in Germany (commenting also on the different situation in France and in Great Britain); and second, the "Individualbeschwerde" (individual complaint) before the European Court of Human Rights, enabling the individual to appeal even against his or her own state for the protection of rights guaranteed by the European Convention of Human Rights.

1 Fundamental Laws and Fundamental Rights in the 17th and 18th Centuries and the Invention of the Word "Unconstitutional" in England

In early modern Europe, leges fundamentales, fundamental laws, played a significant role. The term seems to emerge in France around the 1570s. Innocent Gentillet, a writer favourable to the Protestants, named three fundamental laws of the French monarchy: First, the so-called lex salica, meaning the exclusion of female succession on the throne; second, the inalienability of crown property, and, most important, the existence of the three estates.[1] Several decades later, in 1607, we find an interesting speech by the first Stuart king in England, James I, at the same time king James VI of Scotland. Fundamental laws, he said, mean different things in England and in Scotland. In Scotland, fundamental laws are only those laws, "whereby confusion is avoided, and their kings' descent maintained…"—in other words, the settlement of royal succession. But James I added, addressing both Houses of the English Parliament, fundamental laws did not mean "as you doe, of their Common Law, for they have none, but that which is called IUS REGIS".[2] Referring to the Common Law opened up the whole world of Private law, of what was often said the rights of "meum et tuum". Indeed we find increasing references to individual rights, whether property rights or rights pertaining to the safety of the

[1] Stourzh (1995, p. 17).

[2] Rede vom 31. März 1607 in: McIlwain (1918, p. 300).

person such as the famous "habeas corpus" legislation (Magna Carta, Art. 39/29, Habeas Corpus Act 1679) providing protection against arbitrary arrest as "fundamental" in English political writing during the seventeenth century. I refer to two publications: In 1669, there appeared a booklet called "Angliae Notitia", widely known and translated. It said that the Commons of England (the Third Estate, in other words), were blessed "for hereditary fundamental Liberties and Properties"… "above and beyond the Subjects of any Monarch in the World."[3] A few years later, 1675, William Penn wrote that he understood by "fundamental laws""those rights and privileges which I call English, and which are the proper birthrights of Englishmen", in the first place property rights, second voting rights concerning property rights, and third participation in the judicial power through the system of trial by jury.[4] In 1679, the habeas corpus act was passed, improving (not establishing!) the protection of free men from arbitrary imprisonment. In 1689, there followed the "Declaration of Rights".[5]

Now in view of these and other documents I have spoken of the process of "fundamentalising" individual rights in the English legal system, a process which reached its apogee in 1765 with the publication of William Blackstone's Commentaries on the Laws of England. Blackstone subsumed his treatment of the supreme powers of the land under the heading "The Rights of Persons". There were three principal rights: the right of personal security, the right of personal liberty, and the right of private property. Yet now, more surprising, there were beneath these, several "auxiliary subordinately rights of the subject", and among these we find in the first place the "constitution, powers and privileges of parliament."[6] Therefore, I have spoken of "fundamentalising" individual rights in England (or Britain) during the seventeenth and eighteenth centuries which I distinguish from the process of "constitutionalising" individual rights, which occured in America.[7]

Inspite of this as it were "fundamental" place of the rights of persons, Blackstone —or indeed English law in general—has developed no procedural way do undo— to "unlaw", as Cromwell once said[8]—Acts passed by the King or Queen in Parliament except by new laws. Within the limits of parliamentary sovereignty, the English Parliament has on several occasions suspended the Habeas Corpus Act of 1679—first in 1688/89,[9] and notably during the Wars of the French Revolution and Napoleon, from 1794 to 1800. No procedural "precedence" for laws deemed "fundamental" by public opinion existed, though one cannot imagine "Magna

[3]"Liberties and Properties" from Chamberlayne's book are reprinted from the third edition, also giving London 1669 as place and time of the printing, and also in a German translation published in the Diarium europaeum of 1670 in: Stourzh (1989, pp. 34–35), *Studien zur Begriffs- und Institutionengeschichte des liberalen Verfassungsstaats*.

[4]Stourzh (1989, p. 29).

[5]Stourzh (1995, pp. 17–21).

[6]Blackstone (1765, pp. 125, 136).

[7]Stourzh (2007, pp. 292–293).

[8]Stourzh (1995, p. 17).

[9]Crawford (1915, pp. 613–630).

Carta" to have been changed by a law of parliament. There has been one law case in 1610, "Dr. Bonham's case", where the deciding judge, the famous Edward Coke, held that "in many cases the common law will control Acts of Parliament", and where he decided against a law privileging the London College of Physicians.[10] This decision angered James I, who removed Coke to another court; its interpretation has led to much controversy, and no additional acts of Parliament were declared void.

There was also, during the seventeenth and eighteenth centuries in England the rise of the notion of "constitution", describing as it were the whole "package" of basic institutions holding the state together. During the Glorious Revolution of 1689, the last Stuart King James II was charged having attempted "to subvert the constitution of the kingdom". But in the 18th century, Parliament also on occasion came under attack. In 1701 Daniel Defoe, on the occasion of an incident whose details I have described elsewhere, regretted that the Revolutionaries of 1689 had not provided for the Right of the people "to judge of the Infractions made in their Constitution" either by Parliament or by the Monarch.[11] More famous or infamous is Parliament's "Septennial Act" of 1716, in later decades strongly to be criticised by the American Founders. In that year, Parliament, elected for three years according to existing legislation, prolonged the duration of parliamentary election from three to seven years. But not, as one would assume, for the next Parliament to be elected, but prolonging its own duration from three to seven years.[12] Opponents argued, that frequently elected parliaments were part of the "fundamental constitution" of Britain. It was argued that from the moment where members of parliament were in office beyond the time for which they had been elected, they ceased to be "trustees" of the people; from this moment on they acted "by an assumed power, and erect a new constitution"[13]. Very modern sounding, for the year 1716! But the opponents failed, the majority in Parliaments had its way, and there was no higher instance to appeal to. Nevertheless, the consciousness that there was such a thing as a "constitution" and that there could be infractions on the constitution had been developed, and it did not take too long until an astute politician and political thinker, Lord Bolingbroke, used adjectives like "constitutional" (1730) and "unconstitutional" (1734). It took another three decades until the word "unconstitutional" began to spread widely—in America on the occasion of the so-called "Stamp Act crisis" of 1765, a process that I have described elsewhere,[14] but also by being used in Blackstone's Commentaries on the Laws of England, a book with a very wide reception both in England and in America.[15]

[10]Stourzh (1989, p. 49).
[11]Stourzh (1989, p. 46).
[12]Stourzh (2007, p. 317).
[13]Great Britain Parliament (1739, p. 410).
[14]Stourzh (1989, pp. 52–54).
[15]Stourzh (2007, pp. 60–79).

2 The Dissociation of "Constitutional" from Legislative Power in North America and the "Constitutionalisation" of Individual Rights (Colonies and States up to 1787/88)

Now I come to the central and most detailed part of my lecture. What I shall discuss in parts three and four concerns themes much better known in Europe, and there I will be briefer.

In North America, an important condition separated the colonial settlers from those having remained in the mother country. They were in need of some basic political documents laying down rules for new communities. These documents were of different kinds; royal charters, privileges given to proprietors empowering them to issue documents regulating the basic framework of a new colony, sometimes agreements of settlers without any higher authority like the "Fundamental Orders" of Connecticut of 1639, only later supplanted or amended by a royal Charter. For the colonial period, I shall concentrate on one most interesting document, "The Charter or Fundamental Laws, of West New Jersey, Agreed Upon" of 1676. This Charter is part of a larger document, "Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey". The Charter has eleven articles designated as "the common law or fundamental Rights" of West New Jersey. They chiefly embodied rights with reference to criminal procedure, including habeas corpus. This Charter now establishes—for the first time, as far as I can see—a definite procedural difference between its own basic character and that of normal laws which are prohibited from changing the articles of the Charter. These fundamental rights were agreed on "to be the foundation of the Government which is not to be altered by the Legislative Authority or free Assembly hereafter mentioned and constituted. But that the said Legislative Authority is constituted according to these fundamentals to make such laws as agree with and maintain the said fundamentals and to make no laws that in the least contradict, differ, or vary from the said fundamentals under what pretence or allegation whatsoever."[16]

This subordination of ordinary laws to the fundamental rights of the Charter anticipates in an amazing way the First Amendment to the American Constitution of 1791, which reads:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press: or the rights of the people peaceably to assemble, and to petition the Government for a redress of grievances". Here we have in both texts, of 1676 and of 1791, the most important innovation of American public law: The subordination and the lower rank of ordinary legislation with respect to the higher law of a fundamental order, from the late 18th century onwards referred to as constitution.[17] If we think not merely of the legislative sovereignty of the British Parliament, if we

[16]Stourzh (2007, p. 319).

[17]Stourzh (2007, pp. 314–318).

think of the basic importance of "the law" or "la loi" in the works of Hobbes or of Rousseau, the dissociation of "ordinary" law from a higher, yet positive "constitutional" law is all the more remarkable. Among the Americans of the Founding generation, pride in their possessing a constitution of higher ranking than ordinary laws also comes to the fore in the contempt for the self-perpetuating powers of the British Parliament, as evidenced in several critical references to the Septennial Act of 1716. James Madison in 1788, in the Federalist (No. 53), heavily criticised the British Parliament's power of changing by legislative acts some of the most fundamental articles of the government (government meant in the broad sense of political system). And Thomas Paine, in his "Rights of Man" of 1791, observed that the Septennial Act was proof that "there is no constitution in England."

Yet before entering the sphere of federal law in America, we need to stop at the level of the individual states. Most, though not all of them gave themselves new "constitutions" between 1776 and 1780, and many of them gave themselves "Declarations of Rights", usually called "Bills of Rights", as part of their constitution, like notably Pennsylvania or Massachusetts, or added them later on, like New York or New Hampshire. Two of them, Connecticut and Rhode Island, held on to their colonial fundamentals. The first and most famous of these Declarations, that of Virginia, stood as a document apart from the constitution. The rights enumerated in these Declarations were in part natural rights invoked in the struggle for independence, in part former "rights of Englishmen" embodied in numerous colonial documents. As far as the former are concerned, one has spoken of the "Positivierung des Naturrechts", the "positivisation of natural law", in the words of Jürgen Habermas.[18]

The enhancement of individual rights as elements of a constitution emerges 1776 in a well-known resolution of the town meeting of Concord, Massachusetts: "[W]e Conceive that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession and Enjoyment of their Rights and Privileges, against any Encroachments of the Governing Part."[19] By the end of the period of constitutional debate from 1776 to 1788, one of the most important constitutional debates in Western history—an American writer writing under the name of "Federal Farmer" in December 1787, (probably Melancton Smith of New York), came up with an amazingly nuanced hierarchy of rights:

"Of rights, some are natural and unalienable, of which even the people cannot deprive individuals. Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws, but the people, by express acts, may alter or abolish them [a reference to the possibilities of amending constitutions]; These, such as the trial by jury, the benefits of the writ of habeas corpus, &c. Individuals claim under the solemn compacts of people, as constitutions, or at least under laws so strengthened by long usage as not to be repealable by the ordinary legislature—and some are common or mere legal rights, that is, such as individuals claim under

[18]Habermas (1967, p. 55).

[19]Stourzh (2007, p. 96).

laws which the ordinary legislature may alter or abolish at pleasure."[20] This passage displays an amazing grasp of the hierarchy of legal norms, much later developed by Adolf Merkl and Hans Kelsen as "Stufenbau"—Theory of legal norms, though of course Merkl and Kelsen would not have admitted the category of natural rights. I shall soon quote a second example of this grasp of the hierarchy of legal norms. The piece just quoted is also a remarkable example of the lowness of rank of "ordinary laws" of which I have just spoken.

Since the formation of the American state constitutions from 1776 onwards it is possible to speak of modern constitutions having an "Organisationsteil" and a "Grundrechtsteil", an organisational part and a fundamental rights part. There occurred thus two important processes simultaneously: first, the dissociation of constitutional from ordinary law, and second, what I have called the "constitutionalisation of individual rights."[21] And a third process, deriving from the first two, also emerged on the state level prior to the entry into force of the federal constitution: The judicial review of ordinary legislation, measured against the superior law of the constitution.

I consider two cases, though many more have been noted in the literature, the case of Trevett v. Weeden in Rhode Island 1786, and the more complete North Carolina case of Bayard v. Singleton of 1786/87. First to Rhode Island:

A butcher by name of John Weeden accepted from his clients only gold or silver coins and no paper money—in highly inflationary times. Yet there existed a law of the legislative assembly of Rhode Island, making the refusal to accept paper money a punishable offense; also this law expressly excluded the procedure of trial by jury and thus a case was opened against the butcher. The Court declared its incompetence. Yet it transpired through the press that four of the five judges had voiced the opinion that the law was void, because it was unconstitutional. The judges were asked to appear before the legislative assembly, where they were threateningly told that it had never happened before that a law of "the supreme legislature" had been declared unconstitutional and void, and that this could lead as far as "to abolish the legislative authority". By the end of the year the four judges said to have spoken of unconstitutionality were not renewed in their office. Yet an interesting accompanying publication has to be mentioned. The lawyer for the butcher Weeden, by name of James Varnum, published a brochure of about 60 pages on the case. He argued that the alleged "supremacy" of the legislative assembly was derived from the constitution (at that time this was still the Royal Charter of 1663 with considerable possibilities of self-determination), and "subordinated" to it. The author expressly referred to Emer de Vattel, famous Swiss author on international law, who had written that the legislature of a nation could not change the constitution since its competence was derived from the constitution. I quote from the French edition (there very soon appeared an English translation): "Enfin, c'est de la constitution que ces législateurs tiennent leur pouvoir, comment pourraient-ils la changer, sans détruire le

[20]Letters from the Federal Farmer, 1787/88 in: Storing (1981, p. 261).

[21]Stourzh (2007, pp. 314–320).

fondemenent de leur autorité."[22] The judicial power, Varnum continued, could not recognise as law an act of legislation which contradicted the constitution. And trial by jury was "a fundamental, a constitutional law."[23]

Now to North Carolina, the case of Bayard v. Singleton. From the point of view of constitutional history, I consider this case at least as important as the much better known federal case of Marbury v. Madison. It also involved the constitutionally guaranteed right of trial by jury. The legislative assembly of North Carolina had passed a law which ordered that suits of persons whose property had been confiscated during the war with Great Britain—in other words persons who had sided with Britain against independence, called "loyalists"—that suits of such persons aiming at the recovery of their property had to be rejected by the courts. The Supreme Court of North Carolina had great doubts that this law was compatible with the constitutional guarantee that property cases had to be dealt with by trial by jury in the ordinary courts. After various attempts for a compromise settlement had failed, the Supreme Court (three judges) judged unanimously that it could not reject the suit. In the reasons for its judgment, the Court said that the legislative assembly had no competence to annul that article of the constitution. If the legislative assembly would ignore the constitution in this case, then it might also ignore it in other cases. Then they might condemn someone to death without trial by jury, or they could nominate themselves legislators for lifetime, or they could even make legislative power hereditary. The Court added that the constitution was "the fundamental law of the land" and therefore the law in question had to be considered as invalid.[24]

Now at least as interesting as the judgment of the Supreme Court of North Carolina is an article written by James Iredell, a lawyer for the plaintiffs, in August 1786. This excellent jurist, born in England, was later appointed by President Washington a member of the first Supreme Court of the United States. Iredell set to examine possible remedies against violations of the Constitution by the legislative assembly. There was the right of petition to the assembly; he ridiculed the appeal of the electors to the elected, and also referred to the spectre of legislative omnipotence by pointing to the British Septennial Act of 1716! Another remedy would be the right of resistance—in other words, violence. Apart from the fact that this was a dreadful expedient, he argued that the violation of individual rights of single persons would never provoke the majority to armed resistance. There remained then a third remedy: the judicial power. It had to be inquired as to whether the judicial power had "any authority to interfere in such a case". He affirmed it by a few memorable sentences, worth to be set alongside the much better known ones of Chief Justice Marshall 17 years later: He described the duty of the judicial power as follows:

"The duty of that power, I conceive, in all cases, is to decide according to the *laws of the State*. It will not be denied, I suppose, that the constitution is a *law of the state*, as well as an act of assembly, with this difference only, that it is the *fundamental* law,

[22]de Vattel (1863 (1758), p. 168).

[23]Stourzh (1989, pp. 58–60).

[24]Stourzh (1989, pp. 60–62).

and unalterable by the legislature, which derives all its power from it. One act of Assembly may repeal another act of Assembly. For this reason, the latter act is to be obeyed, and not the former. An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent with the constitution, is *void*, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people*, *not mere servants of the Assembly*."[25] A year later, 1787, Iredell held the judges' obligation "to hold void laws inconsistent with the constitution" for "unavoidable", "the constitution not being a merely imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which therefore the judges cannot wilfully blind themselves."[26] This logic would have pleased the architects of the "Stufenbau-Theory" of legal norms, to which I have already referred. James Iredell of North Carolina is indeed a precursor of Merkl and Kelsen.

3 Fundamental or Paramount Law on the Federal Level in the United States: Marbury v. Madison 1803 and Obergefell v. Hodges 2015

Discussion of the Federal draft constitution in 1787–1788 brought forth a new word to designate the higher rank of the constitution with regard do ordinary legislation. In addition to "fundamental", the word "paramount" made its appearence. First, it seems, 1788 James Madison, in article No. 53 of "The Federalist," spoke of "the authority of a paramount constitution."[27] "Paramount"—that meant, the highest law of the land. Now the word "paramount" reemerges in one of the best known cases of the federal Supreme Court, the case of "Marbury v. Madison" of 1803. It was the first case in which the federal Supreme Court declared a passage of a federal law void, because it contradicted the constitution. The details of the case are not really important. It was no great "political" case. There had been a change of the Presidency from John Adams to Thomas Jefferson. The outgoing President had appointed one William Marbury to the office of justice of peace for the District of Columbia, the outgoing Secretary of State—ironically no one else but John Marshall, at that time amazingly simultaneously Secretary of State and President of the Supreme Court!—had out of negligence failed to deliver the appointment to the appointee, and the new President Jefferson did not wish to have the appointment

[25]Stourzh (1977, p. 171), emphasis in the original, to be found in: McRee (1858, pp. 147–148).
[26]Stourzh (1989, p. 317).
[27]Cooke (1961 (1788), p. 361).

delivered anymore. So Marbury sued and requested that the Supreme Court issue a necessary document ordering delivery of the appointment, called "writ of mandamus". Now the Supreme Court came to the conclusion that it was not constitutionally empowered to issue such a writ. Famous is the case for the legal reasoning of the opinion of the Court, written by the Chief Justice Marshall himself. The logic was not different from the logic displayed by the North Carolina Supreme Court in 1786. But now an Act of the Federal Congress and the Federal Constitution were at stake. I quote what I consider the central part of the argument:

"The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it….

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered, by this Court as one of the fundamental principles of our society" (Supreme Court of the United States, 5 U.S. 137 1803, at 177).[28]

The words "paramount" and "written constitution" have become the key words characterising the high rank—the highest rank—of "constitution" in the hierarchy of legal norms.

Now let me jump directly from 1803 to 2015. I do by-pass landmark cases like the Dred Scott case of 1857, declaring slavery to be valid in the entirety of the United States—generally considered as the Supreme Court's "worst" decision ever—or Loving v. Virginia of 1967, ending the punishment of marital relations between blacks and whites, or Brown v. Board of Education of Topeka 1954 (ending racial segregation in schools), and go directly to the 2015 case of Obergefell v. Hodges. This decision of June 26, 2015, decided with the smallest possible majority of five against a minority of four judges, declared same-sex marriages as constitutional, thereby making the prohibition of same-sex marriages in 13 American States illegal. This case, which I am sure is to be considered one of the great civil rights cases of American constitutional history, has an interesting background. James Obergefell and his partner John Arthur, the latter with the deadly ALS illness (amyotrophic lateral sclerosis) and soon to die, decided to get married in the State of Maryland, because same-sex marriages were prohibited in the State of Ohio, where they lived. After the death of his partner, James Obergefell requested that on the death certificate of his partner, his own name be indicated as spouse. This was refused by the State of Ohio, and the case finally went to the U.S. Supreme Court.

The majority of five, which incidentally included all three women judges sitting on the Court, came in the lengthy "opinion of the Court" to the conclusion based on the 14th amendment to the constitution, notably on its clause that no State shall "deny to any person within its jurisdiction the equal protection of the laws": I quote

[28]Commager (1963, p. 193).

from the Court opinion, written by Justice Anthony Kennedy: "An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." The opinion went on to say that "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."[29] Thus the principle formulated by James Iredell or John Marshall at the turn from the 18th to the 19th century—supremacy of the constitution, subordination of ordinary legislation—was powerfully reaffirmed in 2015. I should add that the four judges in the minority all wrote quite bitter minority opinions, suggesting that the majority had gravely disregarded the democratic principle of majority rule; one judge, Justice Scalia—who recently died—went as far as charging the majority of a "juridical Putsch."[30]

4 Europe, "Constitutional Complaint" (Verfassungsbeschwerde) and "Individual Complaint" (Individualbeschwerde): Roots 1848 and 1867, Beginnings 1919/1920, Breakthrough After World War II

In this concluding section, I shall concentrate on the development of *a direct access of individuals to the constitution*. The stronger separation of public and private law in (continental) Europe, the growth of separate judicial institutions (unlike the USA), have made this access perhaps more complicated than in America. The most important precondition of gaining access—or wishing to gain access—has been alike in America and Europe the incorporation of basic or fundamental rights ("Grundrechte") into constitutional texts—something which I discussed in section B. As long as declarations of individual rights—(rights of men and of citizens in the beginnings of the French Revolution, later during the 19th and early 20th centuries chiefly rights of citizens (rights of Belgians, rights of Germans etc.)—remained without a procedural "tie" to individuals, these declarations were chiefly appeals to the legislator, to heed individual rights. But there were attempts to do more. In France, the Abbé Sieyès proposed in 1795 the creation of a "jury constitutionnaire" in order to settle conflicts between legislation and constitution. Complaints were to be directed to the Jury constitutionnaire not merely by both chambers of the envisaged parliament, (Conseil des Anciens, Conseil des 500), but also, and this is most interesting, to individual citizens ("citoyens au nom individuel").[31] His plan was not accepted—too strong were in France the sympathies in favour of "la loi."[32]

[29]U.S. Supreme Court, case of Obergefell v. Hodges, 576 U.S.— (2015).

[30]See Footnote 26.

[31]Pasquino (1998, pp. 93–97), text of Sieyès' document, ibid. (pp. 193–196).

[32]Stourzh (2015, p. 114).

In Germany, we note an interesting early development in Bavaria. According to the constitution of 1818, citizens were given the right "to bear complaints concerning the violation of constitutional rights" to the parliamentary assembly, called "Stände-Versammlung". A different level was reached during the revolution of 1848/49. The German draft constitution of 1848/49 envisaged "suits of German citizens concerning violation of rights guaranteed by the German constitution." A high Court, the *Reichsgericht*, was to decide about such suits. Similarly, the draft constitution for the Habsburg Empire of 1849 provided that suits concerning violation of constitutional rights by civil servants could be addressed directly to the Supreme *Reichsgericht*. Both draft constitutions were never put into practice. In Germany, the idea expressed in the 1849 draft constitution was only to be taken up after World War II. In Austria, for peculiar reasons the liberal tradition of 1848 brought forth a liberal constitution for the non-Hungarian part of the Empire, the so-called December-Constitution of 1867. This was a collection of "fundamental laws", and one of them, the "Fundamental law on the creation of a *Reichsgericht* provided that it was competent to hear "complaints of citizens concerning violations of their political rights guaranteed by the constitution". The procedure concerning the *Reichsgericht* had, however, a great weakness: the adminstration was not bound to abide by the judgments of the *Reichsgericht*. This legal gap was filled after World War I, when Austria and Czechoslovakia established the first specialised constitutional courts in the world—as distinguished from the U.S. Supreme Court. The Austrian Constitutional Court was created with the law of January 25, 1919 and was incorporated, with slight changes, into the Austrian Constitution of October 1, 1920. The Czechoslovakian Constitutional Court was created by the Constitution of Czechoslovakia of February 29, 1920. While the Czechoslovakian Court had few competences, the Austrian Court obtained the competence to decide on complaints, here rendered in a slightly simplified way, concerning violations of the plaintiff's constitutionally guaranteed rights by decrees (Bescheide) of the administrative agencies of the State, notably based on unconstitutional laws.[33]

In Germany, the Constitutional Complaint was first embodied in 1951 in the Law on the Constitutional Court, on the level of an ordinary law. Only in 1969 was it incorporated into the *Grundgesetz* (Art. 93, Paragraph 1, Number 4a). The text very simply states that everyman is entitled to bear complaint—addressed to the Constitutional Court—of having been violated by public authority in one of his or her fundamental rights (*Grundrechte*) or certain other specifically named rights. In the meantime, constitutional complaints have enormously increased and by now amount to about 96% of all cases brought before the Constitutional Court.[34] Among rights violated, not merely in Germany, the right to equality before the law has become one of the most important, if not the most important right whose violation is submitted.

In France, skepticism about the "gouvernement des juges" was widespread among decades. The Conseil Constitutionnel, established by the de Gaulle constitution of

[33]Stourzh (2015, pp. 115–116).

[34]Stourzh (2015, p. 117).

1958, knew no individual complaint. An attempt by President Mitterand to introduce it in 1989 failed. Now since the constitutional reform of 2008, a peculiar procedure has been introduced, entitled "question prioritaire de constitutionnalité", in force since 2010. In the course of trials, the question of constitutionality of laws may, after having been examined by the Conseil d'Etat or the Cour de Cassation, be submitted to the Conseil Constitutionel. This is the first time in France that the examination a posteriori of the constitutionality of laws has become possible.[35]

In conclusion, I would like to point to the evolution of individual complaints against rights violation beyond the national level. I exclude here the rather limited possibilities offered by various UN Conventions, and I concentrate on the European Declaration of Human Rights of 1950, in force since 1953, with its most important instrument, the European Court of Human Rights, established in 1959. The admission of complaints by individuals first was at the discretion of individual member states; Germany had admitted it in 1955, Great Britain in 1966, and France only in 1981. Since a reform of the Court in 1998, every one of the 47 members of the Council of Europe including Russia is obligated to admit individual complaints. Individual complaints are only possible, when all domestic remedies have been exhausted. The Court became victim of the hopes engendered by the extension of individual complaints to all member states. In 2011, the high point of more than 160,000 pending applications was reached; since then new procedures have begun to reduce this enormous backlog. In Austria, the articles of the European declaration were given the rank of constitutional provisions. In Germany, the articles of the European Convention have no constitutional standing, yet the German Constitutional Court has said in 2004 that German courts are under the obligation of taking into account the judicature of the European Court of Human Rights. In Norway, since 1999 a law has given the European Convention of Human Rights and some other international conventions with relevance for human rights a special rank above other legislation (Law of 21st May 1999 enforcing the status of human rights in Norwegian law).

Thus the European Convention has assumed, in some countries at least and in different ways, a status of precedence vis-à-vis ordinary law, not quite dissimilar to constitutional rights on the national level. With transcending national boundaries, the special protection of human rights which set in 240 years ago, has now reached, in Europe at least, a level which has never before existed in human history.

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"To Which Constitution the Further Laws of the Present Sejm Have to Adhere to in All…" Constitutional Precedence of the 3 May System

Anna Tarnowska

Contents

Abstract Understanding of the principle of constitutional precedence raises numerous doubts in the Polish case. Although this rule was stated *expressis verbis* in the Declaration of the Assembled Estates from 5 May 1791 joining May Constitution, following studies allow for the ascertainment that its content and significance for the legal order was perceived differently. In light of experienced practice, we may not accept without reservations the claim of a general recognition

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of a superior position of constitution towards other sources of law. We may agree as to the purpose of introducing the supremacy clause: first and foremost, it was the desire to guarantee the desired stability of the system against foreign powers' and internal conservative opposition threats. The author developed the title issue in the field of former Polish legal tradition of fundamental law and French influences; analyzed also the extraordinary procedure of adopting and revision of the 3rd May Constitution 1791. Furthermore the perception of the analyzed relationship between the Constitution and acts of ordinary legislation should be regarded as inconsistent. In the following days and months, the deputies of the Great Sejm made attempts to introduce regulations into ordinary legislation that were contrary to the May Constitution, but at the same time the clauses related to the obligation to adjust legislation to the provisions of the Government Act are a much more progressive systemic solution than the previous ones. Contemporary acceptance of the assumption of supremacy of the Constitution leads to the innovative effect of accepting the concept of unconstitutionality, *id est* the obligation to eliminate from the legal order acts which are incompatible with the Constitution. And again, at the level of the acts comprising the "3 May system" (on the Sejm and the Extraordinary Sejm), this conception remains implemented to a limited degree even when the Sejm deputation was entrusted with the power of preventative constitutional control of draft legislation. It would thus seem that the existing situation can be interpreted as a sort of intermediate stage, symbolizing the arrival of a substantive and axiological legal understanding of the Constitution's supremacy. However, we should objectively assess the innovative Polish steps along the path of encapsulating the state order in a constitutional act, as well as hierarchization of the legal system, however imperfect they may have been.

1 Introduction

What is a constitution on the basis of the Stanislawow system of the First Republic? How did contemporaries understand the concept of a superior act? Can the Polish Constitution of 3 May be held up as an example of a modern mechanism serving to enshrine a political system in law? How to avoid the danger of applying present-day institutions to the political and legal practice of the 18th century?

There is no doubt the elite of the First Republic were aware of the fact that the events observed and commented upon in political literature were for contemporaries of an absolutely crucial character. At the same time, all efforts had to be undertaken with the greatest caution, out of fear of the reaction that may come from neighbouring powers, particularly Russia. Even this caution did not, however, prove helpful. "*Let it be known to whom it concerns. Overturning the Constitution and the internal Government of the Republic of Poland by illegal revolutions on 3 May 1791. The widespread confusion that continually lasted in this unfortunate epoch in the whole country, and the alarming spread of the spirit of faction and disorder; having enslaved His Royal Highness the King of Prussia, and the Empress of All*

the Russia to agreement and the abolition of the Neighbouring Powers…", was included later in the draft treaty between Russia and Prussia.[1] Similarly, in private correspondence to "her brother" Stanisław August, Catherine the Great wrote about the "Revolution of the 3rd of May",[2] whereas the subsequent critical Imperial Declaration gives the following account: "the overthrow of the entire Government to its very foundations, on one day of 3 May 1791, under which the Republic has flourished for centuries"[3]; the process of enacting the Polish Constitution was likened to the French Revolution, and similar public disturbances were expected.

Essen, the ambassador of Saxony, wrote to Dresden "in essence, the total system of governments previously in existence has been overthrown";[4] "I cannot assess this revolution as anything other than a desperate step, as the nation was convinced of being in danger. I am also certain that this revolution will result in a great deal of problems and difficulties for us".[5]

As it turned out, even the limited systemic reform and political revolution which was ultimately carried out, quite mild for the 'truly patriotic' Republican camp, would be too far-reaching of a step. The "revolutionary" argumentation would serve Polish conservatives, enemies of the Constitution: Dyzma Bończa Tomaszewski would write "about the terrible freedom of the Polish revolution" and "the most disastrous revolution".[6] Stanisław Szczęsny Potocki wrote to the king from Vienna in a similar tone: "If I had not seen the King leading the Revolution, I would have perceived it as a plot against the Republic and a blow inflicted to the freedom of the Noble Polish Nation".[7]

Polish opinion writing and diplomacy directly countered this. The adoption of the Constitution and accompanying laws was frequently referred to as a "gentle revolution". Hugo Kołłątaj declared "all hope in the gentle revolution, which the

[1]'Niech będzie wiadomo komu należy. Wywrócenie Konstytucyi I Rządu wewnętrznego Rzpltey Polskiey przez nielegalną Rewolucyą 3. Maia 1791. Zamieszanie powszechne, które od tey nieszczęśliwey Epoki w Kraiu całym nieprzestannie trwało, I zatrważaiące szerzenie się w nim ducha fakcyi i zaburzenia; zniewoliwszy Nayiaśnieyszego Króla Imci Pruskiego, I Nayiaśnieyszą Imperatorowę Jeymć Wszech Rossyi do porozumienia się i zniesienia z Sąsiedzkiemi Mocarstwami…', 'Proyekt traktatu Do zawarcia między Nayiaśnieyszym Królem Imcią Pruskim, a Nayiaśnieyszym Królem Imcią I Rzeczypospolitą Polską', Archiwum Głowne Akt Dawnych (Central Archives of Historical Records [further: AGAD]), Archiwum Królestwa Polskiego [further: AKP], Teka 7, Nr 35, k.289–290 (289).

[2]Letter of Catherine, 9 Juillet 1792, AGAD, Zbiór Popielów, sygn. 390, k. 67–69.

[3]AGAD, Archiwum Sejmu Czteroletniego (Four-Years-Seym Archives [further: ASCz]), sygn. 24, k. 81.

[4]Letter of Franciszek Essen to the Minister of Foreign Affairs in Dresden, Johann Loss, of 4 May 1791, No. 21, cited in: Kocój (2000, p. 40).

[5]Letter of Franciszek Essen to the Minister of Foreign Affairs in Dresden, Johann Loss, of 4 May 1791, No. 22, cited in: Kocój (2000, p. 42).

[6]Dyzmy Bończy Tomaszewskiego Komissarza cywilno-wojskowego województwa Bracławskiego nad konstytucyą i rewolucyą dnia 3. maja roku 1791 uwagi, n.p., n.d., f.ex. p. 8–9, 24.

[7]Letter of Stanisław Szczęsny Potocki to Stanisław August, 30 Mai 1791, AGAD, Zbiór Popielów, sygn. 392, k. 1.

present Parliament should bring us"[8] and the prevalence of the term should be attributed to him, inspired as he was by the ideas of Gaetano Filangieri and Antonio Genovesi.[9]

The term "gentle" was also at the same time to ensure that selecting the path of revolution would be in nobody's interest if identified with the violence of the French Revolution. It is known that in Poland even the organization of the "Black Procession", which was an expression of the demands of the bourgeois, and courageous speeches by representatives of the urban populace, gave rise to an unjustified panic among the noble political nation. Nobody would directly compare the events in Paris and Warsaw; quite the contrary, some luminaries would find numerous differences, ascribing moderation and non-violence to the Polish activities.[10]

In the words of Feliks Oraczewski, deputy of Stanisław August in Paris: "An opinion on freedom has become a Religion, everyone wants to be free but they cannot find the right path. If they are faced with the smallest obstruction, they will turn violent against the people".[11] In a letter to an unknown addressee written much earlier, Oraczewski argued naively that "we do not know what the reception of Our Revolution was in Vienna, Berlin or St. Petersburg, but it can be inferred from Bulgakov's countenance and demeanour that Moscow will not wage a war on us for the Revolution, just as it did not wage a war on the King of Sweden 19 years ago".[12] Already in 1789 after first reform of Great Sejm, as for example military organisation reform, the Marshal of the Lithuanian Confederation appealed to the king in these words: "Our revolution is different from that in other Countries, for there the peace has been broken, and the result was the destruction of all the impulse to revolution; everything was done here in an undisturbed peace, and in this Sejm where we make law, its Performance is to be found. The Deputation made to

[8]Kołłątaj Hugo, Do Stanisława Małachowskiego, referendarza koronnego. O przyszłym sejmie Anonima listów kilka, cz. 1: O podźwignięciu sił krajowych, List Pierwszy, Biblioteka Polskiej Akademii Nauk w Krakowie, Rkp. (manuscript) 176, k. (charter) 6.

[9]Leśnodorski (1975).

[10]About this "tactical" issue cf. also Salmonowicz (2001).

[11]'opinia o wolności stała stała się Religią, wszyscy chcą być wolnemi ale porządnie trafić na tę drogę nie umieią gdy się naymnieysza pokaże zawada gwałtem prze-ciw ludowi czynią', letter of Feliks Oraczewski to Stanisław August, AGAD, Zbiór Popielów, sygn. 418, k. 295.

[12]'Jeszcze tu nie wiemy, iak Nasza Rewolucya iest wzięta w Wiedniu, Berlinie y Petersburgu, lecz po minie i zachowaniu się Bułhakowa można suponować, że Moskwa nam nie wypowie woyny za Rewolucyę, iak niewypowiedziała przed lat 19 Królowi Szwedzkiemu', Letter of Feliks Oraczewski to NN, w Warszawie, dnia 11 Maja 1791, AGAD, Zbiór Popielów (collection of Popiel family), sygn. 418, k. 571. Jakov Bulgakov was Russian envoy in Warsaw 1790–1792, successor of Magnus Otto Stackelberg (in Warsaw during 1772–1790).

compose the form of the Government has crowned the anniversary of the Election of Your Royal Highness".[13]

Even as the Russian declaration[14] opening the way to Russian-Polish war was published, the aforementioned royal deputy deluded himself further with the following words: "I think that the proclamation requires a genuine explanation which would distinguish our revolution from the French one and prove the proclamation of St. Petersburg erroneous".[15] After publishing the Russian declaration in Paris, Oraczewski called for a widespread explanation of how much the Polish reform, which was curbed by religion and the "simplicity of customs", was divergent from the French Revolution.[16] He sees the mechanisms that will effectively protect the Constitution in the very same traits and in the leadership of the king. Besides, the Constitution "does not need any protection as it will defend itself in the eyes of the People of Europe".[17]

Oraczewski, as well as many others, demonstrated extreme naivety. The Russian narrative was of a strictly propagandistic character. On the one hand, to satisfy the demands of international diplomacy it referred to the theoretical danger posed by the spread of revolutionary ideas; on the other, it sought to protect Polish liberty "threatened" by the constitution. In response to the charge that this was an odd argument coming from a state which itself was of a despotic nature, the Russian ambassador Bulgakov was said to have responded to Marshal Kazimierz Sapieha that in Russia this had been the case for a long time, but "… your despotism began on Monday, 16 April (…) You issued a declaration of war against all of Europe, and specifically against us". Sapieha responded that "it is entirely something other than despotism, that which we have done solely in our own defense (…) The entire nation has verified and consecrated the act of 3 May. And whatever we may do now, we do

[13]'Rewolucya [s. 333] Nasza różna iest od rewolucyi innych Kraiów, bo tam zamięszani spokoyność, i obalone wszystkie sprężyny rewolucyi były skutkiem, u Nas w nienaruszoney spokoyności wszystko się stało, i w tym Seymie, w którym stanowiemy Prawa, znayduie się ich Exekucya. Deputacya wyznaczona do układania formy Rządu uwieńczyła rocznicę Elekcyi W. K. Mci' Sessya 195, 24th November 1789, Diariusz Sejmu Czteroletniego (sessions 98–198 and 327), from the manuscript preserved in AGAD, http://www.wbc.poznan.pl/dlibra/publication?id=20152&tab=3 (2016-10-03).

[14]AGAD, AKP, Teka 1, Deklaracja of 8th/18th May 1792. Comments of the King in his letter to Deboli, 19th May 1792, AGAD, Zbiór Popielów, sygn. 413, k. 381–382.

[15]'zdaje mi się, że ta proclamacia potrzebowałaby objaśnienia autentycznego które by pokazało różność celu y przyczyn rewolucyi naszey od Francuskiei y omył-kę proklamacyi Petersburskiej', letter of Feliks Oraczewski to the King, 9th March 1792 Paris, AGAD, Zbiór Popielów, sygn. 418, k. 277.

[16]Letter of Feliks Oraczewski to the King, 5th March 1792, Paris, Zbiór Popielów, sygn. 418, k. 270–273.

[17]'nieobrażaiąc nikogo sama się lepiey broni w opinii powszechności całey Europy', letter of Feliks Oraczewski to the King, 18th May 1792, Paris, AGAD, Zbiór Popielów, sygn. 418, k. 365. Cf. also elaboration of the correspondence: Kocój (1988).

as a free Nation, which desires not to attack, but only to defend itself".[18] His riposte, however, was in vain. Yet another element of the anti-constitutional narrative consisted in highlighting the fact that the new acts were a breach of the existing law and the guarantees given under Russian pressure of 1775–1776[19] (the notes of Stackelberg, and his successor Bulgakov's Declaration). Ambassador of Stanisław August, Antoni Augustyn Deboli was more aware of these facts and had prophetically wrote to the King, in the beginning of 1792, in relation to the meetings of the Dietines which were about to be held in February and were supposed to give an opinion on the Constitution Act: "I always say that Your Majesty and everyone else has to devote to the success of the meetings of the Dietines and to demonstrate patriotism, not to overthrow the Constitution. Otherwise, the latter will result in the partition of Poland, since rumours could already be heard that each of the three Powers would take a part of Poland, and the rest would be turned into the Duchy to be given to a few, under obeisance respectivé of these Powers".[20]

Jörg K. Hoensch called the Empress' manifesto of May 1792 "grandiose Machiavellianism in its political insincerity and unscrupulousness. The woman of the Enlightenment, a supporter of liberty and natural rights and a correspondent of Voltaire, Grimm, Falconet, and d'Alembert, denied the Polish nation its freedom to establish a constitution for itself and took refuge in the state guarantee of 1768. The autocrat criticized the "despotism" of the new hereditary monarchy and simultaneously its democratic elements".[21]

This particular issue—awareness of essential reforms, the drive to retain external sovereignty, and to strengthen structures of the state while permanently in a state of fear regarding the reaction of Russia—can potentially explain the extreme inconsistency in the actions taken by the Constitution's framers, and perhaps even understand its essence. As early as in the first months of the Great Sejm, Essen had already began to operate under the assumption that the fate of Poland would be decided in Berlin and Petersburg.[22] The mere expression "gentle revolution" would seem to be a symbolic reflection of the paradoxes associated with the preceding.[23]

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[18]Sapieha: 'wcale iest różnym od despotyzmu, cośmy tego dnia iedynie dla obrony naszej uczynili (…) Cały naród potwierdził y poświęcił czyn 3 maja. A cokolwiek teraz czyniemy, czyniemy iako Naród wolny, który nie atakować, ale tylko bronić Siebie chce', relation in the letter of the King to Deboli, No 120, 28 Aprilis 1792, AGAD, Zbiór Popielów, sygn. 413, pp. 369–370.

[19]AGAD, Archiwum Publiczne Potockich [further: APP], sygn. 97, p. 49.

[20]„ja zawsze powiadam, że gdy się wszyscy wraz z Waszą Kr. Mością nie przyłożą do sukcesu tych Sejmików, y do okazania patriotyzmu, nie na wywrocie Konstytucyi skończy się, ale na dziale Polski, bo iuż znowu daią się słyszeć odgłosy o tym zamyśle, to iest: że każda z trzech Potencji weźmie część Polski, a resztę obrucą (sic) w udzielne Księstwo dla kilku osób pod hołdownictwem respectivé tychże Potencyi". Letter of Antoni Augustyn Deboli to the King, Nr 83, ce 6./ce 17. Janvier 1792, AGAD, Zbiór Popielów, sygn. 415, pp. 8v–9.

[21]Hoensch (1997, p. 442).

[22]Kocój (1996, pp. 32, 87).

[23]Cf. analysis of Pepłowski (1961, pp. 53–59).

An analysis of the issue presented in the title of the work, that is of the precedence of the constitution on grounds of Polish constitutional activities taken in 1788–1792, should begin with several remarks of a definitional nature, and then be followed with a brief description of the sources used. The substantive chapters will be devoted to the extraordinary procedure applied in adopting the Government Act, the Polish tradition of the Henrician Articles and Pacta Conventa, the issue of the relation between the Government Act and the Cardinal Laws, and finally the nullification clause and relation of the Government Act's provisions to the normal legislation of the Great Sejm.

2 A Note on Terminology

Implementation of the principle of constitutional supremacy in constitutional practice allows for the possible existence of lower-level laws whose compliance with the constitution, when controlled, will be called into doubt. However, before it becomes possible to speak more broadly about the problem of actions contrary to the Constitution, it should be noted what terminology was used in the era being discussed. Importantly, it was common in the era of the Great Sejm to be aware that thorough political and systemic reforms were required, which were to bring a "new form of government".

This concept was anchored in opinion journalism: for example, one anonymous author gave his work the title "Thoughts on Improving the Form of Government", and published it in the "Collection of Works Inspired by Observations on the Life of Zamoyski".[24] Another anonymous author of a comprehensive work entitled "On the Law and Duties of Citizens" stressed the right of every citizen to demand the establishment of a "form of government", which would "bring about common happiness".[25] This term was used also when appointing the confederated Sejm and stating that its task would be to enact a Form of Government.[26] In mid-September 1789 a parliamentary deputation was chosen and tasked with "preparing Drafts for the Form of the Government".[27] Similarly, the recommendations adopted in December 1789 bore the title "Principles for Improving the Form of Government",[28]

[24]Zbiór Pism, do których były powodem Uwagi nad życiem Zamoyskiego. Osme pismo. Myśl względem poprawy Formy Rządu, Roku 1790 (Collection of writings, which were the reason Observations on the life of Zamoyski. Eight Scripture. A Thought for Improving the Form of Government, 1790).

[25]NN, O prawie i powinnościach obywatela, w Warszawie, u p. Dufour Konsyl. Nadwor. JK.Mci Dyrektora Druk. Korp. Kad. MDCCXCI [1791], p. 21.

[26]Uniwersał, AGAD, AKP, Teka 7, Nr 10.

[27]Sessya Seymowa 155, 14 września 1789, electronic version transcribed by Biblioteka Kórnicka: http://www.wbc.poznan.pl/dlibra/publication?id=20152&tab=3 (2016-10-03).

[28]Zasady do poprawy formy rządu, Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, t. IX, Kraków 1889, pp. 157–159.

and the comprehensive draft constitutional law of August 1790 was a "Draft for the Form of Government". The King wrote in his letters to Deboli about "Government reform". We should clarify here that in those times the concept of government implied a political system, and should not be identified solely with the executive power but rather the entire model of governments.

In addition, the term "constitution" has been used both in the subject literature and legislative work. It should be recalled that originally the ordinary legislation adopted by the Sejm was in the form of acts called constitutions, from the time "when estates entered into a legislative commune with the king," i.e. in practice from 1510.[29] The author of the aforementioned Eighth Scripture referred as early as in 1790 to the "constitution" in the specific sense as "all the rights which universally constitute the security of liberty, property, honour and life of every citizen in particular, the change of which rights may only be to the detriment of another, they are the rights that define estates, sovereignty, gravity, offices, and their competences, the description of which makes up the fundamental Constitution of the Government".[30] The concept of the constitution was sometimes thus identified with the organization, the totality of the political system, as in the case of Franciszek Salezy Jezierski: "The freedom of the nation thrives in the Constitution of the Government, and not in the choice of the Ruler, the power of the king set out in judicious laws, the Rights of Man reserved in their entirety, the law-making power placed in the hands of the States composing the Nation, the Executive power entrusted to magistrates by the selected States, the composition is true freedom, the rest is merely a vacuous conceit that a riotous unitary authority can use to entice, and attempt to retain others in bondage".[31] Kołłątaj wrote in similar tones of the "Constitution of the Government", with such recommendations as "The lawmaker,

[29]Cf. „konstytucye", Zbior potrzebnieyszych wiadomości porządkiem alfabetu ułożonych, Vol. II, Za przywilejem w Warszawie i Lwowie 1781, Nakładem i Drukiem Michała Grölla, Księgarza Nadwornego J.K. Mci w Marywilu pod Nro 24, p. 473.

[30]'te wszystkie prawa, które w powszechności stanowią bezpieczeństwo wolności, majątku, honoru i życia każdego w szczególności Obywatela, których odmiany nie może zyskać jedna osoba, tylko z pokrzywdzeniem drugiej; to iest, które opi-suią stany, moc, powagę, urzędy, i onych władzę, a tym opisem urządzają istotną fundamentalną Konstytucyą Rządu', Zbiór Pism, do których były powodem Uwagi nad życiem Zamoyskiego. Osme pismo…, p. 37.

[31]'Wolność narodu zasadza się na Konstytucyi Rządu, nie na wyborze Osoby do Panowania, władza króla rozsądnemi opisana prawami, Prawa Człowieka zawarowane w całej swej zupełności, Władza prawodawcza złożona w ręku Stanów Naród składających, władza Wykonawcza powierzona magistratom przez Stany wybranym, składem iest prawdziwey wolności, reszta iest tylko próżnym ułudzeniem, którym rozchukane (sic) możnowładztwo siebie mamić, a innych w niewoli trzymać usiłuie', NN (Jezierski, Franciszek Salezy), O Bez-Królewiach w Polszcze y wybieraniu krolow począwszy od śmierci Zygmunta Augusta Jagiełły aż do Naszych czasów. Dzieło w teraźnieyszych okolicznościach do wiadomości przydatne, w Warszawie 1790 Roku (On interregnum times in Poland and the election of kings from the death of Sigismund Augustus Jagiełło until our times. A useful work in the present circumstances, in Warsaw, 1790), p. 8.

I do say, should first determine for itself why this new Constitution is of necessity for the Nation".[32]

One of the deputies wrote about adopting of "Government Law and the Government itself, because it is not the temporary but the permanent, stable and non-changeable existence of Constitution and the Government in its comprehensive meaning what creates the political presence of each Nation, what gives it respect and puts it in a number of reputable powers".[33]

Particular undisclosed revisions of the final phase of draft legislative works bore the titles "Reform of the Constitution",[34] "Constitutional Rights"[35] and "Political Constitution of the Polish Nation".[36] The very term "constitution" is not included in the title of the Act of 3 May 1791. It was given the name "Government Act" to distinguish it from ordinary parliamentary legislation.[37] "Government" in this case means the same as "systemic".

A certain inconsistency should be noted: the intention of the lawmaker is "to further the establishment and the perfection of the National Constitution", which should be interpreted broadly as a synonym for the totality of political and legal relations within the political system. In further fragments, however, direct reference is made to the Constitution and the Act of 3 May. However, in the introduction it is said that "further acts of the present Sejm … should all adhere to the Constitution" (this will be discussed in greater detail later); additionally, in the Declaration of the Assembled Estates of 5 May 1791,[38] which is a key legislative act in this discussion, the term "constitution" was used. In practice, moreover, the term "Government Act" was not widely accepted (although the parliamentary

[32]'Prawodawca, mówię, powinien nayprzód rozebrać sam u siebie, dla to czego nowej Konstytucyi Narodowi potrzeba?', NN (Kołłątaj, Hugon), Krotka rada względem napisania dobrey Konstytucyi Rządu, n.p., Roku 1790 (Some advice on composing a good Constitution of the Government in 1790), p. 6, p. 20. Kołłątaj also uses the phrase "Form of the Government" as an equivalent.

[33]'Rządowey Ustawy, i samego Rządu, bo to co polityczną każdego Narodu ustanawia bytność, co szanownieysze onego czyni znaczenie, co go w rzędzie poważanych umieszcza Mocarstw, iest to nie czasowa, lecz trwała, pewna i nieodmienna Konstytucyi rządowey exystencya, iest Rząd w całym słowa tego wzięty znaczeniu', Głos Michała Odrowąża Strasza posła województwa sandomierskiego Dnia 20. Marca 1792 R. Na Sessyi Seymowey Miany (Voice of Michał Odrowąż Strasz, deputy of Sandomierz Voivodship). AGAD, ASCz, sygn. 24, k. 231.

[34]Draft written by Aleksander Linowski dictated by the king. The draft was translation of „Projet de réforme de Constitution", fair copy prepared by Scipione Piattoli. AGAD, APP sygn. 98, pp. 733–755.

[35]Text written by Hugo Kołłątaj, based on „Reforma konstytucyjna".

[36]Text of Hugo Kołłątaj: „Prawa ostatecznie podane, które mają składać I Rozdział Konstytucji Politycznej Narodu Polskiego", dnia 25 marca 1791 r., Ossolineum Zakład Narodowy im. Ossolińskich we Wrocławiu, rkp. 1778, Zbiór pism rozmaitych z czasów sejmu konstytucyjnego (Czteroletniego) od roku 1788 do 1792, pp. 201–233.

[37]Normal, usual acts of the Sejm were referred to using the word *constitutio*, in the Roman tradition. Cf. remarks by Grodziski (1983). On catalogue of legal sources in Sejm legislation: Kucharski (2012, pp. 127–159).

[38]Deklaracya stanów zgromadzonych, Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, Vol. IX, Kraków 1889, pp. 225–226.

debate saw the use of the phrase "the sacrosanct Act"[39]); it was basically referred to as the Constitution, and henceforth ordinary legislation was referred to as the "law".[40] A "constitutional parliament" was also one of the names invoked. In his correspondence (such as with Deboli) the king used the phrases "Constitution of 3 May" and "revolution of 3 May" interchangeably.

Subsequent legislative acts of the Polish state already referred directly to the term "Constitution" (Constitution of the Duchy of Warsaw 1807,[41] and the Constitutional Act of the Polish Kingdom 1815[42]).

3 Characteristic of the Sources

ReConFort employs a particular scope of selection of sources. Of course, in the first place it goes for traditional juridical materials, *id est* for the purposes of this work published diaries of the Sejm were investigated,[43] as well as a partially handwritten manuscript detailing the activities, Minutes of the Sejm.[44] They are complimented by prints of speeches by the king, senators and deputies of the Sejm. That category of sources also includes products of the Sejm's lawmaking process, drafts and adopted acts published as collections of Sejm constitutions, a range of prints based on *oblate* (Pol. *oblata*, registration in borough books), and also edited in 19 ct. collection of law, called *Volumina Legum,* Vol. IX.[45]

ReConFort also makes use of a broad range of media. It can be characterized by referring to the determinations in ReConFort I,[46] as well as the relevant subject

[39]For example: Sessya Seymowa 83. Dnia 30. Maja 1791, AGAD, ASCz, sygn. 19, k. 367.

[40]Bardach (2001, pp. 16–17).

[41]Konstytucja Księstwa Warszawskiego Z 22 lipca 1807 r. (Dziennik Praw [Księstwa Warszawskiego] 1807 r., t. I, s. II-XLVIII) (French: Statut Constitutionnel du Duché de Varsovie, Le Moniteur Universel No 214, Dimanche, 2 Aoŭt 1807).

[42]Polish Constitutional Act of the Kingdom of 15/27 November 1815 (French: Charte Constitutionelle du Royaume de Pologne). Rumours about the reinstatement of the May Constitution and such a will signalled by the Dietines in the period after Napoleon's fall in 1812 should be noted: Rosner (1998, p. 33).

[43]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 1790/[wyd. Antoni Siarczyński], w drukarni… Michała Gröllа… [1791].

[44]Dziennik Czynności Seymu Głównego Ordynaryinego Warszawskiego pod związkiem Konfederacji Oboyga Narodów agitującego się, partly printed, partly manuscripts: AGAD, ASCz.

[45]Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, Vol. IX, Kraków 1889.

[46]Müßig (2016).

literature.[47] However, neither on the pages of "*Gazeta Narodowa Y Obca*" nor "*Pamiętnik Historyczno-Polityczny Przypadków, Ustaw, Osób, Miejsc i Pism wiek nasz szczególnie interesujących*" will the reader encounter a discussion of the legal character of the Government Act, which is why this category of sources constitutes a less important source of material for deliberation.

The category of media under discussion also includes free writings. The phenomenon of their popularity in the 1780s and 1790s has been accented by the author in ReConFort I. As an aside, mention can also be made of the so-called "militant literature",[48] serving as a sort of complement to the free printings. Works classifiable as fiction and theatre pieces played a not insignificant role in transforming public opinion. The fear felt by conservatives towards this process is illustrated *inter alia* by the fact that the Marshals of the confederation were summoned by the deputy Suchorzewski to convene the Sejm Courts. Before that court Suchorzewski brought charges against the police for permitting the J.U. Niemcewicz comedy "Return of the Deputy" to be performed, in which there is mention of introducing succession to the throne, formally forbidden under Pacta Conventa. While the king described events as amusing, he did express his disquiet that the obstinacy of Suchorzewski in such absurdities would lead to a multiplication of "the number of hindrances to things more helpful", which should most certainly be understood as concern over a potential shift in the general mood problematic for the planned reforms.[49] The King was forced to defend the comedy itself and its anti-Petersburg tenor before Bulgakov.[50]

It is mass literature that played an incontrovertible role in the evolution of political leanings and worldview in society at large, although the opinion expressed by the King to Maurice Glayre may be somewhat overblown: "We were a nation of badly raised children, mouthy and wanton, alternatively timid and courageous through ignorance or carelessness, and we remained fast in our prejudices. All this has passed."[51]

ReConFort also proposes analysing the private correspondence of the protagonists as sources for recreating the constitutional debate, offering the potential to reach additional and sometimes unexpected conclusions from the legal history perspective. In the Polish case, where one of the key actors is the monarch, letters of a quasi-official status frequently are of greater value, such as correspondence with Antoni Augustyn Deboli, the 'plenipotentiary minister' to Petersburg, or with Feliks Oraczewski, emissary in Paris. However, analysed correspondence is essentially private, in which diplomatic considerations are accompanied by expressions of the king's sympathies and fears; he describes events from sessions of the Sejm, repeats rumours about the foreign mistresses of politicians, and relates his conversations with antagonists. Deboli supposedly did not hesitate to remonstrate with the king and instruct him in various matters; the King, for his part, only presented the letters to

[47]Łojek (1960, pp. 49–192).

[48]Woźnowski (1971).

[49]Letter to Deboli, January 19th, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 14.

[50]Letter to Deboli, January 22nd, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 15–16.

[51]Mottaz (1897, p. 252). Citation translated in Polish: Dembiński (1904, p.3.)

officials of the Warsaw court after creating censored copies of them, concealing their overly informal elements.[52] Portions of the correspondence of key protagonists were collected (including editions of Stanisław Dembiński, Bronisław Zaleski, Henryk Kocój, Maria Rymszyna and Andrzej Zahorski). An in-depth analysis, however, requires a very extensive query,[53] which has so far only been conducted partially. The author also makes use of valuable subject literature.

4 French Inspirations of Polish Republicans: Drafts of Mably and Rousseau

A complimentary thread alongside the primary deliberations is the issue of foreign influences on the political and systemic thought accompanying the reforms of the Great Sejm. This is an issue which has been raised multiple times and is well-described in the subject literature, if not somewhat less visible in the Western literature. It cannot be discussed in great detail here, which is why I would like to refer only to the republican strand of thought, represented by two theoreticians and writers in French: Father Gabriel Bonnoit de Mably and Jean-Jacques Rousseau, as those who, somewhat earlier in the 1770s, prepared draft reforms of the Polish state, on request of the confederates of Bar.[54]

The primary problem in Western analyses of Polish issues of the time is indirect access to sources. On the one hand, Polish was not a familiar language; on the other, there were few willing to engage in the risky journey to the distant east. Out of necessity Western authors based their writings on stories from governors employed in Poland or the journals of travelers,[55] with the errors and oversights contained in them. One example is the picture painted of Poland in Diderot's Encyclopaedia under the entry "*Pologne, histoire et gouvernement de (Histoire et Droit politique)*", composed by Louis Chevalier de Jaucourt, or "*Droit de Pologne*" by Antoine Gaspard Boucher d'Argis. Similar entries by that author were prepared with far more diligence than those concerning Poland.[56] It was not until the 1770–

[52]This went both ways—the King also hid various facts from Deboli. Łojek (1964, pp. 17–18).

[53]Especially in AGAD—APP, Zbiór Popielów; also Biblioteka Książąt Czartoryskich (Czartoryskis Library, royal correspondence).

[54]Bar Confederation (konfederacja barska)—an armed association of Polish patriotic-conservative nobility formed in Bar in Podolia, directed against the Russian-imposed King Stanisław August and the cardinal laws passed by the guardianship of the Russian Empire in February 1768. The Confederation, supported by France and Turkey, it summoned the uprising led by, among others, the young Kazimierz Pułaski. The last flames of revolt flickered out in Summer and Autumn of 1772 (Tyniec, Wawel, Jasna Góra), while the Confederation itself served as one of the pretexts to the first partition of Poland conducted that year by Russia, Austria and Prussia.

[55]Zawadzki (1963), Figeac (2014), Jakuboszczak and Sajkowski (2014).

[56]Wolodkiewicz (1996).

1779 Livorno printing of the Encyclopaedia that it contained a correction with a much more accurate description of the legal system in Poland.[57]

It should be recalled that in the 1760s, a French governor in the Sanguszko family, César-Félicitas Pyrrhis de Varille, published his work "*Compendium politicum...*",[58] which was strongly influenced by Rosseau's earlier writings while at the same time containing ideas similar to those which would appear soon thereafter in "*Considerations on the Government of Poland*", and which might have served as inspiration for the Genevan citizen. Slightly later, in 1769 Pyrrhis de Varille announced the "*Lettres sur la constitution actuelle de la Pologne et la tenue de ses diétes*",[59] in which he also took up the issue of political reforms, drawing attention to similar elements that Rousseau would soon explore—reorganization of the Sejm (eliminating the *liberum veto* in favour of a minority vote in cardinal cases), reform of the assemblies, criticism of the *interregnum* and expression of concern over foreign intervention. In acknowledgement of Pyrrhis de Varille's writings, in 1764 the Sejm granted him indygenat (naturalization for a foreign nobleman).

Rousseau's writings quickly made their way to Poland, where they were employed in public oration without indicating their author.[60] "*Considerations on the Polish government*"[61] came about as a result of a short-lived intimacy with

[57]Encyclopédie, ou… Troisiéme édition enrichie de plusieurs notes, Dédidée à son Altesse Royale Monsigneur l'Archiduc Pierre Léopold Prince Royal de Hongrie et de Bohême, Archiduc d'Austriche, Grand Duc de Toscane etc. etc., Vol. I-17, a Livourne 1770–1778. Note on Polish law system was published in Vol. 5, pp. 150–151.

[58]Pyrrhis de Varille, Compendium politicum seu brevis dissertatio de variis Poloni Imperii vicibus in qua Reipublicae sive Libertatis, necnon in Comitiis Vetandi Juris Origo, Progressus et Status praesens nova methodo inquiruntur, 1761, Polish translation, "Zebranie polityczne", published two years later.

[59]à Varsovie et se trouve à Paris chez Gaugery, 8°. Letters sent officially to the pupil, Prince Jan Sanguszko, circulated already in the country in copies Szyjkowski (1913, p. 53).

[60]Speech of X. Szymon Wyhowski, September 1778. Cf. Szyjkowski (1913, pp. 21–22). Supposedly, Karol Wyrwicz, rector of the Jesuit college in Warsaw, in his introduction to "A geography of current times" (1770) and then "A history of ancient states" plagiarized Montesquieu's "Spirit of the laws". He also did not hesitate to present the paper as an original at 'Thursday dinners' (meetings of artists, intellectuals, architects and politicians held by Stanisław August. Smoleński (1927, pp. 64–69). Fragments of the "*Social contract*" of Rousseau appeared in Polish in the form of an anonymously-published brochure „O wolności człowieka". Szyjkowski (1913, pp. 37–38).

[61]*Considerations sur le gouvernement de la Pologne et sur sa reformation projetée*, original in Biblioteka Czartoryskich, 1st ed. London 1782. For this elaboration has been used: [Rousseau, J. J.], Uwagi nad rządem polskim oraz nad Odmianą, czyli Reformą onego projektowaną przez J. Jakuba Russo obywatela genewskiego z Francuzkiego na Oyczysty ięzyk przełożone Miesiąca Grudnia dnia 20. R. 1799. Część I–Część II, w Warszawie, 1789, Nakładem i Drukiem Michała Gröllа, Księgarza Nadwornego J.K. Mci. The translator in Polish was an apologist of Rousseau, Maurycy Franciszek Karp.

Michał Wielhorski and on the basis of his "Picture of the Polish government".[62] In Chapter V, Rousseau called for a reinvigoration of the Polish Government, "… granting a Constitution to the great Kingdom, a constancy and energy to the Republic".[63] He felt that his original ideas on decentralization (separation into equal provinces a "division into two Polands, as well as Lithuainias", as many "states as provinces", each with "its own governments", strengthening of the authority of assemblies) were consistent with the "spirit" of the Polish constitution.[64]

The existing Polish legislation he describes to be "comprised over time out of bits and pieces", as all European laws.[65] The point of departure is the concept of the sovereignty based on the knighthood. It was supposed to slowly transform into a true *nation*, followed by the emancipation of the non-noble classes, very conservative in relation to the peasantry (which long supplied arguments to opponents of peasantry reforms), through their inclusion into a system of a public judiciary, or enfranchisement upon the application of special censor commissions, *Comités censoriaux.*[66] The philosopher appealed for the retention of the binding nature of Sejm instructions (a Sejm entirely dependent on the assemblies), and even expressed regret that similar institutional "curbs" available to Sejm deputies were not present in the British model.[67] Deputies (or potentially assemblies, the Dietines) should also elect senators, yet it should be noted that the arguments presented by the Genevan here were somewhat inconsistent. He declared the head of state to be a "natural enemy of liberty", and in reference to the replacement of the elected monarch with a hereditary one, he said that Poland could "forever say goodbye to its freedom".[68] In the *interregnum* he saw the moment when the Nation restored its rights, and legislation recovered its resilience. In Rousseau's opinion, weakening of the royal privileges could make the monarch the "first Citizen". This alone demonstrates that the Genevan was provided with biased information about the Polish system, with its ineffective executive.[69] The actual weakness of the state and debauchery associated with the *interregnum* was one of the often-raised arguments in favour of a hereditary throne. Another entirely original idea, and one unacceptable in light of the Polish tradition of

[62]This picture, according to Szyjkowski, was the work of Wielhorski „O przywróceniu dawnego rządu według pierwiastkowych Rzplitej ustaw", 1775. Szyjkowski (1913, p. 71). Jerzy Michalski, however, later identified it with an entirely different treatise by Wielhorski, written specially for Rousseau, which he referred to as Tableau. Michalski (1977, pp. 11–12). Work of Michalski has also been also translated in English: *Rousseau and Polish republicanism*, Warszawa 2015; http://rcin.org.pl/Content/58076/WA303_78371_JM_Michalski-eng.pdf.

[63]„dania Konstytucyi wielkiemu Królestwu, trwałości i rzeźwości małym Rzeczom-pospolitym własney", [Rousseau, J.J.], *Uwagi*…, p. 41.

[64][Rousseau, J.J.], *Uwagi*..., pp. 43–44.

[65][Rousseau, J.J.], *Uwagi*…, p. 51.

[66]Michalski (1977, pp. 37–44).

[67][Rousseau, J.J.], Uwagi…, p. 61. On the Sejm and assemblies see also: Michalski (1977, pp. 45–58).

[68][Rousseau, J.J.], Uwagi…, pp. 82, 87.

[69]Analysis of recommendations for legislative power: Michalski (1977, pp. 92–106).

the theoretical equality of the nobility, was the building of a separate class, „*membres actifs de la République*", a sort of elective "aristocratic government", based on people with experience holding state office, who would therefore be entitled to campaign for successive functions. Paradoxically, he was also an opponent of professionalization of the state apparatus, and the aforementioned careers were supposed to be based on the trust of fellow citizens, demonstrating a sort of virtue—a similar concept worked its way into the project Rousseau prepared for Corsica.[70]

Among divagations on the model of the state there are general indications that the law should be a collection of simple and clear rules that members of society should know and respect.[71] Rousseau criticised expansive and complex codifications based on the Roman law—"this was harmonious with opinions firmly rooted in Polish noble society, wary of the Roman law and professional lawyering, but practically familiar with the law, respecting the civil model of offices and courts".[72] There is an absence of reflection on the potential specific role of the Constitution, considering that Rousseau writes of the "act, that is, a Constitution". He also essentially calls into question the concept of fundamental laws ("a gaggle of articles which have been absurdly counted among the fundamental laws, and which are but a mere collection of legislation …"[73]). He thus treats the Constitution substantively, as a collection of key laws regulating the political organization of the state, and also economic and military matters.[74] In the philosopher's opinion, the nation has the right to "amend" and "refresh" its constitution,[75] yet the deepening anarchy in the state meant that the solutions offered by Rousseau gave no guarantee of success.[76]

Already in the 18th century we may encounter the opinion that certain elements of "Considerations" (*Considérations*) are incompatible with conceptions of Rousseau's in "The Social Contract" (e.g. the relativizing concept of the nation, or enthusiastic praise for anarchical confederations), and that it was an example of advice tailored to the specificities of the subject matter. A different opinion is held by Jerzy Michalski, who does not perceive such contradictions, and even declares that *Considérations* complement and extend Rousseau's doctrine as known from

[70]Michalski (1977, pp. 99–101).

[71]In notes of Rousseau, Michalski (1977, p. 101).

[72][Rousseau, J.J.], *Uwagi*…, p. 102.

[73]'mnóstwo artykułów, które śmiesznie w liczbę praw fundamentalnych pokładano i które iedynie zbiór prawodawstwa składają…', [Rousseau, J.J.], Uwagi…, p. 99.

[74]In respect of the organization of the armed forces, he wrote: "Poles! You should not look around and seek to emulate even that which they (neighbouring monarchies) are doing properly. These remedies applied to constitutions of such disparities would be an evil in their Constitution" („Polacy, nie powinniście się zapatrować dokoła siebie, chcąc nawet tego naśladować, co się u nich [sąsiednich mocarstw] dobrze dzieje. Ta dobroć stosowna do Konstytucyi cale się różniących, byłaby złem w ich Konstytucyi"), and he encourages the formation of a militia in the Swiss mold. [Rousseau, J.J.], *Uwagi*…p. 130.

[75][Rousseau, J.J.], *Uwagi*…, p. 178.

[76]A broader comparative analysis of Rousseau's work (based on the French original) i Wielhorskiego cf. Szyjkowski (1913, pp. 75–101); on *Tableau* also Michalski (1977, pp. 18–26).

other works. However, they retain a rather literary-rhetorical form, replete with a "childish optimism as to the possibility for their implementation".[77] At the same time, however, Bogusław Leśnodorski opines against an overly hasty disavowal of the usefulness of Rousseau's deliberations. "In spite of the excesses of which [Rousseau] was well-aware, in this country he found an expression of some imperfect, yet praiseworthy ideal of civic freedom",[78] and this is what is accented in his writings. In effect, Rousseau invoked both progressives (such as Stanisław Staszic or Hugo Kołłątaj[79]), as well as conservatives, supporters of reform in the republican, classic noble spirit (Adam Wawrzyniec Rzewuski[80]). Bogusław Leśnodorski does suggest, however, that it is more appropriate to speak of inspirations rather than borrowings from Rousseau's treatises.[81] Nevertheless, the remarks remain difficult material for the foreign scholar, owing to their being anchored in the specificities of the Polish political system.

Fr. Gabriel Bonnot de Mably was also an author of works which quickly attained recognition in Poland. In London in 1781, his tract "*Du gouvernement et des lois de la Pologne*" was published.[82] This work, already somewhat outdated at the time of its publishing, was based on tracts written a decade prior whose roots were in conversations with Wielhorski, and constituted the presentation of polemics by the two writers.[83] Mably identifies problems similar to those discussed by Rousseau—weakness of the legislature in Poland (*liberum veto* and confederations were said to be a detrimental lawlessness). He does not glorify the local assemblies, the Dietines; just the opposite, he assumes that it is in them the seeds of anarchy were sown, and recommends their role be restricted (which Wielhorski could not abide, proposing only a reduction in 'abuses'). Mably incorrectly, however, perceived the executive in Poland. Under the influence of conversations with Wielhorski, as well as an exchange of opinions in correspondence with Ignacy Bohusz, secretary of the Bar Confederation, radical critics of StanisławAugust, Mably assigns a tremendous role to the king and proposes far-reaching curbs on his power in favour of the Senate. Paradoxically, at the same time he considers it appropriate to put a foreign dynasty

[77]Michalski (1977, pp. 109–110).

[78]Leśnodorski (1967, pp. 36–39). Quot. p. 36.

[79]Szyjkowski (1913, pp. 122–156).

[80]Szyjkowski (1913, pp. 156–165).

[81]Leśnodorski (1967, p. 39).

[82]A.M. le Comte Wielhorski, 8°.

[83]Initial *Conférences* and subsequent "*Observations de M. l*'abbé de Mably *sur la Réforme des Loix de la Pologne adressée à Monsieur le Comte Wielhorski*" (1770), "*Secondes observations…*", "*Troisièmes observations…*", "*Quatrièmes observations…*" of Mably; "*Observations sur la premiére conference*", "*Observations sur la seconde conférence*", mentioned "*Tableau*" of Wielhorski: handwritten copies in AGAD, Zbiór Anny Branickiej, sign. 8 (the user has to pay attention to the wrong technical information on specification of microfilms: ref. 8 (sign. 8) as microfilm wrongly marked under 9) and 9 (as microfilm under sign. 10). Cf. also an introduction of Michalski (1995, pp. 5–12) and further analysis pp. 81–83.

on the throne, which would allegedly serve to reduce the risk of internal rivalry.[84] An interesting idea was that of convening a national assembly ("*la nation sera convoquée extraordinairement*"), an extraordinary Sejm convened every 25 years, as well as after the death of the king an conclusion of a peace in order to examine abuses of the original, ideal system. Mably writes: "*une des fautes principales des législateures en faisant leurs lois, c'est de ne pas donner la faculté de sa rétablir et de se reproduire, pour ainsi dire, par ses propres forces. De là une dégradations journalière et insensible; et enfin des maux extremes auxquels il n'est plus permis de remédier*".[85]

Fundamentally, the criticism of the legal system in the letters under analysis was unspecific. Mably charged Polish law with being ineffective, and that there were no real means of enforcing it. Although he appreciated that Polish law was conducive to the practice of civic virtues, he called for reform of the political system: "…*rien ne me paroit important que la Pologne commence par se former une constitution. L'histoire de tous les peuples et de tous les siècles démontre l'importance de cette vérité. J'ai remarqué chez toutes Nations qu'un Gouvernement vicieux ou établie sur des mauvais principes a toujour rendu les citoyens malheureux. Par quell privilège les Polonois ne seroint-ils pas soumis à cette règle générale? J'ai toujours remarqué qu'à mesure qu'un Gouvernement se perfectionne en se rapprochant des bons principes, les citoyens, sans qu'ils s'en apperçoient et pour ainsi dire malgré eux, prennent peu à peu toutes vertus don't ils ont besoin*."[86]

The result of the reform was to be the fundamental laws, a constitution which would be the source of executive legislation. Mably did not, however, offer details, considering it too early.[87] Although some of his remarks addressing the judiciary, such as the postulates of openness, permitting the bourgeoisie to participate in the administration of justice (Mably most likely was unfamiliar with the estate model of judiciary in Poland) were of a substantive nature, he was not able to provide specific proposals of institutional reform. He limited himself rather to generalizations about the necessity of observing "the highest standards of justice" ("régles de la plus éxacte justice"[88] to be applied by the chancellor's tribunal and which could set a

[84]Michalski (1995, pp. 90–92, 175, 179–182).

[85]"*Secondes observations de m. l'Abbe de Mably; sur la Reforme des Loix en Pologne à Monsieur le Comte Wielhorski*", AGAD, Zbiór Anny Branickiej 9 (microfilm marked as 10), k. 267 (old pagination below: k. 136). Also Michalski (1995, pp. 180–181).

[86]"*Troisiêmes Observations de Monsieur l'Abbe de Mably sur la Reforme des Loix en Pologne à Monsieurs le Comte Wielhorski*", AGAD, Zbiór Anny Branickiej, sign. 9 (ref. 9 on microfilm under ref. 10), k. 311 (old pagination below k. 158v).

[87]Michalski (1995, p. 94). Mably devoted to executive power an elaboration entitled "*Seconde Conférence*", AGAD, Zbiór Anny Branickiej, Archiwalia różnej proweniencji, sign. 8 (ref. 8 on microfilm under ref. 9), pp. 95–103 (pagination below 51–54v) and later the second chapter: "De la Puissance Éxécutrice du Roi" of mentioned "*Observations de M. l'abbé de Mably sur la Réforme des Loix de la Pologne adressée à Monsieur le Comte Wielhorski*", sign. 9, pp. 27–54 (pagination below 14r–27r).

[88]„*Troisiême Conference*", AGAD, Zbiór Anny Branickiej, Archiwalia różnej proweniencji, sign. 8 (on microfilm on ref. 9), k. 104 (pagination below 55v).

relevant example for other courts), "the principals of humanity" ("régles de l'humanité"[89]), which was supposed to influence citizens' trust in the state and the law.[90] Particularly harsh assessment is warranted by Mably's recommendations concerning foreign policy—the fiasco of his analysis (e.g. of Prussia's neutral attitude towards Poland) demonstrated the circumstances around the first partition.[91]

Mably arrived to Poland in 1776; his correspondence from that period betrays a deep disappointment at the real state of things. He compared the subjective vision of Polish relations presented to him by confederates with political reality; more pain came with remarks on the situation of the bourgoisie, peasantry, and the Jewish population, which we may find in "*De la situation de la Pologne en 1776*", published after the author's death.[92] Mably's visit also impacted the shape of the final version of the previously-mentioned tract.

Both of those treatises remained idealized and moralizing lectures: the thinkers were viewing things through "two lenses: their own ideas, plus the information and judgements delivered by Wielhorski".[93] Both of the propositions presented were of a republican slant, emphasizing reinforcement of the legislative authority at the cost of what they felt was the most usurpatory, *id est* the monarchial, which demonstrates a detachment from Polish reality in which the central executive was in a state of decomposition, while no local one existed. Mably was no fan of direct democracy, whose materialization Rousseau perceived in the assemblies. Rousseau, however, was a supporter of an effective executive, whereas Mably in turn sought to weaken it through an internal division.

It is a sort of paradox that the conceptions of the two writers were used to achieve utterly opposite aims—the postulates of the movement to weaken the king through the actions of the Permanent Council (Rada Nieustająca) following the first partition, as well as the postulates of the baronial opposition against the Permanent Council, appealing to "the true nation", *id est* the landed provincial gentry. During the era of the Four-Year Sejm, politicians from the patriotic camp like Ignacy Potocki and, somewhat later, Kołłątaj, taking their inspiration initially from Rousseau and Mably, came to adopt a less radical and far more realistic position.[94] Anna Grześkowiak-Krwawicz perceives in Polish political thought of the day a surprising "capacity to interweave theoretical considerations into current political

[89] „*Troisiême Conference*", AGAD, Zbiór Anny Branickiej, Archiwalia różnej proweniencji, sign. 8 (on microfilm on ref. 9), k. 105 (pagination below k. 56).

[90] Cf. „*Troisiême Conference*", AGAD, Zbiór Anny Branickiej, Archiwalia różnej proweniencji, sign. 8 (on microfilm on ref. 9), k. 103–111 (pagination below 55–59); Michalski (1995, pp. 93–94).

[91] Michalski (1995, pp. 198–199).

[92] Michalski (1995, pp. 206–221).

[93] So Michalski about Mably (Michalski 1995, *Sarmacki*..., pp. 242–243), but the same can be said of Rousseau.

[94] Michalski (1983).

reasoning", even if it proved impossible to develop an original concept of the social contract.[95] This was also the case with the concepts referred to above.

Above generally outlined drafts did not become a direct basis for legislative process in Poland. It should be noted that references to Rousseau concept had already been made during the constitutional debate in the Great Sejm era (after 1788), however they had been of a general character.

5 The Extraordinary Procedure for Enactment of the Constitution of 3 May: Oath on the Constitution

5.1 First Constitutional Works

The name referred to in preceding chapters attests to the desire to distinguish the adopted Government Act from "normal" parliamentary legislation. It should be borne in mind that the procedure for enacting the Constitution deviated significantly from both parliamentary procedure and custom.

As has been mentioned, the deputies of the Great Sejm (from 16 December 1790 sitting in double composition) were aware of the breakthrough taking place in the moment. Evidence of this comes from the amazing awakening of the political nobility, reflected *inter alia* in the rash of opinion journalism,[96] but also activity during provincial sessions in October 1788.[97] On 7 September 1789, the anniversary of the election of Stanisław August, the deputation of parliament was selected and entrusted with preparing the form of government in these words: members of the deputation "Cardinal laws, duties of sovereign magistracies, authority and appropriateness in between, in short the whole form of political government the States of the Republic shall describe and design: if anyone wishes to submit their ideas, they will be accepted and considered, and the complete work shall be left to the Decision of Us, the King and the States of the Republic".[98] Its members were

[95]Grześkowiak-Krwawicz (2000b, p. 125).

[96]Grześkowiak-Krwawicz (2000a, Introduction, pp. 15–68).

[97]Szczygielski (1994a, 2009).

[98]In text paraphrased translations; in length as followed:

„Wyznaczenie Osób do ułożenia Proiektów do Formy Rządu. Gdy pomyślność Narodu, a w niey ugruntowana Sława Nas Króla, i beśpieczeństwo Obywatela od trwałości Rządu zawisły. Pomnożone zaś Woysko, powiększone dochody publiczne bez utworzenia nieodmiennych Ustaw, urządzenia i rozdziału Władz Magistratur, i ich między sobą związków, szkodliwym stawałyby się ciężarem, a sama wewnętrzna spokoyność, którą zapewniać za cel troskliwości Naszey mamy, wzruszoną bydźby mogła; Przeto My Król zawsze z ukochanym Narodem złączeni, chcąc dwudziestopięcioletnie trudy dla Kraiu czynione przyłożeniem się do iego szczęścia mieć nadgrodzonemi wraz z Rzeczypospolitey Skonfederowanemi Stanami do takowego Dzieła naydokładnieyszego rozważenia Osoby następuiące wyznaczamy (…), Którzy Prawa Kardynalne, Magistratur Zwierzchnich obowiązki, Władzę, i między niemi stosowność, zgoła całą Rządu Politycznego Państw Rzpltey Formę opiszą, Proiekta, ieżeli kto zechce podawać do tey materyi

both progressive parliamentarians, such as the Lithuanian vice-chancellor Chreptowicz, Lithuanian Court Marshal Potocki, and Lithuanian deputy Józef Weyssenhoff, as well as conservatives such as Krasiński, the Bishop of Kamieniec.

In December 1789, the deputation proposed "Principles to improve the form of government" (*Zasady do poprawy formy rządu*), which were significantly revised during the subsequent debate, and finally passed and entered into the borough books on December 23.[99] The original text by Ignacy Potocki[100] was considered too revolutionary; the final outcome highlighted the role of the nobility. The terms "nation" and "people" disappeared from the text, and the term "The Republic" appeared in their place.

Also, the comprehensive "Form of government draft" (681 articles in 11 chapters) did not meet the expectations of the deputies. Initially only a part of the whole was tabled, i.e. only a draft law on regional councils, but deputies demanded that the entire draft reforming the state system be submitted, which was effected on 2 August 1790. A special part of the draft accounted for 89 articles under the title "Constitutional rights and cardinal rights within them", "the first comprehensive attempt to formulate the principles of the political system in a single act".[101]

The draft, again composed largely by Potocki and strongly republican, emphasized the role of councils and parliament with a weak position assigned to a hereditary monarch, was not adopted by deputies. The issue of the order of succession was delegated to the councils, and it was their role to consider the possibility of appointing Frederick Augustus Wettin as Stanisław August's successor. The debate went on from September 1790 with consultation on "Cardinal Laws" draft to January 1791, at which point the deputies decided to suspend their deliberations and return to the law on regional councils. The king wrote to Deboli: "It is perhaps the task of Marshal Małachowski to begin the Form of the Government from the Assemblies, and not from a continuation of the Cardinal Laws, as through those Cardinal Laws we would quickly arrive to the matter of Succession or Election, which we must most assuredly delay, insofar as the Saxonian Elector himself wishes for there to be no decision as he is becoming aware that the Vienna and Moscow courts, which opposed that at once, are now displaying malevolence (?) towards Him".[102]

Ultimately it turned out that only the "Cardinal Laws" came into force, yet they were cut down to a mere 11 articles, were passed and entered into force, which was

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ściągaiące się, przyimą, i rozważą, całkowite zaś Dzieło do Decyzyi Nam Królowi i Stanom Rzeczypospolitey przyniosą".

Sessya Seymowa 155, 14th September 1789, cf. transcribed version of Biblioteka Kórnicka: http://www.wbc.poznan.pl/dlibra/publication?id=20152&tab=3 (2016-10-03). Text also: Volumina Legum, Vol. IX, p. 107.

[99]Zasady do poprawy formy rządu, Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, t. IX, Kraków 1889, pp. 157–159.

[100]AGAD, APP, sygn. 98, k. 159 and forthcoming.

[101]Szcząska (1990, p. 41). Cf. also Leśnodorski (1951, pp. 147–150).

[102]Letter to Deboli, January 1st, 1791, AGAD, Zbiór Popielów sygn. 413, k. 2. Similarly in the letter of January 5th, k. 4.

an unstable compromise. They were eventually published in the borough books by the Speaker of the Sejm, Stanisław Małachowski, on 8 January 1791.[103]

Following the experience described above, it turned out that the submission of any controversial issues about the political system to broader parliamentary discussion led to fruitless deliberations lasting for months. In general the Sejm did not merely "jaw-jaw", but in fact produced a river of verbiage; Bogusław Leśnodorski claims that "there remained a great deal of old-fashioned noble rhetoric in which, among the Ciceronian moments and bloated patriotic phrases, the fundamental idea of picking the Fatherland up after its fall is frequently lost in the mountain of details".[104]

From December 1790, the composition of the sitting Sejm was extended—formally speaking, the authorisation of the body had been renewed, and young, reform-orientated deputies entered the parliament. The Patriotic camp became organized and resigned itself to the fact that reform could only take place in consultation with the king. There was tremendous distrust on both sides; the king's tendency to display an excess of sympathy towards Potocki could give rise to the suspicion that a conspiracy had been conceived; on the other hand, antipathy towards Potocki or Małachowski could lead to "demolition of the entire system".[105] The king also had to deal with a personal grievance: "Now Potocki is the beneficiary of an honest and favourable deed which I am performing. And I always do so for precisely that reason for which you, Sir, are writing to me, that the downfall of Małachowski and the Potockis would result in tragedy for our Fatherland. Indeed, I have the greatest possible occasion to take revenge against the Potockis for their long years of mischievousness towards me, but I hope that God saves me from vindictiveness until the end of my days".[106] The breakup of the previous coteries may also be attested to by the King's record given to Deboli of the somewhat idealistic conversation between Potocki and Branicki, in which the former, when asked about the opinion of his "party" on the subject of events in England, responded thus: "We know of no party, we only wish for all Poles to think and act in the best interests of the country".[107] The fracture lines had been diagnosed and ultimately work in secret began. After the adoption of the Constitution, on 4 May the king wrote to Deboli that he had been dealing with Potocki and Małachowski for 8 months, but work accelerated when he became convinced of the sincerity of his partners.[108]

[103]Leśnodorski (1951, pp. 157–160).

[104]Leśnodorski (1951, p. 382).

[105]The king describes this peculiar 'dance' in his letter of January 5th, 1791 to Deboli, AGAD, Zbiór Popielów, sygn. 413, k. 5.

[106]Letter to Deboli, February, 2nd, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 23.

[107]Letter to Deboli, April 13th, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 71.

[108]Letter to Deboli, May 4th, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 82.

5.2 *Enactment of the Government Statute*

The fundamental draft of the constitution was ready by the end of March 1791. Stanisław August, Ignacy Potocki, Scipione Piattoli—a former secretary of Potocki and then reader of the King who recorded and prepared editorials, Stanisław Małachowski and Hugo Kołłątaj contributed personally to its drafting, not without friction and mutual animosity. The first para-constitutional laws, including the Law on Cities of 18 April 1791, were signs of things to come.[109]

The text of the constitution was to be presented at a session on 5 May, but in the face of the anticipated difficulties and shifts in the international situation—alarming news had come from England[110]—the decision to speed things up was taken. The first two weeks by law would have been devoted to examining revenue, tedious for a number of deputies, and it was hoped that not everyone would be back in Warsaw immediately after the two-week Easter break. Only those whose support could be counted on were informed about the plot. The opposition, however, learned of the planned date of 5 May and also began to conspire, with strong support from Russian ambassador, Jakov Bulgakov.

The draft text was presented to the public in the afternoon on 2 May in Radziwiłł Palace on Krakowskie Przedmieście street. The text was welcomed enthusiastically by the audience, and the reading was followed by both supporters and opponents of reform scampering away all across the city. Some found themselves drawn to Stanisław Małachowski's house, others to Bulgakov's lounge.

The events of the following day, and primarily the course of the session on 3 May were a sort of *theatrum*. The application of tried and tested elements of parliamentary strategy can be discerned.[111] As a means of exerting pressure, the gallery was populated by numerous so-called arbiters, urbanites, and even

[109]This phase described among others Dihm (1930). Detailed also by Leśnodorski (1951, pp. 177–204 and 205–210).

[110]In 1790 an improvement in relations between Poland and England occurred, and there was likely an attempt at drawing Poland into the Triple Alliance. At the same time, at the beginning of 1791 relations between Russia and coalition members worsened—the Petersburg court was ready to risk a second war rather than submit to Prussian and English pressure over the peace with Turkey. Russian diplomacy was also engaged in activity within the United Kingdom, inspiring Russian-friendly articles in the press and publishing propaganda pamphlets. The Whig opposition spoke out fiercely against PM Pitt, and there was a split in the government which led to suspension of the sending of a war ultimatum to Russia. The Polish court followed English and Prussian preparations for war with significant fear that the country could be engulfed by international conflict, and—strictly in the practical dimension—fear of the effects of armies marching through Polish and Lithuanian territory. Ultimately, Russia, having seen off the threat of a two-front war, forced the Western powers to accept peace with Turkey on Russia's terms. Poland understood that the breaking of war plans and sudden shift in British policy towards Russia meant that the window of opportunity for neutralizing Russia had closed.

[111]Broader: Stroynowski (2013b).

aristocratic ladies from society.[112] In additional, the reading of carefully-selected—and even partially falsified—reports from abroad at the beginning of the session fomented an atmosphere of gravity and fear. In response to Potocki's question about what means of rescuing the fatherland are available, the King was to have responded that there is a draft constitution already accepted by many.[113]

The text was read in the Sejm on 3 May. This was a further breach of procedural rules. Enacted in January 1791, the Act entitled "Solemn affirmation of order in the Chamber of the present parliament", foresaw the need to print and provide to deputies a copy of the bill, following which debate could begin three days after the text had been distributed.[114] What is more, the Deputation for the form of governments, appointed to the task, had not read the draft. At the same time it should be noted that instances of Sejm procedures being violated were not at all uncommon. It was assumed that since the Sejm is authorized to enact its own rules, it also enjoys the authority to waive them if the necessity arises (in accordance with the principle of *necessitas non habet legem*). For example, in a 1 January 1791 letter to Deboli, the King describes how violations of procedures in several rules occurred immediately "on the first day after the law was made". In the same letter he expresses the opinion that adopting "the English manner of parliament" would eliminate both prolixity and excessive haste (the new regulations required crowning the session with some sort of concluded "deed"[115]). When the Marshal of the Sejm was summoned to adhere to procedures, he was said to have responded "this is not an ordinary session, but a revolutionary one".[116]

The supporters of reform were counting on the forbearance of the public gathered in the galleries of the Sejm.[117] They weren't wrong, the opponents of the Constitution finally bowed to pressure from the public. The Constitution was enacted by acclamation en bloc, and votes for and against were not formally counted. It is estimated that of the 182 representatives present in the hall, 110 senators and deputies were in favour of the Constitution.[118] The discussion was very lively, sometimes dramatic. The conservative deputy Suchorzewski, a client of the hetmans, attempted as Rejtan to lay down on the ground and shouted "mercifulness for freedom".[119] As an aside, during the session following adoption of the

[112]Their role grew during the times of Stanisław. Andrzej Stroynowski cites a letter of 28 November 1782 from the King to E. Sapieżyna in which the author grumbles about that frequent presence and "care" exercised by the ladies over the Sejm "exceeding all decency of the sexes and their situation" („nad wszelką przyzwoitość płci i sytuacji swojej"). Stroynowski (2013b, p. 64).

[113]Izdebski (1998, p. 14).

[114]Uroczyste zaręczenie porządku Izby na teraźnieyszym seymie (Solemn Affirmation of the order of the Chamber at the present Sejm), pos. CCXXXIV, Volumina Legum, Vol. IX, pp. 202–203.

[115]Letter to Deboli, January 1st, 1791, AGAD, Zbiór Popielów sygn. 413, k. 1–3.

[116]Letter to Deboli, May 4th 1791, AGAD, Zbiór Popielów sygn. 413, k. 84.

[117]These events visually depicted Wegner (1866, pp. 121–196).

[118]So Rostworowski (1966, p. 233); cf. also Dihm (1932, pp. 12–20).

[119]Scene similar by various witnesses' relations; also the king described it in the letter to Deboli, May, 4th, 1791, AGAD, Zbiór Popielów sygn. 413, k. 83.

Constitution, Suchorzewski approached Potocki and, attempting to return to him the royal Order of St. Stanislaus, spoke of his plans to leave for America. Potocki and the foreign diplomats present attempted to dissuade him from that trip, explaining that "there he would encounter an executive of greater power than what we have given the king here. Suchorzewski was surprised and remained in doubt as to whether to leave Poland for good".[120]

The opponents of the Constitution called for remarks at a crucial point of the debate did not dare to speak. Finally, the question of the Speaker of the Sejm for the approval of the Chamber to accept the Government's Bill was answered loudly and, it seemed, unanimously. As he himself described in a letter to Deboli, when the King wished to again speak against deputy Zabiełło and raised his hand, the reformers interpreted this as a "sign of oath": „They crowded the throne. And I, seeing that the thing could be done, did it".[121] The King stood on the throne and took an oath on the Bible before Feliks Turski, the Bishop of Krakow. Giving it a far more serous dimension the King made later many references to that event, one of them being: "It is not the first time that I hear the declaration that by swearing on the Constitution of 3 May I have undertaken never to relent in adhering thereto".[122] The King identified this moment with the creation of an obligation to remain faithful to the Constitution and to always strive to carry out its provisions. In Art. VII the Constitution established the duty for each future King acceding to the throne to submit "an oath to God and the nation that he shall retain this constitution on *Pacta Conventa*".

From the hall of the Sejm deputies went to the church of Saint John, where they were welcomed by municipal authorities and the fraternity of Warsaw. After a few speeches, the Constitution was sworn in by speakers given the title of Marshals of the Confederation, bishops, senators and ministers. After returning to the hall of the parliament, the Marshals of the Confederation signed the text of the Constitution. In the evening, members of the parliamentary military commission took an oath to uphold the Constitution at an extraordinary meeting. The people of Warsaw cheered "Hail to the King, Hail to the Constitution".

The next day, 4 May, a group of almost 30 deputies filed an official protest against the Constitution, which, in accordance with procedure, was entered into the borough books. Kołłątaj warned of such a possibility, writing the same day to Marshal Stanisław Małachowski "for the town and the city chancelleries to remain closed until the Constitution is appointed, and afterwards that none of them would dare to accept manifests (…) In order to properly confer, and that those who have

[120]In King's relations, Suchorzewski was told by Potocki: „zastanie tam moc wykonawczą większą, niżeśmy ją tu dali królowi. Zdziwił się Suchorzewski y został w wątpliwości, czyli Polskę ma rzucać na zawsze", letter to Deboli, May 4th, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 86.

[121]'Rzucili się hurmem do tronu. A ja widząc, że rzecz się daie zrobić, zrobiłem'. It was said that this was, in the King's opinion, the second miracle after adoption of the bourgeois draft—via the lips of Suchorzewski—in April 1791. Letter to Deboli, May 4th, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 83.

[122]Głos JKMsci na Sessyi Seymowey 24 Octobris 1791, AGAD, ASCz, sygn. 22, k. 322.

not taken their oath to that Constitution not to grace our Sejm sessions until they swear that oath".[123] In the protest entered into the books by the chronicler of Warsaw, the legality of the Constitution was called into question by indications of procedural violations and the absence of "pluralitas", a formal vote which would give a decision of the majority.

Among them were declared supporters of the Russian option, but also deputies who had signed the Dietines' instructions for opposition to the abolition of free elections and feared of being accused of violating the Dietines' recommendations. An open defence of the Constitution also sometimes entailed family conflicts. The King wrote to Deboli and informed him that after the conclusion of the session he was approached by Marshal Sapieha, who had been kept in the dark as to the plans for reform, and who, in a rush of emotion, ultimately swore his oath to the Constitution; he also declared his regret that "neither with Mother nor with Uncle is there a place", he was ruined, and the King was his only hope for rescue.[124]

5.3 An Oath on the Constitution

Meanwhile, the Marshals of the Confederation continued the process of swearing in key state officials on the Constitution. Among others, Treasury Commission members swore an oath, while key opponents of the Constitution, namely Hetman Franciszek Ksawery Branicki, Seweryn Rzewuski and Stanisław Szczęsny Potocki left Warsaw for Jassy where they established contacts with the court in Moscow.

The Marshals of the Confederation turned to members of the Sejm Constitutional Deputation in order to complete formalities and sign the Government Act. One member of this committee was Bishop Kossakowski, who, despite his oath, refused to sign, explaining that the Deputation could not sign an act which was not adopted unanimously or by a majority in a roll-call vote. Finally, it was decided to entrust the Sejm with the settlement of the dispute between Kossakowski and other members opting for immediate signing.

Therefore, the session of 5 May began with the awarding by the Chamber of unanimous consent for the signing of the Constitution by the Constitutional Deputation, whose members had completed the necessary formalities.[125] The Declaration of the Assembled Estates, enacted on that day, could play several roles: on the one hand, it was an act remedying the constitution in the words "We solemnly swear to God and Homeland to obey and defend the Constitution with all

[123]'aby kancelarye grodzka i miejske nie były otwarte, aż ta konstytucya oblatowaną będzie, a po oblacie aby żadna nie ważyła się przyjmować manifestów (…) Aby dobrze się naradzić, żeby i, którzy nie zaprzysięgli tej konstytucji, nie znajdowali się na sesyach sejmowych, póki nie zaprzysięgną'. Quotation after Smoleński (1909, p. 278).

[124]Letter to Deboli, May 4th, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 82.

[125]About searching an unanimity wrote also Oraczewski in his letter, May 7th, 1791, AGAD, Zbiór Popielów, sygn. 418, k. 568–570.

means possible."[126] One of the key regulations concerned the abolition of old and new laws that were inconsistent with the Constitution. This will be analysed later. The Declaration also consisted of introductory provisions related to the process of taking an oath by the officials of government committees and judges without delay, and within a month for the army, as well as regulations concerning sanctions imposed on those who would dare to oppose the Constitution ("giving an attentive eye on insurance of this constitution"). This intricate procedure provides grounds for the assumption that the Constitution was enacted in two stages. The Declaration was to allay all anxieties related to procedural violations, e.g. the French version of the Constitution prepared at the request of the King and published by Peter Dufour indicates in the title that the Constitution was enacted by acclamation on 3 May and then unanimously sanctioned at the sitting of 5 May.[127] Civil servants and residents of the Brzeg province gathered in the assemblies (*Sejmiki*) of 14 February 1792 also wrote of the "Government Constitution of Third and Fifth May 1791" in reporting the swearing of an oath of loyalty.[128] The title of an English-language publication emphasized the revolutionary nature of the events.[129]

Those absent on 3 May swore an oath. The other absent officials, such as members of the Tax Commission of Lithuania, were ordered to send a Rota and take the oath in the proper office. After a few solemn speeches the parliament proceeded to continue normal operations. The matter of the constitution and the oath returned over the following days, both members who joined and those who had previously remained silent, now wished to comment as supporters of the Constitution. A small group of opponents stressed the indisputable fact of parliamentary procedure being violated in the process of adopting the Constitution. The circumstances of the Constitution's enactment would soon come to serve as a pretext for questioning it. On the one hand, Russian diplomacy and propaganda would emphasise the fact of pressure being put on the deputies: "The castle and the Sejm Chamber were crowded with the common people of Warsaw, armed men were brought in, the cannons, an artillery regiment and the Lithuanian Guard were gathered to support the common people, they were turned against those who were feared the most, the opposition".[130]

On the other hand, strictly legal arguments appeared, i.e. undermining the Sejm's legitimacy to enact the Constitution, from the liberal interpretation that the

[126]Cf. Izdebski (1998, pp. 15–16).

[127]Forme constitutionnelle décretée par acclamation dans la séance du 3 mai, et sanctionée á l'unanimité dans la séance suivante du 5 mai 1791, P. Dufour, Warsaw 1791. Cf. Izdebski (1998, pp. 15–16).

[128]Czartoryski Library, rkps (manuscript) 929, p. 63.

[129]New Constitution of the Government of Poland, Established by revolution, The Third of May, 1791, J. Debrett, London 1791.

[130]'Zamek y Izba Seymowa napełnione były pospólstwem Warszawy, wprowadzono do niey lud uzbrojony, wytoczono z Arsenału Armaty, Regiment Artyleryi, y Gwardie Litewskie zgromadzono do wsparcia pospólstwa, zapalczywość jego pobudzono przeciwko osobom, których się lękano opozycyi', Deklaracyia, AGAD, ASCz, sygn. 24, k. 81.

parliament had extended its term of office in contravention of the law to the raising of procedural issues, such as the absence of a fair number of deputies and an actual lack of unanimity among the deputies present. Unanimity was not a legal condition as the Sejm was confederated, but the process of formal vote counting was not carried out. It also must be emphasised that enactment of the Constitution did not imply a change in the understanding of sovereignty, and neither did the composition of those wielding power. As far as procedural provisions are concerned, they has been breached before with the rule holding that the Sejm has the power to adopt regulations but also to withdraw them when needed (*necessitas non habet legem*).[131] The Saxon deputy Essen also wrote to Dresden about "strong ferment" and the presence of 10,000 burghers greeting the king and the elector. However, he explained in extensive detail that "It is said that many deceptive means were employed to frighten the Russian partisans in the Sejm, by placing a mob in the castle courtyard and having them occupy all the seats. Nevertheless (…) I wish to emphasize with all seriousness that the threat of a new partition has made such a strong impression that even if various superior considerations prevent the elector from consenting to the Polish proposals, (…) it would seem that agreement could be found to turn the throne over to any prince, or even a common nobleman, as long as the idea of an inherited throne could be instituted and by the same token Poland could free itself from the influences of Austria and Russia."[132]

The Marshals of the Sejm and the Confederation made a solemn proclamation, informing the public about the adopted Constitution. The text for the oath of allegiance to the Constitution for deputies and "military persons" stationed overseas was also drafted. Congratulations poured in from around the country and from abroad, and there was mention of the Polish Constitution in the British and French parliaments. The monarch handed out "Constitution rings", in snuffboxes, and even buttons and belts were engraved with the commemorative dates.

The King reinforced this mood through his speeches in the Sejm, swearing that he would only abandon the Constitution "upon his death".[133] Diplomatic correspondence was also employed in his manoeuvring. The King did not hesitate to make use of extensive manipulations and censorship, for example by editing out of incoming message troubling fragments about the reticence of the elector and the Vienna court. The Prussian ambassador, Girolamo Lucchesini, who viewed the Constitution as a house built on sand, opined against presenting the Prussian King as a reliable ally of reform in Poland. He criticized the naivety of Polish diplomacy, correctly pointing out that the Saxon elector did not take the decision on his own, but only in concert with the neighbouring powers. However, at the same time he worked to convince the Prussian King that Russian intervention in Poland should

[131]Uruszczak (2011, p. 25).

[132]Letter of Franciszek Essen to the Minister of Foreign Affairs Johann Loss, of 7 May 1791, No. 22, in: Kocój (2000, p. 41).

[133]„*que je n'abandonnerai qu'avec la vie la loi du 3 mai*". Letter of the King to Józef Poniatowski [Warszawa] 30.IX.1791, Dembiński (1904, p. 45).

not be expected. Letters to Berlin are replete with negative commentaries on the Constitution, wild exaggerations of the number of those opposed to it, and criticism of the French diplomat Descorches, who was said to propagate in Poland (even in Russia, using Poland as a conduit) dangerous democratic ideas. He was resentful of the fact that the King portrayed conversations with Lucchesini as ever so promising for Polish matters, while the attitude of Frederick Wilhelm II was depicted as exceedingly positive towards the Constitution. In Lucchesini's opinion, documents falsified in this way could fool the nobility awaiting the assemblies and convince them that the Constitution enjoyed a "powerful ally" in the Prussian King. The ultimate success—support for the Constitution in the assemblies—was, in Lucchesini's opinion, to be achieved through lies about the acceptance of the crown by the Saxon elector, and the close alliance of Poland with Prussia and Austria.[134]

The independence of the King in this issue was useful in the reorganization the foreign affairs apparatus which was written into the Constitution. Additionally, the king also appointed opponents of the Constitution to the Members of the Guard of the Laws; their presence can be attributed to activities taking place behind the scenes. The King was rightfully afraid of betrayal by them, although this might have been a mere excuse in light of the ignorance in which the Guardians—supporters of the patriotic camp—were kept.

The activities being described here comprise a sort of propaganda campaign, directed largely at creating a favourable climate for the Constitution outside the capital. The Act of 3 May was essentially an initiative of Warsaw and, to a smaller degree, some of the larger cities; greater resistance was expected in the countryside. On 14 May the King reported to Deboli that "Emissaries for the Revolution have gone out in great numbers".[135] Meanwhile, the mood in the countryside seemed favourable: "Several dozen Civilian and Military Commissions from the Crown and from Lithuania have sent their delegates, while others have forwarded letters attesting to their support of the work of 3 May", the King reported to Deboli.[136] Undoubtedly a significant role in these "spontaneous" events was played by the aforementioned trusted deputies—for example, the deputy of Wieluń Mączyński wrote to the King about his gathering of citizens "of the entire district" who had sworn their allegiance to the 3 May Constitution and assigned deputies to present their expressions of gratitude to the monarch.[137] In turn, the citizens of Bracław wrote with regret to the *Gazeta Narodowa Y Obca* that no oath-taking had been done in their city, and recalled that the "lover of the Constitution and of the deeds of the present Sejm", *id est* the chamberlain of Bracław, Bogdan Ostrowski, had even thrown two ceremonial balls and that "the whole of the Bracław populace and that

[134]Kocój (2006).

[135]'Rozesłańców za Rewolucją apostołuiących iuż wyiechało, y wyieżdża dosyć', letter of the King to Deboli, 14th May 1791, AGAD, Zbiór Popielów, sygn. 413, pp. 92–94.

[136]Letter of the King to Deboli, Varsovie ce 24.7bre 1791, AGAD, Zbiór Popielów, sygn. 413, k. 194.

[137]Letter of deputy from Wieluń W. Mączyński to the King, de 28. Junii 1791, Biblioteka Czartoryskich, rkps. 734, p. 337.

of the surrounding towns, 600 in all, had gathered" at the parish church on 4 February to declare their loyalty to His Royal Highness of the Republic in defence of the 3 May Constitution.[138]

A final referendum on national consent were supposed the Regional Council (the Dietines) sittings of 14 February 1792 became—out of 78 Councils 70 expressed their approval of the Constitution by taking an oath, vouching or expressing their gratitude to the King and the Sejm for the enactment.[139] Successive editions of *Gazeta Narodowa Y Obca* reported on ceremonies organized in the countryside where oaths on the Constitution were taken, cannon volleys fired in salute, ceremonial masses and festivals were held during which toasts for the King, the Constitution, and even the succession of the throne were offered.[140]

Some of the deputies who had signed the Dietines' instructions for opposition to the abolition of free elections justified their initial objection towards the Constitution with the fear of being accused of violating the Dietines' recommendations[141] and changed their position during next months. The assemblies selected their representatives for the anniversary ceremonies held on 3 May 1792. The celebrations were reported in the "Gazette", and were accompanied by appeals to the Nation in conjunction with the outbreak of war in the defence of the Constitution, as well as reports of Russian military actions taken against Poland.[142]

The above description of the circumstances surrounding the adoption of the Constitution leads to a controversial conclusion—in a certain sense, from the very beginning the May Constitution was a myth, the embodiment of a tool for protection against both internal and external threats. No serious constitutional debate was conducted in parliament, nor among polemicists; decisions as to the wording of particular provisions were taken in negotiations between the King, Potocki, Małachowski and Kołłątaj; translations and transpositions of successive versions by

[138]Excerpt of the letter to Gazeta Narodowa (Wypis listu pisanego do kantoru Gazet Narodowey z Bracławia dnia 7. Lutego), Suplement do Gazety Narodowey Y Obcey Nro XIV z Warszawy Dnia 18. Lutego Roku 1792, p. 84.

[139]Letters of the King to Deboli—end of February, March 1792, AGAD, Zbiór Popielów, sygn. 413; Szczygielski (1994b).

[140]Cf. also Gazeta Narodowa Y Obca Nro XV z Warszawy we srzode dnia 22. Lutego 1792, p. 85, Nro XVIII z Warszawy w sobotę dnia 3. Marca Roku 1792, pp. 103–104, reports from Merecz county (doniesienia z powiatu mereckiego), Suplement do Nro XXIV z Warszawy dnia 24. Marca 1792.

[141]Głos Jaśnie Wielmożnego Franciszka Mielżyńskiego Starosty Wałeckiego Posła Poznańskiego (Voice of the Poznań Deputy Franciszek Mielżyński) Na Sessyi Dnia 19. Marca Roku 1792 Miany, AGAD, ASCz, sygn. 24, k. 223–224v, there also similar speeches, a similar description is provided by Stanisław August to Deboli in his letter of 21 May 1791, AGAD, Zbiór Popielów, no. 413, p. 96.

[142]The ceremonies in Warsaw and the countryside were related by the Gazeta Narodowa Y Obca, No. XXXVI, z Warszawy w Sobotę Dnia 5. Maia Roku 1792, pp. 213–214, Nro XL z Warszawy w Sobotę dnia 19. Maia Roku 1792, p. 237, Suplement do Nro XV, p. 240, Suplement do Nro XLI, p. 246, Nro XLII z Warszawy z 26 maja 1792, p. 250, Suplement do Nro XLII p. 252, Nro XLIII z 30 maja, p. 256. Smoleński also described these events in: Smoleński (1897, pp. 5–18).

Piattoli and Linowski could also have contributed to editorial changes in the document. This came about for obvious reasons—experiences of work on the draft of "the Form of Government" convinced Potocki not only of the deputation's conservative attitude, but also of the extreme inefficiency of debates. This is not, therefore, a constitution of lawyers, such as that of 1831 in Belgium. It is a constitution of citizens placing their trust in the slogans of the progressive camp, the voices of the 3 May session which emphasized the necessity of adopting the Constitution in the face of international volatility. In a certain sense the Constitution achieved legitimacy later: during the 5 May session, the submission of the oath by civil servants in the following days, and ultimately the decision of the assemblies of 14 February 1792. A thorough analysis of its contents was not really conducted until work was underway on legislation implementing its provisions.

6 The Problem of the Supreme Law in the Time of the 3 May Debate

6.1 Henrician Articles and Pacta Conventa

Evaluation of the revolutionary 3 May Constitution in the context of its supreme location in the Polish legal system is not a simple task. A particular difficulty here lies in determining the relation between the existing sources of law, including the category of Cardinal Laws, and the new important act "to which all other laws (should) submit".

In particular, three categories should be addressed: the Henrician Articles, Pacta Conventa, and Cardinal Laws. The Polish tradition of recording fundamental rights is very long. In this context we should mention the tradition of the oath taken by each newly elected King through the Henrician Articles (1573). These articles may be referred to as a sort of "estate constitution". They constituted a compromise between the nobility and the magnates, but also between Catholics and infidels, and they constituted a legal barrier against the "*absolutum dominium*" arbitrary power of the newly-elected Polish King Henri de Valois.[143] Mention should be made of opinions present in the Polish subject literature that the articles constituted a "fundamental Act" or "constitutional Act", although these claims[144] are met with

[143]Szczęska (1990, pp. 19–20). Newest elaboration of Articuli Henriciani issue: Makiła (2012, passim).

[144]Among historians Andrzej Stroynowski: cf. Stroynowski (2013a, pp. 27–28); among legal historians f.ex. Lewandowska-Malec (2013, p. 93). strongly Makiła; cf. his summary: Makiła (2008, p. 60), Articuli Henriciani as "fundamental constitutional laws", also Makiła (2014a, pp. 155–168).

the charge of hyperbole in relation to the significance of the articles.[145] The Henrician Articles survived in their classic form until the second half of the 18th century, when they were transformed by the instrument that was the Cardinal Laws, to be discussed in detail below.[146]

The *Pacta Conventa*, on the other hand, represented a bilateral agreement concluded by the King and the nation represented by the nobility. Each successive elected King took an oath on the Henrician Articles and entered into a contract, a *Pacta Conventa*, which could refer to royal grants, marriage, etc. From 1632 the *Pacta* begin making greater reference to issues of political organization, replacing the Henrician Articles (which from thereon are only rarely invoked); to a lesser degree they refer directly to the personal obligations of the monarch, as they originally did. This is the source of the opinion present in the subject literature that the acts taken together form a sort of *sui generis* constitution.[147]

The Henrician Articles (*Articuli Henriciani*) are treated fairly, according to Polish literature, as a kind of prototype for a "Basic Law". A particular argument in favour of the articles' role in establishing a political system is the fact of the unique position they enjoyed in the legal culture of the nobility, coupled even with the conviction of their supremacy, evidenced for example in the slogan "*firnamentum publicae libertatis*". This theory is dismissed by Tomasz Kucharski, who demonstrates that there is no broader justification for it to be found.[148] Although we should concede that they are acts regulating key issues of the political system, at the same time Kucharski rightly points out that very few of the principles underlying the system, and whose existence is not in doubt, were stated *expresses verbis* in the wording of the articles.[149] The author also questions the supreme power of *Pacta Conventa*, mainly emphasizing their strictly political role and their capacity to amend only "normal" parliamentary constitutions. The author invoked the authority of such scholars as Gottfried Lengnich, who did not differentiate the legal force of the *Pacta* and an ordinary constitution. He understands the ritual of reciting the pacts at the beginning of deliberations of every Sejm as rather an expression and exposition of the control function, and by the same token a sort of reminder to the monarch of his obligations as set out by the structure of the state.[150]

Such an agreement was also entered into by Stanisław August at the time of his coronation. Regular invocations to this fact can be found in the parliamentary debate. "The *Pacta Conventa* was mentioned here: not for I would like to declare

[145]This refers to the aforementioned work by Dariusz Makiłła and review by Tomasz Kucharski and Zbigniew Naworski, cf. Kucharski and Naworski (2013) The author, D. Makiłła, also responded to this review in a work given the title "On the first Polish fundamental law. In response to the critics Tomasz Kucharski and Zbigniew Naworski" (2014b). Sceptical voice on constitutional character of *Articuli* also: Matuszewski (2007, p. 301).

[146][A.M.] (2010, p. 25, broader: pp. 18–29).

[147]Uruszczak (2013a, p. 223).

[148]Kucharski (2014, pp. 122–129).

[149]Kucharski (2014, pp. 125–126).

[150]Kucharski (2014, pp. 129–131).

against them, as I am most familiar with their sanctity; I would dare not touch them, for fear of committing sacrilege", said Ignacy Potocki, the Lithuanian Court Marshal, during the 9 December 1789 debate over the prerogative of the king to send deputies to foreign courts.[151] In the course of that same debate, the Czerniechów deputy Czacki referred to the *Pacta* as a "sacred bond between the King and Nation", whilst deputy chancellor Garnysz emphasized that "*Pacta Conventa* is an inviolable thing, and the Sejm may not amend it for the Sejm represents only the Nation, while the *Pacta* was concluded with the entire Nation."[152]

These circumstances of the pacts's swearing were invoked by the King on 3 May for fear of being accused of breaking the *Pacta Conventa*, which might even result in repudiation of allegiance to the ruler. The King requested that the Sejm release him from the corresponding passage of the *Pacta* which referred to a free election,[153] and even deputies opposed to the Constitution such as Chomiński from Oshmiana did not hesitate to remind the King of his oath.[154] Stanisław Szczęsny Potocki made the accusation in a letter sent from Vienna to the king in May 1791: "crushing of the sacred *Pacta Conventa*", "breaking the links that bind with the Free Nation".[155] It also mentions that even if the Sejm freed the King from the duties he had sworn to carry out at the election, the Sejm "did not have a mandate from the nation to such a piece of work". Potocki asks "which Voivodeship commissioned its representatives to do so?"[156] The King referred to this issue in his anniversary speech on 3 May 1792, indicating that it was the Sejm that relieved the monarch of this duty (i.e. *Pacta Conventa*) and which called for him to swear allegiance to the Government Act which constitutes the 'Succession Throne', covering the legislative, executive and judiciary in such a way as to do harm to no person and put no man at a disadvantage (…) The entire nation has come to love the

[151]'Wspomniano tu Pakta Konwenta: nie chęcią iakbym miał co rzec przeciw nim, bo aż nad to znam ich świętość, y tykać ich lękałbym się, żebym w świętokradztwo nie popadł', Sessya XXXII, dnia 9 grudnia 1789, Dyariusz Seymu Ordynaryinego pod związkiem Konfederacyi Generalney Oboyga Narodów w Warszawie rozpoczetego Roku Pańskiego 1788, t. I, cz. II, w Warszawie w Drukarni Nadworney J.K. Mci Y Przesw. Kommisyi Edukacyi Narodowey, pp. 357, 360.

[152]'Pacta Conventa są rzeczy niewzruszone, y od Seymu nawet naruszyć się nie mogące, bo seym reprezentuie tylko Naród, a Pakta zawierane były z całym Narodem'. Sessya XXXII, dnia 9 grudnia 1789, Dyariusz Seymu Ordynaryinego pod związkiem Konfederacyi Generalney Oboyga Narodów w Warszawie rozpoczetego Roku Pańskiego 1788, t. I, cz. II, w Warszawie w Drukarni Nadworney J.K. Mci Y Przesw. Kommisyi Edukacyi Narodowey, p. 360.

[153]Also in a later accusation of the Targowica Confederation against the King and his fear, cf. the letter of the King to Deboli, No 153 Varsovie ce 22. Aout 1792, AGAD, Zbiór Popielów, no. 413, k. 452.

[154]Wegner (1866, p. 181).

[155]Letter of Stanisław Szczęsny Potocki to Stanisław August, May 30th, 1791, AGAD, Zbiór Popielów, sygn. 392, k. 1–2.

[156]'…które Województwo Reprezentantom swoim takowe dało zlecenie?' Letter of Stanisław Szczęsny Potocki to Stanisław August, May 30th, 1791, AGAD, Zbiór Popielów, sygn. 392, k. 2.

Constitution and expresses it through the Deputies gathered here".[157] When, in the following months of 1791 the Saxon elector was being lobbied, under the constitution of the future king of Poland, to engage in negotiations, the necessity of appointing a plenipotentiary for matters concerning the Pacta Conventa was indicated. On the other hand, the Saxon elector emphasized those amendments to articles of the Constitution which he expected from the Polish side, such as the potential for the acquisition of throne by not only the Saxon infant but also one of the royal brothers.

6.2 *Cardinal Laws in Polish Tradition and Legal System*

The Polish concept of a Cardinal Law appears to be related to some degree to the French model of fundamental rights. Nevertheless, it should be emphasized that it seems even more closely linked to the medieval theories of Marsilio da Padova, "monarchomachs" theories of contracts concerning power and sovereignty of the people over the ruler. In Poland, the Cardinal Laws particularly helped to reduce the powers of the King and directly expressed the principle of supremacy of the nobility.[158] Dariusz Makiłła emphasises that the development of the Cardinal Laws did not mean repealing the Henrician Articles according to the principle of *lex posterior derogat legi anteriori.*[159] They emerged as a reflection of the evolving viewpoints expressed in the doctrine, and were partially overlapping with the subjective scope of the Henrician Articles while extending or clarifying them as well.[160] The concept itself was derived either from "*cardinalis*" or from "*cardo*", e.g. hinges, "for as the rotation of a door depends on hinges, the entire machine of the Lawmaker's authority and the executive power depend on the Cardinal Laws".[161]

The Cardinal Laws adopted in 1768 and completed in 1775 are crucial for subsequent events and an assessment of history of the eighteenth century. These were first announced in 1767 in the treaty with Russia and fulfilled in the first part of so-called separate second act, added to the treaty and limiting the sovereignty of Poland, emphasizing its position as a Russian protectorate. As announced, the

[157]'stanowiącey Tron Successyiny, a tak określaiącey trzy Władze, prawodawczą, Wykonawczą, Sądowniczą, że wszystko obeymuiąc, nikogo nie krzywdzi, nikomu przewagi nie daie (…) Naród cały tę Konstytucyę uwielbił, i otym nayuroczyściey zapewnia przez tych zacnych Delegatów.' Mowa jego Królewskiej Mości Dnia 3go Miesiąca Maia Roku 1792 w Kościele świętego Krzyża Miana, AGAD, ASCz, sygn. 24, k. 161v.

[158]Radwański (1952, p. 185).

[159]Makiłła (2012, pp. 490–491).

[160]Kucharski (2014, pp. 122–129).

[161]'iż iako na Zawiasach zależy obrót drzwi, tak na Prawach Kardynalnych zależy cała machina władzy Prawodawczey y mocy wykonawczey', Myśli o istocie praw kardynalnych, n.p., n.d., [probably: Myśli o istocie praw kardynalnych. (Projekt do prawa na sejmie r. 1790), n.p. 1790]. Biblioteka Uniwersytecka w Toruniu, sygn. Pol 8.III.1945.

"form of the Polish Government and the freedom of its citizens clearly and inalienably oblige posterity not to allow any circumstances to bring changes to the constitution in its fundamental part".[162] This act should have "all the powers of validity"; also the assumed "lifetime durability" of the arrangements was emphasized far and wide. The Cardinal Laws of 1768 guaranteed, among other things, *neminem captivabimus*—the privilege of the nobility, lifelong offices and the royal bestowals, free elections, and the dominant position of the Roman Catholic religion. They primed the limit of the monarch's power reaching for the formula "the king in parliament".[163] This catalogue of rights is theoretically "never likely to change". During the Partition Sejm (1773/1775) an amendment was added that a son or a grandson of an elected king may not himself become king. The Cardinal Laws did not deprive the Henrician Articles *expressis verbis* of their binding force; the latter were mentioned as 'the fundamental law of 1573' as religious rights were being secured.[164]

The Cardinal Laws of 1768/75 should be legitimately deemed the first act of a permanent nature (the introduction included its overall objective *expressis verbis* as "once and for all, to permanently secure the form of government and freedom"), and a document in which a more comprehensive attempt was made to regulate systemic principles. They were beyond a doubt much more complete than the Henrician Articles or the subsequent editions of Pacta Conventa. However, it does not appear as if the lawmakers were striving to create a comprehensive set of regulations, but rather in order to secure the status quo against changes. It would be an exaggeration to claim that there was a deliberate intention to place the norms at the peak of the hierarchy of sources of law; however, Tomasz Kucharski makes a legitimate point that "their essence was not to be formally superior in the legal system, but boiled down to serving as an additional (…) guarantee of the established order".[165]

The notion of "Cardinal Laws" was also used in political publications by the most outstanding protagonists of the era on both sides of the political spectrum—the Liberals, such as Ignacy Potocki and Hugo Kołłątaj, and the Conservatives, namely Seweryn Rzewuski. Proposals by Kołłątaj and Potocki for categorizing and understanding the meaning of the Cardinal Laws were essentially similar as they related to the content of the political and social system. The possibility of changing these laws was treated differently and an amendment by a qualified majority of 3/4

[162]'forma rządu Rzeczypospolitej Polskiej i wolność wolnych jej obywateli wyciągają dla potomnych czasów wyraźniejszego i w niczym nigdy nie poruszonego postanowienia, żeby nowe przypadki nie mogły na potym wprowadzać nowe odmiany, które w pospolitym rządzie nie powinny ściągać się do samej fundamentalnej konstytucji', Volumina Legum, Przedruk Zbioru Praw Staraniem XX. Pijarów, w Warszawie od roku 1732 do roku 1782 wydanego, Vol. VII, Petersburg 1860, pp. 250–256; second act, pp. 276–285; citation, pp. 253–254.

[163]Leśnodorski (1951, pp. 11–20).

[164]In the Sejm constitution on the rights of dissidents, Volumina Legum, Vol. VII, p. 259, folio 573.

[165]Kucharski (2014, p. 133, cf. 131–133).

of the votes was allowed, while the original version of the Constitution of 3 May included a provision for unanimous consent.[166] The most extensive concept was that developed by Hugo Kołłątaj, including the first category of the laws of nature being inherent and inalienable (not to be breached by any consensus), then the "political general" law, or "the law of the social contract", not subject to amendment, and finally special political rights forming constitutional law, subject to alteration with the consent of a 3/4 majority of the assembly and a unanimous Act of parliament.[167]

Potocki adequately distinguished "Cardinal Laws" from "constitutional rights". In "Principles to improve the form of government" he suggested the introduction of unanimity in respect of Cardinal Laws, 3/4 in decisions on resolutions of war and peace, and an absolute majority in making laws about civil law, military and financial affairs. One of the previous printed versions of the "Rules" envisioned unanimity in instructions of assemblies concerning changes to the Cardinal Laws, a 3/4 majority of instructions in political matters, 2/3 in tax and revenue matters, and a simple majority in respect of civil law and criminal law matters (4 to).[168] One of the many opponents of Potocki's distinct concepts was bishop Ignacy Massalski, who treasured *liberum veto* as an expression of freedom and feared that any reforms made to strengthen the state could become a pretext for yet another partition.[169] In the final edition there is only a general mention that "the will of the Nation as to the law-making of the Sejm is decided either unanimously or by some sort of majority, depending on the Material under consideration. Only in the material of the Cardinal Laws should there be unanimity of the Instructions."[170]

The introductory document titled "Thoughts on the essence of the Cardinal Laws" was likely a supplement to the draft of 1790,[171] whose author accepted the classification of immutable and fixed Cardinal Laws, and also attempted to outline their essence. He asks where such can exist in a nation "which wishes to have a Legislative authority accompany it?", and answers the question by remarking that "the meaning of words must be agreed upon". He emphasizes that their immutability does not mean that the foreigner or usurper "cannot abolish them, but

[166]Radwański (1952, p. 173).

[167]Leśnodorski (1951, pp. 368–371).

[168]Zasady do poprawy rządu (Rules for improvement of the government), 4 to, 1789 (Bibliografia Estreicher Vol. XX, p. 229). The Rules are signed by the "Presiding over the Deputation" bishop Krasicki, but this must be one of the earlier versions still referring to the "Nation" (1mo and successive articles), not "The Republic", as in the version prepared for oblate.

[169]Janeczek (2007, p. 212).

[170]'wola Narodu co do prawodawstwa władzy Seymowey poruczona, podług gatunku Materyi jednomyślnością, lub różną większością okazywać się będzie. W Materyach tylko Praw Kardynalnych powinna być jednomyślność Instrukcyi.' Zasady do poprawy formy rządu, Volumina Legum, Vol. IX, Kraków 1889, pp. 157–159.

[171]Myśli o istocie praw kardynalnych. (Projekt do prawa na sejmie r. 1790), n.p., 1790. The author used the copy found in a legacy collection of Ignacy Franciszek Stawiarski, Biblioteka Uniwersytecka w Toruniu, sygn. Pol 8.III.1945.

that they may not be abolished without the downfall of the freedom of Citizens and the political freedom of the entire Nation, that they are so bound to the freedom of the Citizen and the Nation that, were they to be abolished, the Citizen would become a Slave, and the Nation would, in whole or in part, find itself brought to heel by the violence of the usurper. Such laws are nothing other than universal maxims which every free Man feels in his heart; this is why they ought to be written down, for the Nation to know what must be taken from the grasp of the Usurper or the violent foreigner by the Law".[172] The Cardinal Laws are to serve as a template for legislation "as a line which not even the Legislator himself would dare to attempt crossing". These rules for the legislator—what extent the law may be amended, and "what extent the Laws may not be touched insofar as they have not been sacrificed by natural truth and justice". In the draft this category was to include provisions addressing freedom of conscience (on the faith of the ruler, apostasy and tolerance), provisions on the indivisibility and self-rule of the Republic, the protection of the law over all people, and civic freedoms protected in three articles: on freedom of contract, personal safety, and freedom of speech. In the author's opinion the immutable Cardinal Laws should include a chapter on fixed Cardinal Laws which could only be abolished by unanimity of instructions from the assemblies—regulations concerning the Sejm, the assemblies, congresses of the people and of the estates, the Republic, and the Executive.[173]

The draft from September 1790 opened with a chapter entitled simply "Constitutional and cardinal laws within them." It was a list of key political solutions which assigned a special role to "cardinal laws", in which the change discussed below would be associated with a rigid mode of introduction. These cardinal laws constituted key decisions on the organization of the state and its supreme authorities, Polish-Lithuanian relations, and the powers of the three estates. The act itself was not constructed properly in terms of legislation; the cardinal regulations were mixed with the so-called constitutional provisions, which were an extension of the former (60 to be precise).

During the debate, and in particular during sessions held in Marshal Małachowski's house, it was decided—as was indicated in "Thoughts…" ("*Myśli…*")—that among the key regulations "inviolable cardinal laws" and "permanent cardinal laws" would be cleaved off. This distinction was close to Kołłątaj's division into Cardinal Laws "planted on the law of nature" and "planted on political

[172]'wzruszyć nie potrafił, lecz dla tego, że niemogą być wzruszone bez upadku wolności Obywatelskiey y wolności polityczney całego Narodu, że są tak spoione z wolnością Obywatela y Narodu, iż gdyby naruszone były, Obywatel stałby się Niewolnikiem, a Naród w części lub całości zostałby pod przemocą uzurpatora. Takie Prawa nic innego nie są, tylko maxymy powszechne, które każdy wolny Człowiek w sercu swoim czuie; dlatego zaś przepisanemi być powinny, żeby Naród wiedział, czego ma strzec od Uzurpatora y przemocy obcey, żeby każdy Obywatel czuł w sobie, co mu uzurpator lub przemoc obca wydziera, żeby nawet zgnębiony Naród wiedział, co z rąk Uzurpatora lub przemocy obcey odzyskać ma Prawo'. Myśli o istocie praw kardynalnych. (Projekt do prawa na sejmie r. 1790), n.p., 1790, as above.

[173]Myśli o istocie praw kardynalnych. (Projekt do prawa na sejmie r. 1790), n.p., 1790, no pagination.

rights". The cardinal inviolable laws were supposed to be a collection of general principles, including freedom of conscience, personal freedom, freedom of contract, the principle of subordination of law, protection of property and indissolubility of the Republic.[174] However, this latter issue sparked a fierce debate, as the draft absolutely forbade any alienation or even territorial exchange, which probably resulted from the traumatic experience of the first partition. Potocki, however, argued that "the integrity of the Republic cannot be insured with cardinal laws, but with the government, the military, virtue and customs prevailing in the country".[175]

Stroynowski, a deputy of Volyn, also approached the concept of the cardinal principles in the same debate and objected to Suchodolski's intention of introducing a ban on foreign candidates to the throne, saying that he knew no other but this Cardinal Law, which derives from the natural law, or from the divine law, yet these said additional issues were not such, so they should not be included within Cardinal Laws.[176] Ultimately a portion of the regulations was approved. Work on the final shape of the Form of the Government was drawn out, in January 1791 the deputies continued to bury themselves in fruitless discussions, work on the law of the assemblies, or continue work on the partially finalized discussion of the Cardinal Laws. In opting for the second solution they emphasized the fundamental role of the Cardinal Laws, "truly" constituting the Form of the Government, for "it is the foundation which determines the structure". The Cardinal Laws were applicable to Sejms and assemblies, "and therefore are the source from which the stream of freedom flows, they are the only rule of the Republican Government". Opponents claimed that regulations concerning Sejms and assemblies were the priority, as the "foundation of the freedoms and wellbeing of the Republic", *palladium libertatis*. At the same time, it was perceived that the Cardinal Laws in and of themselves provided no protection against foreign aggression, something evidenced by the events of 1773 and the "watchful and bravely active Government." It was argued that those adjustments of the Cardinal Laws that had already been made possessed everything crucial for preserving the liberty of the nation. The others should flow from the entirety of the political system, *id est* detailed regulations on the Form of the Government. Ultimately, on 7 January 1791 the deputies voted to undertake work on an Act on the assemblies with a vote of 174 to 89. The long session, completed at 2:00 at night, was concluded with the recommendation to enshrine the

[174]Szczęska (1990, pp. 41–42).

[175]'całość Rzpltey nie Prawami Kardynalnemi, ale Rządem, Woyskiem, Cnotą i zaprowadzonymi w Kraiu obyczaiami ubezpieczyć tylko można (…)'. Dziennik Czynności Seymu Głównego Ordynaryinego Warszawskiego, pod związkiem konfederacyi Oboyga Narodów agitującego się 1790, Sessya CCCVI, Dnia 3 Września w Piątek (used version: AGAD, ASCz, sygn. 9, p. 81) Cf. also Radwański (1952, pp. 162–163).

[176]'Ja prawa kardynalnego innego nie znam, tylko to, co wypływa z Prawa Boskiego i z przyrodzenia, to jest, co się rodzi w sercu każdego człowieka i w jego naturze i takie prawo ustanowiliśmy (…) To zaś co (?) w sobie rzeczone dodatki, jak nie wypływa ani z prawa Boskiego, ani z prawa przyrodzonego (…) tak do praw kardynalnych należyć niepowinno' (Sessya 30 września 1790, AGAD, ASCz, sygn. 9, p. 567v)'.

Cardinal Laws in the agreed form.[177] The progressive camp, as indicated, put off the acceptance and publication of the cardinal principles, which were finally adopted on 7 January 1791, fearing the further binding of their hands in the reform process. During the session of 11 January the dithering Marshal Małachowski was given his final rebuke concerning the matter of publication of the Cardinal Laws.[178] In the adopted text attention is drawn by the particular indication that "by the Cardinal Laws" the invalidity was assured of "all foreign guarantees of the Polish government contrary to the independence of the Republic and detrimental to her self-rule", "and that, under no pretext and from nobody in the Republic, could any such be proposed and adopted".[179]

Lastly, the 3 May Constitution did not use the term "Cardinal Laws". This phrase was associated with the events of 1768 and even there was awareness that the subjective distinction between "cardinal" and "constitutional" law was arbitrary and fictitious. It was considered that the mere use of the term "Cardinal Law" did not give them special durability among other constitutional rights. A proposal to distinguish between "inviolable constitutional rights" and "permanent constitutional rights"[180] appeared, but this did not explicitly materialize in any of the articles. Only the privileges of the nobility and the Constitution itself were treated as "inviolable", and the separation of powers was introduced "forever". Each king ascending to the throne had to swear an oath to God and the nation "to preserve the Constitution, on the *Pacta Conventa* (…) which, like the former, shall bind him".

Bogusław Leśnodorski and, in his footsteps, Zbigniew Radwański, emphasized, that the mere fact of the enactment of the Constitution had not eliminated the concept of inviolable laws, which were to be above or somehow within the Constitution. However, Leśnodorski did write not consistently about the 3 May Constitution taking "the place of previous 'fundamental' and 'cardinal' laws", which in the present author's opinion did not take place if we invoke the understanding of the Cardinal Laws in the same manner as the protagonists, not narrowing the definition down to merely the acts of 1768/75 and encompassing them with the *expressis verbis* meaning of the immutable laws and *Pacta Conventa* set out in the Act on the Sejms.[181]

At the end of May 1791, in the course of the debate over the bill on extraordinary Sejms during session 82, the Bracław deputy Seweryn Potocki directly invoked the inviolability of the Constitution by these words: "I have seen no expression of immutable laws in this draft. We have only Laws known as Cardinal, and those are not immutable, as they may be amended by unanimous Instructions.

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[177]Gazeta Narodowa Y Obca, Nro IV, z Warszawy we srzodę dnia 12. Stycznia Roku 1791, p. 13.

[178]Gazeta Narodowa Y Obca Nro V, z Warszawy w sobotę dnia 15. Stycznia Roku 1791, p. 17.

[179]Art. VII: 'Wszelka cudzoziemska gwarancya rządu Polskiego, przeciwna niepodległości Rzeczypospolitey i uwłaczająca jey samowładności iest i nazawsze będzie nieważną, i aby żadna podobna pod iakimkolwiek bądź pretekstem od nikogo w rzeczypospolitey proponowaną, i przyiętą bydź nie mogła, tym prawem kardynalnym waruiemy'. Prawa kardynalne niewzruszone, Volumina Legum, Vol. IX, Kraków 1889, CCXXXVI, pp. 203–204.

[180]Radwański (1952, p. 174).

[181]Leśnodorski (1951, p. 363).

They tell me that the expression of immutable laws is to be found in the law already adopted on the Sejms. I would implore that we be granted such a Law, as all expressions of it cannot be encompassed by the memory. If, in its very essence, the said expression is contained in that law, I would at least request that we finally clarify what is meant by immutable laws".[182] In response, Weyssenhoff indicated that in the draft law on ordinary Sejms "there was a provision that the Ordinary Sejm shall not enact anything that would infringe the Act of 3 May and the Cardinal Laws, but it was judged that the expression of immutable laws was preferable to that of Cardinal Laws, and with this expression the Law of the Sejms was passed".[183] The Lithuanian Marshal lgnacy Potocki explained that in the works of the Deputation a deliberate attempt was made to avoid the concept of "cardinal laws", to avoid associations with the Sejm of 1768; it was also proposed to use the term "eternal", but ultimately the phrase "immutable laws" was applied, to apply to "the sanctity of Religion, freedom, security of life, ownership of property and the entirety of the Republic".[184] It was also mentioned during a later session that although conclusion of the works could be seen on the horizon, "we are approaching the finish of Our Government [form], and we still do not know what Laws we desire to be immutable from here on out?"[185] It can also be noted that such elements regularly appeared in discussion of the Sejm—as late as May 1792 the deputy Siwicki stated that the transfer to the monarch of military rights (under the May Constitution such a solution was to be found in the draft bill on the military commission) is "a threat to liberty", while Marshal Potocki objects, indicating that the voice of the Sejm and of the nation decided unanimously "of the harmony of our government act with the will of the nation".[186]

Ultimately, two closely related Acts, the Act on the Sejms and the Act on Extraordinary Sejms, refered to "the fundamental law under the title of the

[182]'Praw niezwruszonych wyraz znaiduiący się w proiekcie nie znam. Są tylko u nas Prawa pod nazwiskiem Kardynalne y te nie są niewzruszone, gdy za iednomyślnością Instrukcji odmienione, lub poprawione bydź mogą. Mówią mi że ten wyraz niewzruszonych znayduie sę w zapadłym iuż prawie o Seymach. Upraszałbym o rozdanie nam tego Prawa, gdyż pamięcią wszystkich wyrazów Yego obiąć niepodobna. Jeżeli w samey istocie rzeczony wyraz zawiera się w tym prawie, proszę przynaymniey, abyśmy objaśnili w końcu, co to są te prawa niewzruszone'. Sessya 82. Dnia 27. Maja 1791 R., AGAD, ASCz, sygn. 19, pp. 360–360v.

[183]'była wzmianka, że Seym Ordynaryiny nic stanowić nie będzie coby naruszało Ustawę 3.Maia y Prawa Kardynalne, ale sądzono, że wyraz praw niewzruszonych zamiast Kardynalnych iest lepszy y z tym wyrazem zapadło Prawo o Seymach'. Sessya 82. Dnia 27. Maja 1791 R., AGAD, ASCz, sygn. 19, p. 361.

[184]'Świętość Religii, wolność, bezpieczeństwo życia, własność majątku y całość Rzpltey'. Sessya 82. Dnia 27. Maja 1791 R., AGAD, ASCz, sygn. 19, p. 361.

[185]'zbliżamy się do ukończenia Rządu Naszego a niewiemy dotąd iakie będą Prawa, które za niewzruszone mieć chcemy?' Deputy of Kijów voivodeship, Jan Rybiński, Sejm session 83, AGAD, ASCz, sygn. 19, s. 369v.

[186]'o zgodności ustawy naszey rządowey z wolnością narodową', Gazeta Narodowa Y Obca Nro XL z Warszawy w sobotę dnia 19. Maia roku 1792, p. 235.

Government Act and on immutable laws".[187] The constitutional provisions which should be included in the latter category include the principle of separation of powers, which was mentioned earlier to have been adopted "forever", and the "inviolable" privileges of the nobility.

Thus, as Radwański correctly states, the Cardinal Laws in the post-may sense should not be associated with the assumptions published in January 1791.[188] It should be noted that the Sejm taken place in Grodno 1793, in abolishing the 3 May legal system, in a formal sense restored the law to its previous state. Its further determinations—the Cardinal Laws of the Grodno Sejm[189]—were themselves derogated in turn by the Kościuszko rebellion of 1794, which invoked the 3 May laws in respect of those norms they could be applied to in practice.[190]

In the debate of Great Sejm the theories of natural laws of the individual and the community, as well as the Cardinal Laws of the nobility converged. Leśnodorski writes that "the tendencies mixed and intersected".[191] He also emphasises an essential difference: while in the West the state does not "issue" laws but "declares" them, in Poland the inviolable rights of the nobility are based on legal 'privileges' and on the authority of the law.[192] Although e.g. Kołłątaj was a supporter of the first of those ideas, it would seem that the political scene was dominated by the second, with its narrative based not so much in the innate nature of the laws, but rather in the presumption of the binding force of once-granted privileges, the impossibility of their legal negation in light of the principle of sovereignty of the law.

In summary, it is practically self-evident that actors on the political stage intuitively felt that certain determinations by the legislator were of a special nature. There was thus a general conviction as to the existence of immutable Cardinal Laws —anchored in both tradition and in a unique conception of natural law—which no legislative act could amend or abolish. Furthermore, there was a group of legal solutions qualified as fixed or constitutive Cardinal Laws—in respect of which it was held possible to revise by way of unanimous instructions from the assemblies or a qualified majority of them. We can therefore perceive an awareness of the need to institute a hierarchy of sources of law; the protagonists attempted to achieve this, offering various conceptions. These views were not rendered inoperative by the 3 May legislation. As the debate taking place after 3 May has proven, it was rather held that the Government Act was a sort of additional and unclear addition to the existing doctrine, but did not annul it as such. In Poland, fundamental laws did not

[187]Volumina Legum, Vol. IX, p. 258.

[188]Radwański (1952, p. 173), Leśnodorski (1951, pp. 364–366).

[189]Volumina Legum, Vol. X. Konstytucje Sejmu Grodzieńskiego z 1793 roku, wyd. Z. Kaczmarek, przy współudziale J. Matuszewskiego, M. Szczanieckiego i J. Wąsickiego, Poznań, nakładem Poznańskiego Towarzystwa Przyjaciół Nauk z zasiłkiem Ministerstwa Szkolnictwa Wyższego i Polskiej Akademii Nauk 1952, pp. 110–113.

[190]Makiłła (2012, pp. 492–493).

[191]Leśnodorski (1951, p. 367). Broader cf. Salmonowicz (1991).

[192]Leśnodorski (1951, p. 372).

serve to mutually undermine one another, and their content intersected like the links of a chain, creating an unbroken continuum.

This fact would seem to negate the contemporary understanding of the constitution as the creation of a "new order", radically overturning existing reality. This is not a characteristic of the May Constitution. However, it is also obvious that, for many reasons, the authors of the Constitution were required to behave tactically and hide their intention of revolutionizing the political order. Fears of accusations that they were engaged in destabilization, the export of French slogans, and the threat of revolution—this constituted an excellent pretext for the intervention of Russian diplomacy and, ultimately, of Russian troops; on the other hand, fears of support for the May law by the conservative nobility in the countryside meant that the constitutional change had to be explained as a delicate revolution, a transformation and modernization of the existing system, *id est* essentially to smuggle a new regime in under the guise of the existing one.

7 Relation Between the Constitution and the Ordinary Legislation: Nullification of the Law Contravening to the Constitution

In undertaking this difficult topic, several issues must be addressed. One is verification of the theory of constitutional regulation and discussion contained in its entirety the principle of supremacy of the 3 May act over other laws adopted by the Sejm. A consequence of this is the creation of a nullification clause regarding law that contradicts the Constitution. It should also be judged whether the practice associated with the May constitution allows us to state that such a clause was, in fact, unequivocally understood in this manner.

The rule of nullifying law contravening the Constitution appears on the basis of Piattoli's version of "*Projet de réforme de Constitution in 1791*" in Art. 15.[193] This was yet another edit from the end of January/beginning of February, later translated by Linowski into Polish. This version, just as before, was so marked up that following consultations with Potocki, Marshall Małachowski sent it to Kołłątaj to prepare a new version, which, at the end of March 1791, assumed the form of a text known as "Constitutional Laws".[194] This was the fundamental reference point for preparing the final version of the text.[195] The principle of supremacy is also present here, but according to Kołłątaj it should concern the acts of "the present Sejm"; however, following the principles of linguistic interpretation, it would not apply to the law-making of future Sejms.

[193]Leśnodorski (1951, pp. 199–200).

[194]Been described in detail by Rostworowski Emanuel (1963, pp. 266–462).

[195]The newest work has been written by Mroziuk (2017).

The Constitution itself in the final draft referred to the title of the problem in two parts, the preamble and the subsequent Declaration of the Assembled Estates. The preamble contained the intention of the legislator, stated as "we adopt this constitution and this entirely sacred and inviolable pledge until that nation at the time prescribed by law, clearly has not recognized a need to alter any of its articles". According to another passage the supremacy of the Constitution was guaranteed in the following words: "To which constitution the further statutes of the present Sejm have to adhere to in all". To quote Feliks Oraczewski, "It was recommended at the session of the Constitutional Deputation the day before yesterday that all the subsequent draft legislation submitted by the government referred to this fundamental act".[196]

A particular summation was built into the Declaration in the words "All rights past and present opposed to this Constitution or to any of its articles we abolish, and descriptions specific to articles and any matter in this Constitution confined needed, as specifically detailing the duties and system of government for honour consisting of a Constitution, we declare (…) Having granted universal joy, we place an urgent eye on ensuring the Constitution, stipulating that whoever dared to be opposed to this Constitution or hustle on its corruption, or moved by the peacefulness of good, happy to be starting the nation by implanting distrust, perverse translation of the Constitution… as an enemy country, behind her a traitor, a rebel recognized, the most severe penalties immediately they will be punished by the Sejm court."[197] The Declaration thus assumed the punishability of actions against the Constitution. The deputies themselves also perceived a problem with guaranteeing the performance of its regulations, fearing that the lawmaker would be more focused on the creation of law rather than its execution. This was the source of the deputies' postulate to quickly appoint the Sejm Courts, which were to ensure the Constitution was followed, and finally fulfilled during session 82 of 27 May 1791.[198]

These concerns can also be interpreted as an expression of the conviction that not all deputies considered the Constitution to be an exceptional, superior act. Indeed, the lawmaker itself displayed a certain inconsistency, treating the Law on

[196]'Zalecono iest także na Sesyi Zawczorayszey Deputacyi Konstytucyiney stosować wszystkie przepisy dalszych projektów Rządówych do tegoż aktu fundamentalnego', letter of Oraczewski to NN, 7th May 1791, Warszawa, AGAD, Zbiór Popielów, sygn. 418k. 569.

[197]'Wszystkie prawa dawne i teraźniejsze przeciwne niniejszej Konstytucji lub któremukolwiek jej artykułowi znosimy, a opisy szczególne do artykułów i każdej materii w niniejszej Konstytucji zamkniętych potrzebne, jako dokładniej wyszczególniające obowiązki i układ rządu, za cześć składającą też Konstytucję deklarujemy (…) Uczyniwszy zadosyć radości powszechnej, dajemy pilne oko na ubezpieczenie tej Konstytucji, stanowiąc, iż ktobykolwiek śmiał być przeciwnym niniejszej Konstytucji lub targać się na jej zepsucie, albo wzruszał spokojność dobrego i szczęśliwym być zaczynającego narodu przez zasiewanie nieufności, przewrotne tłumaczenie Konstytucji… ten za nieprzyjaciela ojczyzny, za jej zdrajcę, za buntownika uznany, najsurowszymi karami natychmiast przez sąd sejmowy ukarany będzie'. Deklaracya stanów zgromadzonych, Volumina Legum, Wydawnictwo Komisyi Prawniczej Akademii Umiejętności w Krakowie, Vol. IX, Kraków 1889, pp. 225–226.

[198]Sessya 82, 27 Maia 1791, AGAD, ASCz, sygn. 19, pp. 353–354v.

the royal free Cities as an integral portion of the Constitution (Art. III), and in that manner determining constitutionally the entire issue of the burgher movement. This is the shortest of the articles addressing social classes, with the nobility and the peasantry given far more attention. At the same time, the Act on cities, constituting part of the "3 May system", was adopted following the same legislative procedure as later acts on the Sejm and Extraordinary Sejm, and they were also referred to directly in the wording of the Constitution. Should the entire Act on cities therefore be considered somehow superior to other acts, was this the intention of the lawmaker? Zbigniew Szczęska would seem to make a distinction: he feels that the Act on cities is a component of the Constitution, after which he distinguishes a group of acts "tightly coupled" with the Constitution (the Law on assemblies, "solemnly secured" in Art. VI of the Constitution "as the most important principle of civil liberty"), the Declaration of the Assembled Estates and the Mutual Betrothal of the Two Nations, and finally the executive acts (the Law on the Sejm, the Law on Sejm Courts, the Laws on amnesty, the Guard, the police commission, the military commission, and further laws on cities).[199] This classification is, however, devoid of any deeper procedural or substantive grounds; it is a presumption grounded in the relationship of the lawmaker expressed in the Constitution to particular content, and is both highly ambiguous and inconsistent. The Act on Sejms clearly sets out two categories of acts adopted by the Sejm: "drafts of the Sejm" ("political, civil, criminal and taxation laws") and Sejm resolutions (one-off acts, acts of contraction, ratification of international treaties).

As results from the deliberations already undertaken, the nullification clause did not imply direct and automatic revocation of the previous fundamental laws. The question must be asked of whether it thus functioned as an instrument of hierarchical control in respect of common legislation, and thus was the mechanism mentioned by Oraczewski in fact applied in practice.

During further legislative work following the adoption of the Government Act, it was indicated that constitutional provisions are contravening to adopted before Law on Guard of the Laws (ustawa o Straży Praw),[200] because both acts regulated the sphere of executive powers and mutual relations between the king and Members of the Guard in the other way.[201]

The work on Description of the Sejm (Opisanie Sejmu) deserves mention, and its enactment on 12 and 16 May was in its own way an attempt to overcome some of the provisions of the Government Act. As reported by Oraczewski, the changes suggested during the 12 May session were to pertain to the future principles of elections of the senators. The defence against the charge of violating the Constitution consisted in invoking the provision on the royal nomination of senators, and the new provisions

[199]Szczęska (1990, p. 47).

[200]Volumina Legum, Vol. IX, Kraków 1889, pp. 266–270.

[201]Voice of the Deputy (lack of the first page with the name of the author), w Drukarni Uprzywileiowaney Michała Grölla, Księgarza Nadwornego J.K. Mości, AGAD, ASCz, sygn. 24, k. 177.

were only to indicate that future kings may nominate only from among two candidates indicated by the each Dietine (*Sejmik*); this constituted a very creative piece of legislative trickery and was in blatant contradiction with the sense of the constitution's provisions.[202] The right of clemency was also significantly restricted by excluding "all murders, especially those in ambush and treacherous", pointing to the fact that the king could commission a murder and then pardon the perpetrator.[203] During this and the following session the provisions of the Sejm resolution were amended to the 'Act of Revolution' and adopted via secret ballot with a vote of 100 to 20.[204] It was precisely the examples of the aforementioned restrictions in the scope of *ius aggratiandi* and the appointment of senators that was invoked by the Saxon ambassador Essen in his letter to minister Loss,[205] expressing his doubts as to the declared and sworn sanctity and immutability of the Constitution. Essen emphasized that these changes came into effect within 6 days of the adoption of the Constitution. In the opinion of the author of a key monograph on the Great Sejm, Bogusław Leśnodorski, legislation following 3 May caused a real shift in the constitutional model towards traditional republicanism.[206]

At the same time, however, the Act on Sejms analysed above contains an extremely interesting decision in Art. XV on the Duties of the Sejm Deputation. Namely, it places the *expressis verbis* obligation on members of that commission to control submitted drafts with the fundamental law, *id est* the Government Act (literally: "so that no draft aims at violating and altering the fundamental law given the name Government Act and the immutable laws"[207]). In the next paragraph this obligation is repeated: according to its wording, drafts are categorized as legislative projects and as Sejm resolutions. The former are broken down into categories such as political, *id est* "whatever aims at refinement in changing or improving particular descriptions of the Form of the Government, yet always without violating the fundamental law known as the Government Act".[208] Thus arose a specific obligation of an internal nature to engage in preventative control. To date, the author has been unable to determine whether it was applied in practice, and if so, in what scope.

[202]Letter of Oraczewski to NN, in Warsaw May 14th, 1791, AGAD, Zbiór Popielów, sygn. 418, k. 574.

[203]King to Deboli in the letter from 1st June 1791: "Our session of two days previous turned to dividing and diminishing the *iuris aggratiandi* concentrated in my hands. I allowed this, as I perceived a great but unnecessary shyness in the public" ('Sesya nasza zawczoraysza zeszła na dysceptacyach y umniejszeniu Iuris aggratiandi w moim Ręku. Jam na to zezwolił, bo widziałem wielką lubo niesłuszną o to trwożliwość w publiczności'), AGAD, Zbiór Popielów, 413, k. 112.

[204]AGAD, Zbiór Popielów, 413, k. 574.

[205]Letter of Franciszek Essen to the Minister of Foreign Affairs in Dresden, Johann Loss, of 21 May 1791, No. 26, in: Kocój (2000, pp. 54–55).

[206]Leśnodorski (1951, pp. 164–165). About more examples of contravening provisions cf. Kądziela (2011, pp. 26–27).

[207]'aby żaden projekt nie dążył do naruszenia i odmiany prawa fundamentalnego pod nazwą Ustawa Rządowa i praw niewzruszonych'. Seymy (Law on Sejms), Art. XV, Volumina Legum, Vol. IX, Kraków 1889, p. 258.

[208]Seymy (Law on Sejms), Volumina Legum, Vol. IX, Kraków 1889, pp. 250–266.

The sequence of the 81 meeting of 26 May might be taken as an example, however not certainly representative: 'There has been a lot of inadmissible opinions that the draft [regarding Senate] should not be taken under consideration and debate because of its contradiction with the Government Statute'. The King declared that he himself, along with the Deputies, had sworn the Constitution in order to protect its integrity, and anything that could violate it would not be accepted. The Chamber admitted the King's words and called to restrain from such violating drafts which 'are time consuming and propagate unfavourable opinion of Legislators, since they have no respect for the sacred laws'.[209] Marshal of the Sejm obliged himself not to allow the Secretary to read such drafts.[210] Work on the most important laws of the May system was associated with analysis of constitutional content, which, contradictory to the above-mentioned example, seemed however not to constitute an absolute obstacle.

The King quite clearly stated his position on the possibility of complementing the Constitution's provisions by way of normal legislation. Describing the course of the dispute during the last May session over the position of the Church in the light of constitutional regulation, in a letter of 1 June to Deboli he wrote the following: "Whatever is in the law of 3 May, whatever you Gentlemen swore, whatever I have sworn upon your summons, this law cannot be changed nor violated. Yet since we are now engaged in the details proceeding from this general Law of 3 May, if it occurs among you that there is need to dispel any doubts which none of us could expect when writing the law of 3 May, I shall not object to you in the moment using such words as will best preserve what is my intention until my death that we Poles remain in eternal unity with the Catholic Church under the Papal authority (…)".[211] Two elements stand out in this statement: on the one hand, the King highlights the impermissibility of violating a provision of the Constitution by normal legislation, and on the other he takes account of the framework character of the Constitution, whose provisions are a point of departure for normal legislation of a particular executive nature. Similar convictions were expressed by the deputy Skarszewski: "It is your duty, most magnificent Estates, to explain and detail this Constitution of the Third of May, in which the Republic of Poland is to be reborn".[212]

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[209]Sesja 81 z 26 maja 1791, AGAD, ASCz, sygn. 19, p. 352.

[210]Sesja 81 z 26 maja 1791, AGAD, ASCz, sygn. 19, p. 352od.

[211]'Cokolwiek iest w prawie 3. Maja, coście WPanowie zaprzysięgli, com Ja za Waszym powołaniem zaprzysiągł, to odmienionym ani ruszonym z tegoż prawa być nie może. Ale że teraz zatrudniamy się szczegółami wypływaiącemi z tego ogulnego [sic] Prawa 3. Maja, więc ieżeli się WPanom ukazuie potrzeba obiaśnienia tych wątpliwości, których zaiste nikt się nie spodziewał przy pisaniu prawa 3. Maja niesprzeciwię się temu, abyście WPanowie w tych szczegółach teraźnieyszych wpisali takie wyrazy, które naywybitniey ubeśpieczyć mogą to co iest intencją moią do śmierci, abyśmy Polacy zostali w wieczney iedności Kościoła Katolickiego pod iedyną głową Papieską (…)', letter of the King to Deboli, June 1st, 1791, AGAD, Zbiór Popielów, sygn. 413, k. 113.

[212]'Do Was należy, prześwietne Stany, abyście Konstytucyą trzeciego Maia, w której ma się odrodzić Rzplita Polska, objaśnili w ciągu opisów iey szczególnych', Głos JW. Imci X. posła Skarszewskiego, Biskupa Hełmskiego i Lubelskiego (Voice of deputy Skarszewski, Bishop of Chełm and Lublin), Na Sessyi Seymowej Dnia 26 Maia Roku 1791, pp. 339–340.

Deputy Korsak several months later spoke of "stewardship of the Republic with the immortal King and the Government Act, as if on a foundation stone" founded.[213]

It would seem vital to inquire as to the extent of which the nullification clause is, in fact, proof of a legal distinction among the sources of law previously developed, and of their subjugation to the constitution. There is no evidence allowing for a definitive answer to the question of how much the deputies themselves distinguished various ranks of key laws and the Constitution. One clue as to the divergent convictions among deputies is a statement made on 31 May by the deputy of Podolian Voivodeship Rzewuski, who concludes "I also agree to other improvements, but in the place where it is written that the successor to the Throne must swear an oath on the Constitution, please add a description of the Constitution intended, for one may suspect that it is only the Constitution which came about on 3 May".[214] A riposte was provided by the Kraków deputy Linowski: "from hence not all laws are the Government Constitution, firstly, not all laws are of the range of the Constitution, secondly, if the successor were to take his oath on the whole of the Constitution and its elaborations, he would thereby block the route to making later changes as need arises".[215] Opponents of constitutional provisions expanding the privileges of the monarch invoked the argument that executive acts extend beyond constitutional regulation.[216]

There was a group of deputies, particularly the Constitution's direct authors, whose obvious intention was to create a superior legal act. The Constitution was understood as a framework for normal legislation. In turn, for a portion of the conservative deputies, the May Constitution did not constitute a superior act, and was rather regarded as another variation of the rules improving "the form of government". This was the source of the real attempts at verification of its provisions through normal legislation. Ambassador Essen wrote to Dresden the following

[213]Głos J.W.J: Pana Tadeusza Korsaka Seymowego i Ziem. Sędziego Posła Woiewództwa Wileńskiego Na Sessyi Seymowey Dnia 15 marca 1792 Roku (Voice of Deputy of Vilnius Voivodeship Tadeusz Korsak), AGAD, ASCz, sygn. 24, k. 200.

[214]'Na inne poprawy równie się zgadzam, ale w tym miejscu, gdzie iest napisano, że następca Tronu na Konstytucyą ma przysięgać proszę dodać na Konstytucyą z iey opisaniem, bo możnaby mniemać, że to tylko iest Konstytucyą, co dnia 3 Maia stanęło'. Sessya 84. Dnia 31 Maja 1791, AGAD, ASCz, sygn. 19, p. 387v.

[215]'nayprzód nie wszystkie prawa są Konstytucyą Rządową, y powtóre, gdy następca przysięgał na całość Konstytucyi z iey opisami, iużby tym samym zagrodziła się droga czynienia odmian w szczególnościach podług uznania potrzeby'. Sessya 84. Dnia 31 Maja 1791, AGAD, ASCz, sygn. 19, pp. 388–388v.

[216](„P. Siwicki Trocki… Wnosi nakoniec, że gdy koniecznie utrzymać się podoba w proiekcie ten wyraz, którego w całey ustawie rządowey nie czyta: że komisja wojskowa chociażby przeciwną prawu decyzyą króla w Straży, jednak provisorie uskutecznić powinna, domagając się zwołania seymu: aby te provisorie nie rozciągało się do dyslokacyi, i ruszenia woyska bez woli seymu gotowego"). Gazeta Narodowa Y Obca z Warszawy w Sobotę Dnia 19. Maia Roku 1792.

words: "The final text of all articles of the new Constitution will be the subject of debate during future sessions of the Sejm".[217]

The events of 3 May should be perceived as a significant acceleration down the path of reform of the political and administrative system, the creation of a framework for more detailed work. Indeed, as experience had shown that earlier sessions lasting countless hours, which were the subject of complaints particularly after the doubling of the Sejm, did not bring any measurable effects. The method of proceeding on the Draft to the form of government was an utter failure, as the deputies and senators were capable of fighting interminably over the mere shape of the agenda, return to discussing the issue of the assemblies, or engage in work on the Cardinal Laws. After passing the Constitution, legislative work undertaken on the basis of improved procedures accelerated significantly, but violations of it still occurred at times.

The circumstances described would seem to prove that there was still no common, shared conviction as to the particular precedence of the Government Act in the legal system; this view is shared by some contemporary scholars.[218] The position of parliamentarians as to the supremacy of the Constitution was not, as has been described, consistent. Insofar as the provisions of the Law on Sejms establish an obligation to control drafts against the fundamental law, *id est* the Government Act, the detailed regulations in the same act concerning the scope of royal authority would doubtlessly be adjudicated from a modern perspective as unconstitutional. In turn, the manner in which the Constitution was celebrated by local assemblies in later months demonstrated that the nobility was aware of how extraordinary the events were, and of the particular nature of the law adopted on 3 May. Acts of celebration, widespread oaths sworn by citizens who did not even hold official offices, celebrations of the anniversary on 3 May 1792 all come together and form a sort of visual dimension.[219] It cannot be denied that the supremacy of the

[217]Letter of Franciszek Essen to the Minister of Foreign Affairs in Dresden, Johann Loss, of 7th May 1791, No. 22, in: Kocój (2000, p. 43).

[218]Matuszewski (2007, p. 301). Totally opposing position by Wacław Uruszczak who regrets that, as the saying "you praise the foreign, but don't know your own" goes, contemporary researchers (P. Tuleja) overlook the legislative achievements of the Grand Sejm in respect of the Constitution's supremacy. Cf. Uruszczak (2013b, p. 252, annot. 23).

[219]Bishop Kossakowski appealed to make 8 May, the day of the patron saint of the King, a holiday for the Constitution. The Sejm adopted a resolution on raising the Temple of the Highest Providence as an expression of gratitude for passing the Government Act. This was written in the Declaration of the Assembled Estates: "For the children of ages to feel all the stronger, that a work so desired, in spite of the greatest difficulties and obstacles, with the aid of the Highest Steward of the fate of nations leading us to our aim, we have not forfeited this joyous moment for the salvation of the nation, we resolve that a church ex voto of all estates be erected in commemoration and consecrated to the highest Providence". The first architectural competition in Poland was announced for a design of the church. A year later, during the anniversary celebrations, a cornerstone was laid; yet by the outbreak of war with Russia, only a chapel was built. Another competition was planned for the twenty years of the inter-war period, after the restoration of independence, but it was initially inconclusive. Ultimately there was an attempt at merging the winning design with an estate planned as a memorial to Józef Piłsudski, who died in 1935.

Constitution crystalized through something other than strictly juridical practice. The theoretical recommendations of the lawmaker about revisions of the Constitution were, for obvious reasons, not implemented.

8 The Procedure of Constitutional Revision

Although the preamble to the Constitution consisted of statements declaring the Constitution "sacred and inviolable", this did not mean the intention not to change it in a legal sense, but rather referred to the process of implementing and observing it.[220]

Already on the basis of the "Form of government draft" the first regulations on an amendment of special rights appeared. Modifying the cardinal principles could be done only by unanimity of the Dietines' instruction, whereas ordinary constitutional law and tax law by a majority of 3/4 of instructions, and civil and criminal law—by an absolute majority of instructions. Only for military, education and police affairs was the possibility of amendments with a majority of votes allowed (simple or qualified) without recourse to the instructions of the Dietines.

There were already regulations for revisions in the first draft text of the Constitution itself. Scipione Piattoli's text "*Projet de réforme de Constitution*" refers to an improvement of the Constitution which can be made through changes based on a 2/3 majority of Dietines' instructions. This, however, does not concern the most important regulations, but only complementary regulation, referred to as the detailed portion (*partie réglamentaire*) dedicated to the organizational and procedural matters of parliament, and Guard. Suitable "réglements are still adopted by this Sejm and then they shall become part of the Constitution".[221]

In his analysis of the revision of the 3 May Constitution, Marian Kallas cites the introduction to the Constitution's draft written by Alexander Linowski. In contrast to the final wording of the Constitution, Linowski's draft represented the "unanimous" rather than the later "clear" (Pol.'wyraźna') will of the people to "recognize the need to alter an article in it [the Constitution]". The later version is an expression of a different, more liberal concept of amending the Constitution.[222]

The Piattoli drafts include plans to amend the Constitution every 20 years unless 4/5 of the Chamber request the convention of an extraordinary meeting, the Constituent Assembly. Another version involved the request to convene the "Convention" by 4/5 of the provinces and when 2/3 of its members opt for change.

However, before the outbreak of World War II no serious work was done. After the collapse of the Polish People's Republic the parliament was reminded of the unfulfilled obligation, and both chambers adopted the appropriate resolution in 1998. A cornerstone was laid in 2002. Recently the temple was consecrated, and it is home to the Pantheon of Great Poles and the John Paul II Museum-Institute.

[220]Szmyt (2006, p. 22).

[221]„Projet...", AGAD, APP, sygn. 197, p. 663; Leśnodorski (1951, p. 199).

[222]Kallas (2001, p. 524).

The original drafts also included concepts such as validity of the constitution (directly associated with Stanisław August) during the reign of only one King (as *Pacta Conventa*), or amending the Constitution only at the request of the entirety of the nation.[223]

Finally, the 3 May Constitution contains detailed provisions on this issue. It can be assumed that its findings were perceived in advance as requiring clarification and adjustment to changing circumstances, and the constitution on 3 May "was not closed or constant. It was more of a process than a structure."[224] The text of the Constitution contained an announcement of the adoption of further laws, in particular civil and criminal codification. Kołłątaj declared that in addition to the adopted "political constitution" there would come other, economic and moral ones.[225]

The preamble to the 3 May Constitution, as mentioned, refers to the possible need "to alter" the articles of the Constitution. The issue was further developed in Art. VI, which proclaimed "on the one hand preventing abrupt and frequent changes of the national constitution, and on the other, recognizing the need of perfection thereof after experiencing its consequences for the welfare of the public, we establish a twenty-five-year period at the termination of which the revision and improvement of the Constitution should be effected. With a desire to have an extraordinary constitutional Sejm based on a separate description of the law… ".[226] The term "revision" should be understood as a significant change, while "improvement" is less of a legal definition; rather, we are talking about a process of improvement and refinement. Thus a number of expressions such as variety, correction and revision were used by legislative power inconsistently.

Revision should thus be effected by an extraordinary constitutional Sejm, held every 25 years, and the law on the extraordinary Sejm, the act under discussion,[227] was a part of the 3 May system.

Debate over the details of the procedure took place *inter alia* during the 82nd session on 27 May 1791.[228] The debate included discussion of the potential to extend sessions beyond the 15 days assumed in the draft, indicating the significance

[223]Łaszewski (1973, pp. 90, 146–147).

[224]Leśnodorski (1971, p. 422).

[225]Mowa Hugona Kołłątaja na sesji sejmowej 28 VI 1791 R. In: Borowski (1938). Cf. broader on Kołłątaj: Lis (2015, pp. 189–257); also: Dihm (1959), passim, and the discussion around this work, esp. articles of Rostworowski and Dihm's polemics. Finally: Rostworowski (1985).

[226]'zapobiegając z jednej strony gwałtownym i częstym odmianom konstytucji narodowej, z drugiej uznając potrzebę wydoskonalenia onej po doświadczeniu jej skutków co do pomyślności publicznej, porę i czas rewizyi i poprawy Konstytucji co lat dwadzieścia pięć naznaczamy. Chcąc mieć takowy sejm konstytucyjny ekstraordynaryjny podług osobnego o nim opisu prawa…' Ustawa rządowa, Volumina Legum, Vol. IX, Kraków 1889, CCLXVII, p. 222.

[227]Seym konstytucyiny extra-ordynaryiny (Law on constitutional extraordinary Sejm), Volumina Legum, Vol. IX, Kraków 1889, CCXCVI, pp. 241–243.

[228]Sessya 82. Dnia 27. Maja 1791 R., AGAD, ASCz, sygn. 19v, pp. 353–366.

of matters discussed during the sessions, as well as the issue of a potential collision between an ordinary Sejm and extraordinary one.

The regulation ultimately adopted made extensive use of references to provisions in the Law on Sejms. The same procedure would be akin to the one applicable in an ordinary Sejm, with some exceptions. After the selection of Sejm judges, the "reading of legislative drafts" was supposed to begin. Priority was given to the proposals "given from the throne to local councils", the first "draft of political constitutional rights" (the determinant here is Art. VI, consisting of rights "astringent to the rights contained in the law under the title of Government Act"), followed by "projects to ordinary political rights" (art. 4). The project of amendment, as results from the foregoing, should be already known in advance and discussed during Dietines' sessions, which would give Members a special mandate for reform.[229] Those would be the carriers of legislative initiatives (Art. 4(2)).

The revision should not impact "immutable laws" nor the *Pacta Conventa* (Art. VI)—thus, a category of laws with precedence over the Government Act exists! Yet it was not indicated which laws were being referred to—we may presume that one determinant can be the wording of the Constitution itself (the division of powers to be in effect "for all time", the privileges of the nobles to remain "inviolate", personal safety and property "we wish to remain inviolate").[230] Control over this was entrusted to the Constitutional Deputation, which could "declare the need" of withdrawing or amending a draft. If the author of the draft did not intend to comply, as under the normal legislative procedure the Deputation should make note of this in its opinion for the Sejm.

The chamber, in the absence of unanimity, was supposed to decide by a simple majority first in an open vote, or if any objections were noted then by secret vote, even if no such motion was tabled. After the reading of the draft and opinion of the constitutional deputation, the Marshal was to ask for the acceptance of the entire draft, or consent to its amendment. In the event of an objection he should ask if it was the deputies' opinion to reject the draft in its entirety, or to amend it; his proposal led only to an *affirmative/negative* vote. In the event of a majority voting to jettison the draft, it could not again be submitted for voting to that Sejm. If the option to amend the project passed, the Marshal was supposed to allow interested deputies to speak and their remarks were to be presented to the constitutional deputation. This fact could not disrupt the agenda, and the Sejm was to work on the next drafts on the schedule.

The revised draft returned to the chamber, and there was another vote if unanimity as to its adoption *in toto* could not be reached. Ultimately, drafts on political constitutional laws or political ordinal laws were to proceed to the Senate. Here the King was to speak. Next, the Marshal was to ask the Senate for its opinion, which decided whether the draft should be adopted, which completed the legislative

[229]Leśnodorski (1951, p. 283). Szmyt (2006, p. 29).

[230]As Szczęska (1990, p. 61), cited: Leśnodorski (1951, p. 365), and Radwański (1952, pp. 175–176).

process, or whether to return it to the other chamber for the deputies to decide again. In the latter case the Senate could only present its "remarks on the desired law, with counsel as to what ought be amended or altered (Art. VII)". The lower house then took steps analogous to those in the first stage, but its decision served to conclude proceedings. The Marshal of the Sejm and members of the constitutional deputation then affixed their signatures to the adopted law, and the secretary sent it for oblation not later than three days. Beyond "constitutional" law, the Extraordinary Sejm would also deal with executive law. Sessions should conclude three months prior to the next ordinary Sejm.

Constitutional reform would constitute a legal obligation, not an optionality, and Andrzej Szmyt rightly cites in this regard the literal interpretation of the Constitution.[231] The first Extraordinary Sejm was to be convened in 1816 (the date was set for exactly 1 October), so in a time when the Polish lands had already been given another occupational constitution.

9 Summary

Understanding of the principle of constitutional precedence raises numerous doubts in the Polish case. Although this rule was stated *expressis verbis* in the Declaration of the Assembled Estates, previous studies allow for the ascertainment that its content and significance for the legal order was perceived differently. The conclusions that the researcher may arrive are paradoxical, and in their own way even slightly schizophrenic.

The inclusion in the Constitution of assumptions about the special role of the Government Act is a fact. The implementation of a nullification clause in the Declaration of the Assembled Estates is a fact. This was an exceptional invention, a Polish product, and one which would seem an epoch ahead of its time. At the same time, however, in light of experienced practice, we may not accept without reservations the claim of a general recognition of a superior position of constitution towards other sources of law. The Government Act was not a constitutional breakthrough like the acts of revolution in North America and France; it did not overturn an existing social system, but merely reformed a political one without disrupting the evolutionary continuity with the Henrician Articles and the Cardinal Laws. Invoking the words of Leśnodorski: the "fundamental norm" of the previous *ancien regime* was not subjected to any sort of radical transformation in the reformed political system of the noble Republic.[232]

We may agree as to the purpose of introducing the supremacy clause: first and foremost, it was the desire to guarantee the desired stability of the system, while at

[231] Szmyt (2006, pp. 26–27).

[232] Leśnodorski (1951, p. 374).

the same time being aware that the Constitutional Act itself was an act against *inter alia* the legal state established in the Cardinal Laws (1768/75).

A 'legalistic' narrative turned against the Constitution may be viewed in the acts that were issued from the imperial office in Russia. The most essential accusation made towards the constitution refers to the breach of laws that had previously been taken for permanent and inviolable. This assumed to be unintentionally comical for the contemporary researcher when the authoritarian empress rebukes the reformers for violating freedoms and age-old prerogatives through the fact that the "Throne of Poland was converted from elective to hereditary, and the law dictated by the wisdom of their ancestors, which now forbids to prepare the king's successor while he is still alive, was boldly violated, just as all the other laws which had ensured the sustainability of the Republic".[233] The other accusation was aimed at the legality of the enactment of the Constitution, i.e. the legitimacy of the Sejm (whose office was extended) and the procedures. The Empress also undermined the process of confirmation of the Constitution by the assemblies (swearing of an oath or sending a congratulatory message in conjunction with its adoption), declaring that "the assemblies were insincere, as they were under threat of arms".[234]

It is difficult to judge how much of an advancement the Constitution was compared to the cardinal laws in the precedence question. The perception of the relationship between the Constitution and acts should be regarded as inconsistent. The key acts, especially the Law on Cities, were straightforwardly regarded as components of the Constitution. One should agree that together they constituted a peculiar "3 May system", yet attributing binding force to them on par with the provisions of the Government Act would be too far-reaching. Last but not least, in the following days and months, the deputies made attempts to introduce regulations into ordinary legislation that were contrary to the Constitution.

However, at the same time the clauses related to the obligation to adjust legislation to the provisions of the Government Act are a much more progressive systemic solution than the vouching of the 'inviolability' of the Cardinal Laws 1768/75 in which, as indicated, they did not result in being ascribed a superior role, and first and foremost they were to serve as inviolable protection against changes in the keystones of the state system. The latter included the privileges of the nobility at once constituting certain components of the political system, such as the free election and *liberum veto*, which were but derivatives of privileges. As shown by earlier remarks, the adoption of the Constitution did not entail the automatic rejection of the category of inviolable rights, but, quite the contrary, the act of 'system of 3 May' enigmatically invokes this category. It may be understood as an expression of respect for the past in the dimension of social and legal traditions.

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[233]'Tron Polski z Elekcyinego w dziedziczny przemienion, y to Prawo, które mądrość ich przodków dyktowała, y które zabrania za życia króla, zamyślać o obraniu iego Następcy, było równie zuchwale zgwałcone iak wszystkie inne, które zapewniały trwałość nieustaiącą Rzeczypospolitey', Deklaracyia, AGAD, ASCz, sygn. 24, k. 81.

[234]Letter of the King to Deboli, March 21st, 1792, AGAD, Zbiór Popielów, sygn. 413, k. 336.

Contemporary acceptance of the assumption of supremacy of the Constitution leads to the innovative effect of accepting the concept of unconstitutionality, *id est* the obligation to eliminate from the legal order acts which are incompatible with the Constitution. And again, at the level of the acts comprising the "3 May system" (on the Sejm and the Extraordinary Sejm), this conception remains implemented to a limited degree. The Sejm deputation was entrusted with the power of preventative constitutional control of draft legislation. However, this was an internal body of the Sejm, whereby it could be subjected to pressure and did not have at its disposal mechanisms that could definitively block an unconstitutional draft. Constitutional practice, which would undoubtedly teem with disagreements over the compliance of acts with the Constitution and which would have to handle the issue of the lack of institutionalised control and of an organ appointed to settle constitutional disputes, was thus never experienced. It should be acknowledged that only an independent judicial organ is capable of imposing a shape on clauses concerning the supreme character of the Constitution. European countries came to this conclusion much, much later. The clause is therefore an unprecedented phenomenon, far ahead of its time.

It would thus seem that the existing situation can be interpreted as a sort of intermediate stage, symbolizing the arrival of a substantive and axiological legal understanding of the Constitution's supremacy. However, had the formal legal stage been reached? Any answer to this question must take into account an ever-present contradiction, a dissonance: although the Constitution was given an exceptionally modern nullification clause, well ahead of its time, in the awareness of many the Government Act constituted only a modernization and dressing-up of the old system. The Constitution was not written in opposition to the old laws, like other acts of modern constitutionalism—and even if this was the intention of the reformers, they were exceptionally circumspect in expressing it—but in response to the international situation, as a means of strengthening the state and countering a potential external threat (*per* the preamble "for the establishment of freedom, for the salvation of our Fatherland and its borders, with the greatest constancy of spirit"). For this reason the supremacy written into the Constitution should in the first place be associated with the clear effort in many speeches by deputies to create and maintain a lasting system, resistant to sudden change. And most likely this "traditional" perception allowed it to achieve the success of being adopted in May 1791. At the same time, we should objectively assess—and appreciate—the innovative Polish steps along the path of encapsulating the state order in a constitutional act, as well as hierarchization of the legal system, however imperfect they may have been.

Although just one year later the anniversary of the Constitution was celebrated, it was soon followed by Russian intervention and a war in defence of the Constitution. After the defeat, the last Sejm of the Republic of Poland convened in Grodno which, under the pressure of the Russian army, intimidation and abductions of wayward deputies, led to the formal overthrow of the Constitution. Calls for a return to its presumptions in later decades were essentially unrealistic. The Government Act had evolved into the most precious myth accompanying Poles during times of partition and celebrated in the era of freedom.

10 Summary (Polish)

Drugi tom ustaleń projektu badawczego ReConFort poświęcony został zagadnieniu nadrzędności konstytucji. Tymczasem kwestia rozumienia zasady prymatu konstytucji budzi w przypadku polskiej Ustawy Rządowej z 1791 r. rozmaite wątpliwości. Choć zasada ta zostaje wyrażona *expressis verbis* w towarzyszącej konstytucji Deklaracji Stanów Zgromadzonych, to jednak dotychczasowe badania pozwalają na konstatację, iż jej treści i znaczenie dla porządku prawnego postrzegano w różny sposób. Wnioski, do jakich dochodzi badacz, są na swój sposób paradoksalne.

Faktem jest zawarcie w konstytucji założenia o szczególnej roli ustawy rządowej. Faktem jest wprowadzenie do Deklaracji Stanów Zgromadzonych klauzuli nullifikacyjnej. Był to zupełnie niezwykły wynalazek, powstały na rodzimym gruncie, i zdający się wyprzedzać całą kolejną epokę. Zarazem jednak wobec doświadczonej praktyki - tzn. działań Sejmu Wielkiego w kolejnych tygodniach obrad po uchwaleniu Ustawy Rządowej - nie można bez zastrzeżeń przyjąć tezy o powszechnym uznaniu nadrzędnego charakteru wobec pozostałych źródeł prawa.

Ustawa rządowa nie stanowiła konstytucyjnego przełomu, jak akty rewolucji w Ameryce Północnej i Francji, nie zburzyła istniejącego systemu społecznego, zreformowała jedynie polityczny, nie zrywając ciągłości ewolucyjnej z artykułami henrykowskimi i prawami kardynalnymi. Odwołując się do słów Bogusława Leśnodorskiego: „Norma podstawowa" dotychczasowego starego ustroju nie uległa też w gruncie rzeczy jakiejś zasadniczej przemianie w reformowanym ustroju Rzeczypospolitej szlacheckiej".[235]

Zgodzić się należy co do celu wprowadzenia klauzuli nadrzędności: było nim przede wszystkim dążenie do zagwarantowania upragnionej stabilności ustroju przy świadomości, że sam akt konstytucyjny zwrócił się przeciwko stanowi prawnemu utrwalonemu choćby w prawach kardynalnych 1768/75.

Narrację „legalistyczną" skierowaną przeciwko konstytucji prześledzić można w aktach wychodzących z kancelarii imperatorowej rosyjskiej. Podstawowy zarzut stawiany konstytucji odnosi się do złamania praw uchodzących do tej pory za stałe i niezmienne. Przyjęło to niezamierzenie komiczny dla dzisiejszego badacza wyraz, gdy autorytarna imperatorowa gani reformatorów za naruszenie wolności i wiekowych prerogatyw, choćby poprzez fakt, że „Tron Polski z Elekcyinego w dziedziczny przemienion, y to Prawo, które mądrość ich przodków dyktowała, y które zabrania za życia króla, zamyślać o obraniu iego Następcy, było równie zuchwale zgwałcone iak wszystkie inne, które zapewniały trwałość nieustaiącą Rzeczypospolitey".[236] Drugi z zarzutów, podejmowany przez rodzimych krytyków a następnie dyplomację rosyjską, uderzał w legalność procesu uchwalenia konstytucji, tj. samą legitymację sejmu (którego kadencję przedłużano) a następnie procedury. Imperatorowa podważała także proces swoistego zatwierdzenia

[235]Leśnodorski (1951, p. 374).

[236]Deklaracyia, AGAD, ASCz, sygn. 24, k. 81.

konstytucji przez sejmiki (złożenie przysięgi lub przesyłanie gratulacji z powodu uchwalenia), twierdząc, że „sejmiki udały się, bo pod bronią".[237]

Niełatwo odpowiedzieć na pytanie, na ile konstytucja stanowiła krok do przodu w drodze do nadrzędności systemowej wobec praw kardynalnych 1768/75. Jako niezbyt konsekwentne należy ocenić postrzeganie relacji między konstytucją a ustawami. Kluczowe ustawy, w szczególności prawo o miastach królewskich, wprost uznano za części składowe konstytucji. Zgodzić się należy, że stanowiły one wespół swoisty system 3 Maja, ale przypisanie im wszystkim identycznej mocy obowiązującej, jak przepisom Ustawy Rządowej, należy uznać za nadużycie. Wreszcie, posłowie już w kolejnych dniach i miesiącach sejmu podjęli próby przeprowadzenia w ustawodawstwie zwykłym regulacji sprzecznych z konstytucją, choćby w zakresie królewskiego prawa powoływania senatorów czy ius aggratiandi.

Zarazem jednak bezpośrednie klauzule dotyczące obowiązku dostosowania ustawodawstwa do przepisów Ustawy Rządowej są rozwiązaniem systemowym dużo dalej idącym niż zaręczenia „nienaruszalności" praw kardynalnych, w których, jak wskazano, nie skutkowały one przypisaniem im nadrzędnej roli, a przede wszystkim stanowić miały uroczyste zabezpieczenie przed zmianami w zakresie zworników systemu państwa. Tymi ostatnimi były przywileje szlacheckie stanowiące zarazem pewne komponenty systemu politycznego, jak wolna elekcja i liberum veto. Przyjęcie konstytucji nie oznaczało automatycznego odrzucenia kategorii praw nienaruszalnych, a wręcz odwrotnie, ustawy „systemu 3 Maja" dość enigmatycznie przywołują tę kategorię. Można to zjawisko rozumieć również jako swoisty wyraz poszanowania przeszłości w wymiarze tradycji społecznych i prawnych.

Współcześnie przyjęcie założenia nadrzędności konstytucji jest powiązane z nowoczesnym skutkiem, akceptacją koncepcji niekonstytucyjności, tj. obowiązku eliminacji z porządku prawnego ustaw pozbawionych waloru zgodności z konstytucją. I znów, na poziomie ustaw „systemu 3 Maja" (o Sejmie i Sejmie Ekstra-Ordynaryjnym) ta koncepcja zostaje w ograniczonym stopniu zrealizowana. Deputacji sejmowej powierzono kompetencję prewencyjnej kontroli konstytucyjności projektów ustaw. Był to jednak organ wewnętrzny sejmu, mógł pozostawać zatem podatny na naciski, zarazem nie dysponował mechanizmami trwale blokującymi niekonstytucyjny projekt. Nie dane było zaznać konstytucji praktyki, w której niewątpliwie doszłoby do sporów o zgodność ustaw z konstytucją. Należy zgodzić się, że dopiero niezawisły organ sądowniczy jest w stanie nadać realny kształt klauzulom o nadrzędnym charakterze konstytucji. O tym kraje europejskie przekonały się znacznie, znacznie później. Klauzula jest zatem zjawiskiem niebywałym, wyprzedzającym całą epokę.

Wydaje się zatem, że można interpretować istniejącą sytuację jako swoisty stan pośredni, symbolizujący raczej osiągnięcie fazy prawno-materialnego, aksjologicznego rozumienia nadrzędności konstytucji. Czy jednak osiągnięto już fazę

[237]Letter of the King to Deboli, March 21st, 1792, AGAD, Zbiór Popielów, sygn. 413 k. 336.

formalno-prawną? Odpowiedź na to pytanie uwzględniać musi tę nieusuwalną sprzeczność, dysonans: choć do konstytucji wprowadzono niezwykle nowoczesną, wyprzedzającą epokę klauzulę nullifikacyjną, to jednak w świadomości wielu ustawa rządowa stanowiła ona jedynie nową, zmodernizowaną szatę starego systemu. Konstytucji nie napisano w otwartej kontrze do starych praw, jak innych aktów nowoczesnego konstytucjonalizmu—a nawet jeśli taka była intencja reformatorów, to wyrażano ją niezwykle oględnie - lecz w kontrze do sytuacji międzynarodowej, jako środek wzmocnienia państwa i przeciwdziałania potencjalnemu zagrożeniu zewnętrznemu (w preambule dosłownie: „dla ugruntowania wolności, dla ocalenia Ojczyzny naszej i jej granic z największą stałością ducha"). Stąd zapisaną w konstytucji nadrzędność należy w pierwszej kolejności kojarzyć z wyrażanym w wielu mowach poselskich dążeniem do utworzenia i zachowania trwałego, odpornego na gwałtowne zmiany systemu. I najprawdopodobniej takie jej „tradycyjne" pojmowanie w ogóle pozwoliło na sukces, na uchwalenie Ustawy Rządowej w maju 1791 r. Jednocześnie należy obiektywnie ocenić - i docenić – nowatorskie polskie kroki na drodze do zamknięcia porządku państwowego w akcie konstytucyjnym oraz hierarchizacji systemu prawa, jakiekolwiek chybotliwe by one nie były.

Choć jeszcze rok później uroczyście obchodzono rocznicę uchwalenia konstytucji, to niebawem doszło do interwencji rosyjskiej i wojny w obronie konstytucji. Po przegranej zebrał się w Grodnie ostatni sejm Rzeczypospolitej, który pod naciskiem wojsk rosyjskich, w atmosferze zastraszania i porwań niepokornych posłów doprowadził do formalnego obalenia konstytucji. Nawoływania do powrotu do jej założeń w późniejszych dziesięcioleciach były już w zasadzie nierealne. Ustawa rządowa przekształciła się w najcenniejszy mit, towarzyszący Polakom w dobie zaborów i czczony w epoce wolności.

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The Codification of the Polish Substantial Criminal Law in the Sejm Debates 1818

A Practical Test of the Precedence of the 1815 Constitution of the Kingdom of Poland

Marcin Byczyk

Contents

Abstract This article is devoted to the question of the precedence of the 1815 Constitution of the Kingdom of Poland. The paper has been divided into three major parts.

In the first, introductory part the origins of the 1815 Constitution are discussed. This part of the article presents the current state of the art of the polish legal history concerning the genesis of this highest normative act of the 1815–1830 Polish Kingdom. Following the explanations provided by of S. Askenazy, H. Izdebski, D. Nawrot and S. Smolka, it has been expounded that the idea of a Constitution for a semi-independent Polish Kingdom was conceptualised as a propaganda instrument in the intellectual tug of war between France and Russia over the Polish society during the Napoleonic Wars. The Constitution itself had been being elaborated since 1811 with the participation of various polish politicians of the pro-Russian party, including F. K. Drucki-Lubecki, M. K. Ogiński, L. Plater and prince A. Czartoryski. After the ground-breaking victory of the

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sixth coalition spearheaded by Alexander I Romanov over the French forces, it became a founding stone of the newly re-established Polish Kingdom.

In the next part of the this short study, the main regulations of the Polish 1815 Constitution have been outlined, with the special focus on those regulations which pertain to the precedence of Constitution and to the criminal law.

The third main part of the article discusses the issue of the supremacy of the 1815 Constitution with reference to its relationship with the ordinary legislation adopted in the Polish Kingdom. It has been illustrated with an analysis of legislative process of the only (apart from the Civil Code of the Kingdom of Poland 1825, which *de facto* was a very slight modification of the Napoleonic Civil Code) fully-fledged codification of the entire branch of law which succeeded in being adopted by the Parliament ("Sejm") of the Kingdom of Poland: the Criminal Code of 1818. Those parliamentary debates have so far not been analysed more extensively (the valuable, yet short reference made by J. Śliwowski—to whom I am very indebted for his great and inspiring study on this piece of legislation—in his monograph almost 60 years ago can hardly be considered to be exhausting in this respect) in the literature of the subject. The speeches held by the polish deputies to Sejm of the year 1818 explicitly corroborate that a rhetorical argument of a possible unconstitutionality or conversely, congruence with the 1815 Constitution, was widely invoked by both the supporters and opponents of the project. This striving for coherence of the to-be-legislated normative act with the Constitution was also reflected in the adopted legal text of the Code itself, which was to a great extent compatible with the stipulations of the 1815 Constitution. Thus, this short investigation leads to the conclusion that at this point of the development of the Polish constitutional discourse it can be stated that ground-breaking idea of the supremacy of the Constitution was already clearly recognised.

1 Introduction

The importance of understanding Constitutions not merely as legal texts, but also taking into account "*societal context, political practice and respective constitutional interpretation*"[1] calls for detailed studies how the constitutional principles were incorporated and developed in the ordinary legislation. This approach will be applied in the following paper to investigate into the relationship between the notoriously liberal Constitution of the Polish Kingdom of 1815 and one of the very few examples of a more comprehensive legislation which succeeded in being adopted in this Russian protectorate before the beginning of its annihilation after the fall of the November Uprising in 1831—Criminal Code of 1818.[2] Therefore the paper—in line with the main principles of the ReConFort research

[1]Müßig (2014, 27, p. 122).

[2]It would be very difficult to call the Polish Civil Code of 1825 (Kodex Cywilny Królestwa Polskiego z 1825 r.) as an independent codification since it as A. Dziadzio rightly states (cf. Dziadzio 2008, p. 229) it: "*in fact was a slight novelization of those regulations of Napoleon's Code which did not find social approval*".

program[3] focuses not on "*an abstract perception of the political history of ideas*" but on "*the political polemics in concrete situations of conflict*".[4]

2 The Origins of the 1815 Constitution of the Kingdom of Poland

The Constitution of the Kingdom of Poland belongs to the rather less researched into among all of the European Constitutions of the XIX century; especially any kind of more extensive literature in the English language is missing. For this reason it appears crucial to make a brief introductory presentation of this legal act, aimed not only at characterising its textual content,[5] but much more importantly, at expounding the intricacies of its creation and implementation in the Kingdom of Poland.

In the following part I will be relaying on the findings of the polish secondary literature of the subject, especially on the fundamental works of S. Askenazy,[6] H. Izdebski,[7] Dariusz Nawrot[8] and S. Smolka[9] whose contributions provided us with almost everything that we currently know about the genesis of this highest normative act of the Polish Kingdom 1815–1830. Therefore, this part of the article, itself not adding to the state of the art but rather and mostly narrating the already established conclusions in the polish legal history, will serve as an introduction[10] to the presentation of the debate on the Sejm in 1818 in the subsequent part of this paper.

At the very beginning of this sketch it has to be stressed that due to the incompleteness of the preserved sources from the period of creation of the 1815 Constitution it is impossible to state with certainty what were the origins of this

[3]As it has been stressed by principal investigator of the ReConFort ERC Advanced Grant, Müßig (s.a., p. 3) the research within this scientific enterprise is directed not merely at analysing the legal texts of the past Constitutions, but includes a much broader perspective where "*the constitution is understood as an evolutionary achievement of the interplay of the constitutional text with its contemporary societal context*".

[4]Müßig (s.a., p. 6).

[5]Which to the necessary extent will be discussed later in this article. All the quotations of the regulations of the Constitution of Poland 1815 will be made according to the English translation of this legal act published as: Constitutional charter of the Kingdom of Poland in the year 1815, London 1831.

[6]Askenazy (1907). The contribution of *Szymon Askenazy* is particularly valuable since this author did have access to the sources which subsequently, during the upheaval of the war were lost and subsequent authors have to rely on him, cf. e.g. Izdebski (1990, pp. 194).

[7]Izdebski (1972). This explanation of the genesis of the polish Constitution has also been repeated by Izdebski (1990, pp. 185–198).

[8]Nawrot (2008).

[9]Smolka (1907).

[10]I considered such a prolonged introduction especially necessary for the international reader who may not be able to access the relevant literature in the polish language and bearing in mind that the facts concerning the origins of the Polish 1815 Constitution are little known outside Poland.

normative act.[11] Nonetheless there can be no doubts that after the fall of the Polish Commonwealth in the year 1795 the Polish and Lithuanian nobility living in the regions incorporated into the tsar's Empire adopted a somewhat ambiguous approach towards the Russian authorities.[12] Praising them for providing stability and security[13] was simultaneously intertwined with conceptualising plans and requests to obtain more autonomy under the Russian protectorate[14] and subsequently (approximately since May 1810) with attempts to decrease taxation burdens imposed by the Russian authorities.[15] Such a situation is to be explained by the fact that the great Polish noblemen ("magnateria"), after the fall of the Polish Commonwealth did not obtain independence or more autonomy, but, due to their weakness—were rather forced to seek accommodation with the partitioning powers.[16] Moreover, there was a profound conviction that the fate of Polish

[11]The most comprehensive explanation, which is also shared by the author of this article, has been provided by H. Izdebski, who (similarly as S. Smolka already did in the year 1907) pinpointed to the fact that the first drafts of this Constitution go back to the period of the years 1811–1812, when Alexander I attempted to create a counterbalance for the Duchy of Warsaw by reviving the Grand Duchy of Lithuania and equipping it with a semi-independent position, founded on a granted Constitution. Cf. Izdebski (1972, p. 109). This explanation of the genesis of the polish Constitution has also been repeated by Izdebski (1990, pp. 185–198). Those findings of H. Izdebski, being in the authors' opinion the most convincing and also coherent with the views of the earlier researchers, at many places have been inspiration for the narration ensuing here. I am also very indebted to Izdebski for his lavish footnotes, which proved to be very valuable when beginning to seek for the relevant sources for the ReConFort project.

[12]It is also worth mentioning that this refers also to the attitude of Polish nobility towards two others countries which took part in the partition of the Polish territories, cf. in this respect general remarks of Lelewel (1961, p. 476).

[13]Szoper (2004, p. 244) and Izdebski (1972, pp. 96–97). This last author, noting this accommodating positions of the polish nobility quotes here *Kajetan Koźmian*, a prominent polish nobleman, who in his memoirs (1858, p. 296) supposedly wrote: "*In some respect we have it better than during the polish times, we have a bigger part of that, what our home country gave us, but we do not have burden and danger of a massacre of Uman* [the massacre of ca. 2000 Polish and Jewish inhabitants of the town Uman during the Ukrainian haidamack rebellion in 1768—information by the author], *and be it without Poland, we are in Poland and we are Polish*". Yet it has to be stressed that the copy of those memoirs available to the author does not contain such a statement on the mentioned page. Furthermore, as it has been established in the detailed research into the economic situation in Lithuania, it did deteriorate sharply after the year 1805, with the loss of more than 20% of population and significant increase in taxes levied by the Russian authorities (for the meticulous overview of the economic situation of the Grand Duchy after the fall of Polish-Lithuania cf. Nawrot (2008, 65–69) and the literature quoted there). Therefore the view of Szoper (2004, p. 244), who speaks about merely "*negligible fiscal burdens collected for Imperial treasury*" appears to be wrong.

[14]Such attempts were already undertaken in 1805 by Prince Adam Czartoryski [cf. in this respect Skowronek (1969, pp. 201–236)] and were aimed at re-establishing semi-autonomous Poland under the Russian protectorate.

[15]Nawrot (2008, pp. 68–69).

[16]Kowalski (2013). Therefore, as the cited author rightly points out (p. 256), their political situation was entirely different from that of the position of the German princes, who following the fall of Sacrum Imperium Romanum frequently obtained territorial sovereignty.

Commonwealth ended definitely.[17] As it has been established so far in relevant the literature of the subject,[18] those attempts for more autonomy for former polish territories remained grossly futile and did not amount to demands for granting a separate constitution.

The situation changed dramatically after the Napoleon's war with the fifth coalition in the year 1809, which brought a stunning victory of the Duchy of Warsaw over the Austrian Empire and enabled it to expand its borders as to incorporate some of the recently partitioned Polish territories.[19] It simultaneously instilled apprehension in the Russian authorities of an imminent danger of reviving an independent and potent Polish state,[20] what would annihilate the endeavours of the Russian foreign policy of at least the last 50 years and could provoke unrest in the remaining, incorporated territories belonging previously to Polish-Lithuanian Commonwealth.[21]

Consequently, tsar Alexander I Romanov, following a memorandum elaborated by M. Speranski on 11 March 1811[22] commenced to canvass for support among the Polish-Lithuanian nobility by beguiling it with a perspective of more autonomy as well as political and economic liberties. For this reason during the stay of M. K. Ogiński in Petersburg starting in April 1811, this Polish mighty nobleman ("magnat"), since 1810 also a Russian senator, was invited by the Russian tsar to present him propositions apt for satisfying the political expectations and demands of the polish population (what of course was meant here was practically solely the nobility) in the western provinces ("*gubernii*") of the Russian Empire.[23] Answering

[17]Adam Czartoryski wrote about those times: "*After the joys of 3rd May, deep sorrow, black and paralysing distress took over Poland*", cf. Czartoryski (1860, p. 117).

[18]For the general presentation of those attempts cf. Izdebski (1972, pp. 96–97) and the literature quoted there.

[19]Including several major cities such as Cracow or Lviv. Cf. in this respect Czubaty (2011, pp. 198–234) or Thaden (1984, p. 64 et seq.)

[20]Very significant is a remark made by M. Speranski that Poland is "*a week point in all our political considerations*", cf. *N. F. Dubrovin*, Zapiska MM Speranskogo o veroatnostah wojny s Franciej, Russkaa starina 1900, vol. 101, pp. 58–65, quoted after Nawrot (2008, p. 63).

[21]Nawrot (2008, p. 64).

[22]Russkaa starina 1902, vol. 108, pp. 257, quoted after Nawrot (2008, pp. 64–65).

[23]According to the memoirs of Ogiński (1872, vol. III, p. 19) from the meeting with tsar in May 1811: "*What concerns the current moment, said the tsar, I should limit myself to a wish that polish citizens living under my rule were happy and content, and if you can purvey to me certain projects in this respect I will occupy myself with them with pleasure*". Very informative appear the comments written down by M. K. Ogiński during the subsequent meeting with Alexander I in November 1811 (according to the Gregorian calendar), where supposedly the tsar said: "*One of the two should ensue: in case of war I will create a Polish Kingdom, which will be united with the Russian Empire like Hungary and Czech with Austria or when there will be no war, I will introduce our great plan in respect to Lithuania*", cf. Ogiński (1872, vol. III, p. 43). For a more profound discussion of this political game of the Russian authorities cf. Nawrot (2008, pp. 69–83), Izdebski (1972, pp. 96–99) and *Wilham L. Backwell*, Alexander I and Poland. The foundations of his Polish Policy and its repercussions on Russia, 1801–1825, unpublished Ph.D. thesis, Princeton 1959, a possibly interesting dissertation I was made attentive to by Thaden (1984, p. 64, Footnote 1).

this invitation, during one of the following meetings of M. K. Ogiński (which has the date of 22 October 1811 in the memoirs[24]) with Alexander I, the polish nobleman attached to a letter to the tsar a project of ukaz on creation of Duchy of Lithuania,[25] highlighting the need for guarantying due respect for the old polish law, polish language and the monopoly of the public offices for "*citizens living and having property in the Grand Duchy*".[26] This ukaz was so much more far-reaching than earlier similar propositions that in the contemporary secondary literature it has been labelled as "*project of the Constitution of Grand Duchy of Lithuania*".[27]

It appears to be relevant in this context to stress that M. K. Ogiński in this very correspondence with Alexander I mentioned "*certain explications which* [*he has*] *gathered in respect to the administration of Finland*".[28] This very fact hints at a possibility that he already had entered in closer relationships with the Russian and pro-Russian agents occupying themselves with the issue of the newly conquered Finland, which is the more probable, as the members of the so-called Committee for the Finnish issues were meeting in Sankt Petersburg since 1811.[29]

Approximately at the same time, possibly starting from December 1811, a first project of what was proposed to become the highest normative act of the reborn, autonomous Lithuania was elaborated, and its authorship is tentatively attributed to two important finish politician of the pro-Russian orientation: G. A. Rosenkampff

[24]Ogiński (1872, vol. III, pp. 46–48).

[25]As Ogiński (1872, vol. III, p. 46) stated, he considered that it was "*the fastest and easiest way to manifest from which stance I see the organisation of Lithuania*" It is interesting to note that according to S. Smolka M. K. Ogiński was not an author of this text himself, but rather F. K. Drucki-Lubecki and Kazimierz Plater, who was to have been inspired to work upon the question of autonomy of the Grand Duchy of Lithuania by M. Speranski, cf. Smolka (1907, vol. II, pp. 495–498).

[26]Ogiński (1872, vol. III, pp. 46–48). This project amounted to 11 articles.

[27]Izdebski (1972, p. 97); identical statment is made by Nawrot (2008, p. 73), who speaks about „*striving to grant to the Grand Duchy of Lithuania a charakter of a state and national*". This opinion seems to be exaggerated since the project in its Art. VI clearly stated that the organisation of the Duchy is to be developed by a "*general law*" which was to be elaborated by a special committee. This ukaz could hardly be anything else than a prologue for future constitutional works. It is to be noted that H. Izdebski mentions that some of the prominent polish noblemen of the pro-Russian orientation in Lithuania, namely L. Plater and F. K. Drucki-Lubecki claimed to be involved in the preparation of the project of this proclamation, referring himself in this respect the correspondence between L. Plater and A. Czartoryski from November 1811—Izdebski (1972, p. 99), footnote numbers 20–22. In the correspondence between L. Plater and A. Czartoryski recovered by the author of his text and scanned for the purposes of the ReConFort project—namely in The Princes Czartoryski Library's source number: 5511 V, 81–92, which appears to be closest to the source meant by H. Izdebski, there are indeed some confirmations of this thesis, especially the mentions of "*Drucki de Lithuanie*", cf. The Princes Czartoryski Library source number: 5511 V, p. 82).

[28]Ogiński (1872, vol. III, p. 44).

[29]It was established in 1811 by Gustav Mauritz Armfelt, cf. Thaden (1984, p. 201).

and G. M. Armfelt.[30] It is also surmised that then responsible for both polish and finish issues, the mighty close advisor of tsar Alexander I, M. Speranski was personally involved in shaping some of the stipulations of this draft.[31] This document appears to have been lost irretrievably,[32] yet it in the part of the Polish historic studies it is claimed that the preserved draft entitled *Projet de Constitution du Royaume de Pologne* (highly probably, if not certainly elaborated in the year 1812) is nothing else than its (slightly?) amended version.[33]

The further important step in the genesis of the Polish 1815 Constitution was the presentation of the project called "*The governmental law of the Grand Duchy of Lithuania*" ("*Ustawa rządowa Wielkiego Księstwa Litewskiego*").[34] This document, which had 266 articles and was developed[35] jointly by Prince F. K. Drucki-Lubecki and M. K. Ogiński, who is thought to have corrected the first draft elaborated by L. Plater,[36] was presented to tsar Alexander I after he expressed his disappointment

[30]Izdebski (1972, pp. 105, 114–117), who refers to the memoirs of Ogiński (1872, t. III, p. 52), where the latter states that in December 1811 he found out "*that the tsar ordered general Armfelt and baron Rosenkampff to elaborate a law for the inhabitants of Lithuania*". Here especially the figure of Gustaf Mauritz Armfelt appears to be of key importance and merits a closer characteristic. Gustaf Mauritz Armfelt born in 1757 was one of the most prominent politician of the pro-Gustavian orientation at the end of XVIII century/beginning of XIX century. He distinguished himself in the service for King Gustav III, for whom he served between 1780 and 1792. After the death of Gustav, he plotted with Catherine II for a military intervention in Sweden in favour of the Gustavian-party. Barely surviving an attempt at his life in Naples, he fled to Russia where he stayed until 1797. Rehabilitated by Gustav IV of Sweden, he once again entered the King's service until the latter was deposed of the crown by the revolution of 1809. After the revolution Armfelt embarked once again on service for Russian Empire and became one of the closest advisors of Alexander I, canvassing for a plan of autonomous Finland, whose General Governor he became in the year 1813. For more information about Gustaf Mauritz Armfelt cf. *Stig Ramel*, Gustaf Mauritz Armfelt, fondateur de la Finlande, Paris 1999.

[31]Such a thesis was proposed by Izdebski (1972, p. 113), who founds it on attempts of the project to preserve to the highest possible extend local customs and laws, an approach supposedly typical for the policies of M. Speranski. An opposing view, attributing this draft to *Michał Kleofas Ogiński* was put forward by Iwaszkiewicz (1912, pp. 44–47), who based it on the fact that the project had "*strong mark of the oligarchical tendencies of the Lithuanian magnetaria*" (cf. p. 46); it has been also discussed extensively by Izdebski (1972, p. 116).

[32]This claim could be finally falsified after the queries Russian archives were made, but this so far has not been accomplished.

[33]Izdebski (1972, pp. 117–119). Such a view had already been expressed by Smolka (1907, vol. II, p. 505), who wrote: "*Maybe this second preserved* [*project*] *in the papers by Lubecki was a polish modification of the creation of Armfelt and Rosenkampf. Yet we do not have any explicit indications in this respect*", yet the authors disagree on who was responsible for those modifications. Its (possibly only) copy is available in the Drucki-Lubecki collection within the The Princes Czartoryski Library in Cracow, source number 13078 A5 and has been retrieved by the author and enclosed to this book as Appendix C, translated by the PI Ulrike Müßig.

[34]Cf. Smolka (1907, vol. II, pp. 128–129).

[35]Smolka (1907, vol. II, pp. 131, 497–498 and 505–508), cf. also Izdebski (1972, p. 99). This source is available in the The Princes Czartoryski Library in Cracow, source number 13078 A5 and has been made available in the Internet database of the project under: http://sources.reconfort.eu/.

[36]Nawrot (2008, p. 74) and the literature quoted there.

with another, earlier project, probably that elaborated by G. A. Rosenkampff and G. M. Armfelt.[37] The meticulous comparison of its content with the subsequent Constitution of the Kingdom of Poland of 1815 reveals some semblances between the two documents, especially in the structuring of its main editorial subdivisions.[38]

The both aforementioned drafts were sent—with a letter from 13th April 1812[39]—to Prince Adam Czartoryski, the most prominent polish politician of the pro-Russian orientation of the time for counselling, who advised elaborating another, compromising project.[40] Yet, before this could become reality, the war with Napoleon broke out.

Following the spectacular victory over the Grand Army in the year 1812 and during the ensuing military occupation of the Duchy of Warsaw by the Russian military forces,[41] the idea of creating dependent states with formally stipulated autonomy, founded on a Constitution, became politically viable.[42] It finally led to

[37]Ogiński (1872), Oddział III, p. 74 wrote in his memoirs that during his meeting with Alexander I on 27th of January 1812 (8th February according to the Georgian calendar) the tsar stated that: "*he does not like the project that was submitted to him and that he intends to order me creating a different one*" and upon this statement the Ogiński asserted that: "*he occupied himself for months with this work with the prince Lubecki and duke Kazimierz Plater, that they divided all the materials for this work between themselves and that they have been laid down in such a way that can it be anytime presented to the tsar*", cf. Ogiński (1872), Oddział III, p. 74. However it is only a presumption, yet be the more probable as it necessarily must have flattered the Polish-Lithuanian nobility and can be perceived as nothing but a skilful political gesture by the Russian tsar. It also may hint at a fact that the works upon the project of the *Governmental Law*… might have had begun earlier.

[38]Such a detailed comparision has already been conducted: cf. Izdebski (1972, p. 125). Cf. also considerations below (Fn 60).

[39]Smolka (1907, pp. 162–165).

[40]Cf. letter of Adam Czartoryski to tsar Alexander I from 04.06.1812 and an addition to it from 13.6.1812, quoted extensively and discussed by Smolka (1907, pp. 165–168). Some of this relevant correspondence between Prince Adam Czartoryski and tsar Alexander I. was reprinted in: Czartoryski (1888, pp. 213–237), which has been scanned within the ReConFort project and has been made available in the Internet database of the project under: http://sources.reconfort.eu/. For those proceedings cf. Izdebski (1972, p. 118) and Nawrot (2008, p. 82).

[41]Beginning in February 1813.

[42]Izdebski (1972, p. 121). It is also interesting to note that prince Adam Czartorski in his correspondence with Alexander I Romanov (cf. letter of Adam Czartoryski to tsar Alexander I from 04.05.1813, reprinted in: Czartoryski (1888, pp. 237–238) wrote: "*The King of Prussia is not at all opposed to the existence of Poland. He feels the necessity of satisfying the wishes of the Polish nation and considers them just and reasonable*". On the other hand tough Prince Adam Czartoryski urged: "*The tsar Alexander wants the Poles to make a step towards him, he needs evidences of theirs' sympathy which he could place in front of the allied and the Russian*" (cf. *Adam Jerzy Czartoryski*, Memoriał w sprawie odbudowy państwa polskiego, source retrieved by the author and made available on the internet platform of the project under: http://sources.reconfort.eu/, The Princes Czartoryski Library, source number: 5242 V, 96). At the same time however there can be encountered voices demanding a closer alliance with Austria (cf. s.n., Co nam dziś czynić przystaje, source retrieved by the author and made available on the internet platform of the project, The Princes Czartoryski Library, source number: 5242 V, 67–80, especially pp. 76–77).

granting Constitution to the Kingdom of Poland in November 1815 by the Russian tsar.[43] This stage had been preceded by the elaboration of the Principles of the Constitution Kingdom of Poland ("Zasady Konstytucji Królestwa Polskiego z dn. 25 maja 1815 r."),[44] proclaimed by Alexander I a few weeks after the ratification of treaties of Vienna 1815, i.e. on 25 May 1815.[45]

The principles themselves already laid down two most significant rules which found their expression in the future text of the Constitution 1815: the eternal union with the Russian Empire[46] and the monarchical principle, i.e. the assumption that the entire power stems from the person of the ruler.[47] They also stipulated numerous liberties, which were to be subsequently incorporated into the text of the future Constitution, such as *habeas corpus*,[48] freedom of the press,[49] protection of property[50] or religious freedom.[51] Yet the principles could not substitute a veritable constitution and had only temporary significance.[52]

[43]It had the signing date of 27th November 1815 but formally entered into force on 24th of December 1815.

[44]Cf. Zasady konstytucji Królestwa Polskiego (Principles of Constitution of the Polish Kingdom), printed Polish source available in Handelsman (1915, pp. 34–40). This document, consisting of 37 articles—was in fact a stub of a future constitutional regulation. Its roots go at least to a meeting which took place on 21st of September 1814 in Puławy (residence of Prince Adam Czartoryski) where the draft of those principles had been discussed with the participation of i.a. tsar Alexander I, Adam Czartoryski, Nikolay Novossiltzoff and Tadeusz Matuszewicz. For the copy of protocol from this meeting in French, written by A. Skałkowski cf. Askenazy (1937, pp. 369–373), cf. also: Mycielski (2010, p. 55).

[45]It is worth stressing that art. 3 of the Vienna treaty between Russia and Prussia as well as art. 5 of the Vienna treaty between Russia and Austria guaranteed creating a Kingdom of Poland which shall be connected with Russian Empire by the means of its Constitution. Both those treaties are available in English i.e. in Journals of the House of Commons, vol. 71, s.l., 1816, pp. 747–750.

[46]Art. 1 of the Principles of the Constitution of Kingdom of Poland.

[47]Cf. art. 3 of the Principles of the Constitution of Kingdom of Poland, which stated that "*the executive competence and the government are fully placed in the person of a ruler; all the executing and administrative power can only stem from him*".

[48]Cf. art. 4 of the Principles of the Constitution Kingdom of Poland and art. 19 of the Polish 1815 Constitution.

[49]Cf. art. 10 of the Principles of the Constitution Kingdom of Poland and art. 16 of the Polish 1815 Constitution.

[50]Cf. art. 6 of the Principles of the Constitution Kingdom of Poland and art. 26 of the Polish 1815 Constitution.

[51]Cf. art. 2 of the Principles of the Constitution Kingdom of Poland and art. 11 of the Polish 1815 Constitution.

[52]It was already recognised by the contemporaries: in the source retrieved by the author and made available on the internet platform of the project under: http://sources.reconfort.eu/, i.e. *Ludwik Plater*, Myśli wzgledem Rozwiniecia Zasad Konstytucyynych, The Princes Czartoryski Library, source number: 5261 IV, 295–299 (295) this author, working upon the Constitutional drafts stated: "*It is impossible though to commence working on the details without having principles, which make out the generality. Such principles are partially the Constitutional Principles*".

The widespread view in the Polish legal history[53] states that the fervent half-year period[54] between the acceptance of the Principles of the Constitution of the Kingdom of Poland from 25th May 1815 and its final signing on 27th November 1815 abounded in constitutional drafts.[55] The need for such drafting was further exacerbated by the fact that part of the polish society[56] was against restoring the Constitution of 3rd May 1791, a postulate which had been formulated by the conservative circles of the Duchy of Warsaw[57] and which even had been alluded to in Art. 1 of the Principles of the Constitution of the Kingdom of Poland from 25th May 1815.[58]

The most significant of those projects is a 438-articles long document, attributed solely to L. Plater and submitted to the provisional government of the Kingdom in a letter dated on 26 August 1815.[59] It is highly probable that due to the similarities between Plater's project and "*The governmental law of the Grand Duchy of*

[53]Askenazy (1907, pp. 66–72), Bartoszewicz (1916, pp. 213–216) and Izdebski (1990, pp. 193–198). This has been confirmed in the light of the sources retrieved by the author for the database of the ReConFort project.

[54]According to the source retrieved by the author and made available in the Internet database of the project under: http://sources.reconfort.eu/: *Kajetan Koźmian* (?), Notatki o pracach nad konstytucją Królestwa Polskiego, The Princes Czartoryski Library, source number: 5242 V, 343–344, (344): "*Only after returning back from the Congress did we start to think seriously about the text of the Constitution*".

[55]There were at least three such projects: of A. Horodyski, The Princes Czartoryski Library, source number: 5261 V, 219–292, cf. in this respect Kallas (1969, pp. 105–116), an anonymous project supposedly available in Muzem Narodowe w Krakowie, source number according to H. Izdebski: 1025/22, which was based on the idea of joining the former Duchy of Warsaw with the territories of former Duchy of Lithuania, cf. for the discussion of those ideas and promises starting from 1815 Mościcki (1924, pp. 84–96) and the project of L. Plater, The Princes Czartoryski Library, source number: 5261 IV, 3–110. The first and the last of the aforementioned projects have already been retrieved for the purposes of the project, scanned and has been made available in the Internet database of the project under: http://sources.reconfort.eu/.

[56]Cf. especially a source quoted extensively by Mycielski (2010, p. 53), namely: *Józef Kalasanty Szaniawski*, Ogólniejsze myśli względem projektowanej konstytucji Królestwa Polskiego, manuscript, which according to M. Mycielski is to be available in Zielińskich Library in Płock under the source number 511. Cf. also *Stanisław Węgrzycki*, Przestrogi do utworzenia Królestwa Polskiego, 1813; The Princes Czartoryski Library, sources number: 5242 V, 125 who in the year 1813 in this source retrieved by the author and made available in the Internet database of the project under: http://sources.reconfort.eu/. stated: "*It is necessary to give a Constitution, but not to go back to the Constitution of 3rd May 1791 since this one was at that time good, but nowadays the Constitution granted to the Duchy* [of Warsaw—M. Byczyk] *following the Tylżycki treaty in the year 1807 is better for all*".

[57]Cf. in this respect e.g. *Józef Wielhorski*, Reflexions sur le Royaume de Pologne en 1815, reprinted in: *Szymon Askenazy*, Ministerium Wielhorskiego in: idem, Dwa stulecia. XVIII i XIX. Badania i przyczynki, vol. II, Warszawa 1910, pp. 519–522, who discussing such views wrote (p. 520): "*La constitution de 1791 prouve un progres incroyablemais il est imposible de ne pas s'apercevoi que' l'on a regarde la Pologone comme un malade*".

[58]Where it had been stated that "*new Constitution, which was to be granted to the Kingdom of Poland, could be even more national and became close to the law of 3rd May 1791 to the extent to which the difference in circumstances and times enables it*".

[59]Cf. Izdebski (1972, pp. 123–124).

Lithuania" ("*Ustawa rządowa Wielkiego Księstwa Litewskiego*") this last paper must have had been an important source of inspiration for L. Plater.[60] Due to the supposed criticism issued at this draft by numerous prominent figures of the then polish public life, including A. Czartoryski, A. Linecki[61] as well as by I. Sobolewski[62] and J.K. Szaniawski[63] it was profoundly reshaped and shortened, possibly by a wider commission of the polish politicians of the time, probably including F. K. Drucki-Lubecki, T. Wawrzecki and A. Czartoryski,[64] flavouring it with a distinctively liberal spirit. According to S. Akenazy it resulted in creating a new, concise project of 162 articles which was then submitted to the monarch during his stance in Warsaw in November 1815, who after annotating it, referred it to Ignacy Sobolewski for further revision.[65] The final touch nonetheless belonged to the hand of the absolute tsar Alexander I, who once again comprehensively reviewed the draft before ratifying it.[66]

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[60]Those similarities concerned numerous issues such like the relationship between the Kingdom of Poland and the Russian Empire, the organisation of the territorial administration, the Senate, or the procedures of amending the Constitution. For the detailed analysis of the similarities and divergences cf. Izdebski (1972, pp. 125–131).

[61]The claim about such a criticism have been formulated by Izdebski (1972, p. 126) who referred himself to a letter of A. Linowski to Adam Czartoryski from 10th April 1812 (The Princes Czartoryski Library, source number: 5259 IV, 167) and to a letter of A. Linowski to A. Czartoryski from 25th March 1812 (The Princes Czartoryski Library, source number: 5259 IV, 163). Yet an attempt to recover those letters made by the author of this article proved that they are not available under the mentioned location. It has to be stressed however that also Askenazy (1907, p. 67) referred to: "*critical remarks made on this project by Czartoryski, Szaniawski, and particularly by the enlighted Ignacy Sobolewski*".

[62]Ignacy Sobolewski in his memorandum, recovered by the author and inserted into the database of the project, criticised the draft i.a. for being all too similar to the regulations of Constitution of 3rd May, e.g. by introducing in its regulations (in the title X) upon the periodical revival of Constitution every 25 years, whereas Sobolewski deemed it sufficient to require here a qualified majority of 4/5 of the representatives to Sejm and Senate, cf. source retrieved by the author and made available in the Internet database of the project under: http://sources.reconfort.eu/: *Ignacy, Sobolewski*, Uwagi na projektem ustawy konstytucyjnej z 438 artykułów złożonym, The Princes Czartoryski Library, source number: 5222 V, 163–184, especially pp. 182–183.

[63]Józef Kalasanty Szaniawski in his written opinion, recovered by the author, criticised the draft i. a. for introducing regulations that were in his view superfluous, such as regulations upon the viceroy or the States' Council, since: "*The State's Council is a thing entirely dependent from the monarch and the Constitution does not have much to say here*", cf. source retrieved by the author and made available on the internet platform of the project under: http://sources.reconfort.eu/: *Józef Kalasanty Szaniawski*, Uwagi nad projektem ustawy konstytucyjnej, The Princes Czartoryski Library, source number 5222 V, 389–411, (397–398).

[64]Izdebski (1972, p. 131), who also mentions the following persons: A. Linowski, F. Grabowski, S.K. Zamoyski, T. Matuszewicz as possible participants of such a committee. Bartoszewicz (1916, p. 213) also mentions N. Novossiltzoff, who was supposed to participate in the works of that Commission "*at the end*".

[65]Such is the outline of the last stages of drafting 1815 Constitution made by Askenazy (1907, pp. 67–68). It is a narration very difficult to falsify since this author did have access to the sources which are considered to be lost and have also not been found by the author of this text.

[66]Unfortunately and as already mentioned above, any more detailed information about the proceedings on the Constitution has been lost. The only preserved secondary source which gives an

As soon as this work has been accomplished, any plans aimed at unifying Lithuania with the Kingdom of Poland were postponed indefinitely.[67] This, together with the fact of instrumental treatment of drafts of the Constitution for the Grand Duchy of Lithuania, which appear to have been merely an instrument for winning over the support of Polish nobility[68] and possibly providing military support for the incoming war with Napoleon reveal a true meaning of Russian policy.[69]

3 General Characteristics of the Constitution of 1815

It is not an objective of this paper to offer a meticulous overview of the regulations of the Constitution of 1815, yet owing to the shortage of the relevant English literature of the subject before more specific regulations of this normative act concerning the criminal law will be presented in depth, it appears reasonable to outline its main framework and regulatory content in general.

The Constitution of the Kingdom of Poland from the year 1815 is considerably longer then the two previous Polish Constitutions, namely the ground-braking

overview of those works is contained within the publication of Askenazy (1907, pp. 66–68), whom I followed in this part of the article. Szymon Askenazy had had access to the original documents and drafts that subsequently appear to have been lost and were also not recovered by the author of this text. The conclusions of this author are also referred to in the contemporary literature of the subject, cf. e.g. Izdebski (1990, pp. 193–198). It is worth pointing out here that as it has been observed in the literature of the subject (cf. Kozłowski 1907, p. 127) the Polish 1815 Constitution did influence the draft of the Greek Constitution of 1827.

[67]Very interesting is a source quoted by Szoper (2004, p. 245), namely: Ostrowski, Żywot Tomasza Ostrowskiego, Ministra Rzeczypospolitej; później Prezesa Senatu Księstwa Warszawskiego i Królestwa Polskiego oraz Rys Wypadków Krajowych od 1763 r. do 1817, vol. II, Paryż 1840, p. 632, according to which during a meeting of the representatives of the Polish-Lithuanian nobility with the tsar Alexander I Romanov on 25th November 1815 in Warsaw, the tsar supposedly stated: "*I will not allow that you demanded to join your provinces to Poland, then it does not fit that it would be understood that I do it following your request*", cf. also Mościcki (1924, pp. 84–96).

[68]However, Alexander I Romanov was careful enough to sustain the mistake of the Polish nobility: According to the Sobolewski brothers, during an audience in the year 1816: "*The tsar seems to be more and more attached to our national existence as to his creation. He mentioned me with pleasure our Constitution, for which he has received i.a. congratulations from Ms. Staël*", Cf. source retrieved by the author and made available on the internet platform of the project under: http://sources.reconfort.eu/: Correspondence between A. Czartoryski and Jozef, Ignacy and Ludwik Sobolewski, letter from 19.04.1816, The Princes Czartoryski Library, source number: 5515, 9–15, (11).

[69]It is interesting to refer to the J. Iwaszkiewicz, who describes the attempts of tsar Alexander I Romanov to encourage M. K. Ogiński to contact Armfelt in order to find out the best ways of organizing military forces "*as soon as possible*", cf. Iwaszkiewicz (1912). Therefore the author can hardly agree with the view that "*Alexander treated them* [drafts of the Constitution of Grand Duchy of Lithuania] *all the time seriously*", cf. Izdebski (1972, p. 119). Rather, it was part and parcel of the instrumental Russian policy, aimed at securing its interests in central Europe.

Constitution of 3 May 1791 and the Constitution of the Duchy of Warsaw 1807: it comprises 4453 words[70] and is divided into 7 main editorial parts—titles.[71] Two most extensive titles, namely third—"*Government*" and forth—"*Of the national representation*" are additionally subdivided into respectively 5 and 6 chapters.[72] Quantitatively speaking, the most significant number of the legal norms has been devoted to the regulation of the division of powers,[73] with the structure of titles number 3–5 apparently referring to the idea of *trias politica* whose elaboration is commonly attributed to Baron de Montesquieu.

Among those regulations upon the diverse branches of government two legal norms appear to possess towering importance for recreating the balance of power in the Kingdom, namely Art. 35, stating that: "*The government resides in the person of the King. He exercises in all their plenitude the functions of executive power. All executive and administrative authority must emanate from him*", supplemented by the provision of Art. 86: "*The legislative power resides in the person of the King and in the two chambers of the Sejm, conformably with the regulations of the article thirty-one*". Highlighting the position of the king here is not purely coincidental. It possibly stems from the final stage of the drafting of the Constitution, personally conducted by Alexander I which was aimed at securing the unalloyed supremacy of the Russian tsar in the Polish Kingdom.[74] According to the 1815 Constitution such a central position of the king did not curb the freedom of the judiciary: in art. 138 there is a solemn proclamation that: "*The judicial order is constitutionally independent*", what is supplemented by the guarantee that "*the judges nominated by the King are for life and cannot be removed*".[75] There are also provisions for the highest tribunal in Warsaw, which "*shall finally determine all civil and criminal cases, state crimes excepted*",[76] leaving the king no other competence than to grant pardon to the offenders.[77]

For the purpose of a general presentation of the system of legislative and executive powers as moulded in the Constitution of 1815 it shall be underscored that the Polish Parliament—Sejm, following the Polish tradition going back at least

[70]The Polish Constitution of 3rd May 1791 had 3728 words divided into 11 main articles preceded with a preamble and ended with a declaration of the representatives of the Parliament, whereas the Constitution of the Duchy of Warsaw consisted of merely 2622 words in 89 articles, ordered into 12 titles.

[71]They have respectively the following names: Of political relations of the kingdom (art. 1-10) General Guarantees (art. 11-34), Government (art. 35-84), Of the national representation (art. 85-137), The judicial order (art. 138-152), The armed force (art. 153-156) and General regulations (art. 157-165).

[72]Altogether the content of this normative act was therefore organised into 16 autonomous entities within a two-level structural division.

[73]In terms of words it had 3147 words, i.e. 70,6% of the total bulk of the Constitution.

[74]Cf. Handelsman (1915, p. 19) and Izdebski (1990, pp. 200–201).

[75]See art. 141 sentence 1 of the Constitution. All the following numbers of the articles in this subchapter refer to the 1815 Constitution of Kingdom of Poland.

[76]Cf. art. 151.

[77]Art. 43.

to the XV century, was divided into two chambers: Deputies' Chamber (Izba Poselska)[78] and Senate (Senat).[79] However what was a veritable breakthrough for the entire Polish constitutional history was the regulation of art. 130. It enabled anyone who was: "*paying any amount of contribution upon his estate*" to participate with suffrage rights in communal assemblies, which were responsible for choosing 51 out of 126 members of the Deputies' Chamber (Izba Poselska).[80] Those two chambers of the Parliament did not have a right to initiate legislation though, but were voting on the projects of laws submitted upon the King's order, be it previously elaborated by State's Council (Rada Stanu) or not.[81]

It was this State's Council (Rada Stanu), consisting of a smaller Administrative Council (Rada Administracyjna) and of General Assembly (Zgromadzenie Ogólne) as plenary body[82] which together with the king's representative was to "*administer the affairs of the kingdom in the King's name, during his absence.*"[83]—what obviously due to the presence of the tsar in St. Petersburg was a normal situation. State's Council (Rada Stanu) was subordinated to Parliament by the obligation to present general report on its activities,[84] which used to be heavily debated in Deputies' Chamber (Izba Poselska), creating a suitable opportunity for the parliamentary opposition to severely criticise the government of the Kingdom. Another example of a formal subordination of State's Council (Rada Stanu) under the Sejm's scrutiny was the juridical cognition of Parliament's Court (Sąd Sejmowy) over the infrigments of the Constitution and ordinary laws by the Ministers of State's Council (Rada Stanu) and other executive clerks.[85]

Those backbone regulations are preceded by the critical for the position of the Polish state first title of the 1815 Constitution. It formally stipulated a dependent position of the Kingdom, which was to be "*for ever united to the Empire of Russia*".[86] The nature of this unification appeared according to art. 3 to be limited to the personal union, with the Russian tsar being simultaneously the king of Poland.[87]

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[78]Art. 118, i.e. 40, 47% of the deputies.

[79]Art. 108.

[80]From this period there are known examples of Polish peasants who were elected for public functions, such as assessors, cf. Mencel (1968, p. 651), yet there were no peasants among the representatives to Sejm and this political breakthrough associated with granting political rights to peasants was not appreciated in broader circles, cf. Mencel (1968, p. 657).

[81]Art. 96, 102.

[82]I.e. Council of administration—cf. art. 65: "*The council of state shall be divided into a council of administration and a general assembly*". Council of administration was itself composed of "*the heads of the five departments of government and of other persons specially appointed by the King*" (cf. art. 66).

[83]Art. 64.

[84]Art. 92.

[85]Art. 82.

[86]Art. 1.

[87]Art. 3 stated that: "*The crown of Poland is hereditary in our person and that of our descendants, heirs and successors according to the order of succession established for the Imperial throne in*

In case of his absence in the Kingdom of Poland, the tsar shall nominate his representative ("Namiestnik"), being either a Russian Prince of the Blood or a Polish citizen,[88] laying down at the same time the extent of his prerogatives.[89] Nonetheless, it was also regulated that the foreign policy is common for both countries,[90] yet the tsar could allow the Kingdom to be party to the international treaties.[91]

Following those stipulations of the opening title of the Polish 1815 Constitution, it is a very controversial issue to what extend the Kingdom of Poland could be considered to have been an independent subject of international law. It appears right to state that the historical examples of the treaties signed by the Kingdom of Poland[92] are a vital indication that it was not merely an intrinsic part of the Russian Empire, but was at least partially recognised internationally.[93]

Another highly significant part of the stipulations was a combination of individual and collective human rights incorporated into title II of the Polish 1815 Constitution. They encompassed i.a. religious freedom and prohibition of civil and political discrimination on religious grounds,[94] freedom of print,[95] freedom from unsubstantiated persecution and illegal imprisonment,[96] personal freedom,[97] protection of property,[98] guarantee of the usage of Polish language in public affairs[99] and sole access of the Poles to the public, be it civil or military, functions.[100] There was a guarantee of the responsibility of the civil servants for professional activities as public functionaries as well as a vague proclamation that "*The law shall protect every class of citizens alike, without regard to their rank or condition*".[101] Those

Russia". It is worth noting that tsar Nicholas I Romanov undertook his separate coronation in Warsaw on 24th May 1829, which, formally speaking, was the last coronation on the polish soil.

[88]Art. 5 and 6.

[89]Art. 7.

[90]Art. 8. For Mażewski (2014, p. 63) it is a clear testimony that between those two countries there existed a real union. Some earlier authors claimed that it precluded the Kingdom of Poland from attaining a position of a subject of international law: e.g. Dembski (1974, p. 172), see in this respect considerations below.

[91]Art. 9.

[92]As for instance a convention between Russian Empire, Polish Kingdom and Prussia upon the regulation of relationships of mutual trade and navigation, signed in Berlin on 11th March 1825, cf. Mażewski (2014, pp. 66–69).

[93]Mażewski (2014, p. 70) rightly concludes that it also cannot be considered to have been a fully-fledged subject of international law.

[94]Art. 11.

[95]Art. 16.

[96]Art. 21, 23.

[97]Art. 24.

[98]Art. 26.

[99]Art. 28.

[100]Art. 29.

[101]Art. 17.

rights and liberties were not restricted to polish citizens since: "*Every legitimated foreigner shall enjoy the protection of the laws and the advantages which they secure on the same footing as the other inhabitants*".[102]

Finally, the closing title of the 1815 Constitution contains some transitional and organisational regulations, of which two as being highly important merit closer attention: art. 160, which preserved certain polish civil and military awards and art. 165 which, read *a contrario*, kept in force all the previous statues which were not contrary to the adopted Constitution.[103] Therefore it is right in my view to speak about the legal continuity between the Duchy of Warsaw and the Polish Kingdom.[104]

It is important to note that from the formal point of view this Constitution has to be perceived as being one of the most liberal in post-congress Europe,[105] giving suffrage rights to more than 100,000 people, including peasants[106] and numerous civil freedoms.[107] However, it was perennially infringed by the Russian authorities, being reduced to nothing more than an instrument of propaganda, attesting to the alleged liberal approach of the Russian tsar in respect to the Polish Kingdom.[108] A blatant example of such infringements was the notorious curbing of the independence of the judiciary, especially by not-appointing judges and replacing them with dependent deputy-judges,[109] eradicating the freedom of the press[110] or even

[102]Art. 32 sentence 1.

[103]Due to this regulation some of the most vital French regulations, introduced in the Duchy of Warsaw, such as Napoleon's Civil Code could be maintained. This legislation in some respect still influences the polish legal system (cf. in this respect e.g. a judgment of Polish Supreme Court from 27th June 2013 in case III CZP 29/13 upon the applicability of art. 713 of French Civil Code for current legal obligations) what could not be possible, had it not been for the aforementioned art. 165.

[104]Roztworowski, (1915, pp. 34–35) who even goes so far as to state (p. 35) that: "*The Constitution of Duchy of Warsaw and decrees from the previous period are not canceled, but to the contrary, expressis verbis upheld*". It has to be added that it was a situation which apparently Alexander I Romanov strived to achieve at least since 1811, once again taking over the central territories of former Poland-Lithuania.

[105]Kutrzeba (1916, p. 24), where he speaks about "*the most liberal Constitution which any European country had at this time*".

[106]This estimation is given according to a detailed overview of the scale of the political activity of the society of the Kingdom of Poland presented by Mencel (1968, p. 646).

[107]Cf. considerations above.

[108]Bardach et al. (1979, p. 186). As a very accurate appears the statement made by Fryderyk Skarbek, Królestwo Polskie do rewolucyi listopadowej, vol. I, Poznań 1877, p. 46 that tsar Alexander I was "*mistaken, when he understood, that he can win over Poles by merely stipulating freedoms without any guarantees of its respecting*", cf. Szymaniec (2014, pp. 286–292).

[109]Witkowski (1988).

[110]By the decisions issued on 22th May and 16th June 1819 the representative of the tsar, general Józef Zajączek introduced a preventive censorship of the press in a blatant infringement of art. 16 of the Constitution, cf. Gąsiorowska (1916, pp. 53–73).

more outright by not convoking Sejm within the time limits specified in the Constitution[111] or making confidential its proceedings.[112]

That instrumental treatment of the Polish 1815 Constitution as merely a propaganda tool, which contradicted the stipulations of the Vienna Congress in respect to Poland, became quickly known.[113] Moreover, it has been recognized that the 1815 Constitution was used as fake instrument to appease the Polish society[114] and was nothing more than a good will of the Russian tsar,[115] who one-sidedly granted it to the Polish Kingdom.[116] This approach is fully consistent with the view of the Russian politicians who constantly feared the polish striving for independence.[117]

Interestingly, the Polish Constitution of 1815 was not—unlike some other XIX-century Constitutions[118]—subject to any more extensive legal, philosophical

[111]According to art. 87 the ordinary Sejm "*shall meet once in every two years at Warsaw*" whereas the Sejms were convoked only in the years 1818, 1820, 1825 and 1830.

[112]What was introduced due to the one-sided amendment of the 1815 Constitution by Alexander I Romanov on 13th February 1825.

[113]An anonymous French author commenting the outbreak of an uprising of the Polish 1830 November Uprising wrote: "*L'empereur de Russie n'a pas voulu comprender l'esprit des dispositions du congrès de Vienne l'égard des Polonais; il n'a pas même respecté la lettre de la loi*", cf. s.n., La Pologne et le Congress de Vienne, Paris 1831, p. 8, source retrieved by the author from Bibliothèque Polonaise de Paris (source number: BPP FA 30137 II) and made available on the internet platform of the project under: http://sources.reconfort.eu/. The same anonymous author of the text goes on as to say that: "(…) *mais les empereurs russes en se jouant continuellement de ces obligations, en violant sans cesse la constitution qu'ils avaient juré de respecter, l'ont tout-à-fait anéantie*." (s.n., La Pologne et le Congress de Vienne, Paris 1831, p. 9), even though "*les puissances européennes ont reconnu le droit qu'avaient les Polonais à former une nation séparée*" (s.n., La Pologne et le Congress de Vienne, Paris 1831, p. 10).

[114]D'Herbelot (1830, p. 31) source retrieved by the author from Bibliothèque Polonaise de Paris (source number: BPP FA 30138) and made available on the internet platform of the project under: http://sources.reconfort.eu/: "*La Russie, voulant avoir des vassaux, n'a donné à l'amour-propre national qu'une satisfaction dérisoire; elle a mesuré sordidement ce qu'elle concéderait de liberté à la Pologne, et elle a fait la dose si petite qu'autant aurait valu la supprimier tout-à-fait*".

[115]D'Herbelot (1830, p. 31): "*La Pologne ne peutrester telle que 1815 l a constituée: car, dans cet état, elle n'existe que sous le bon plaisir de l'empereur, et n'est d'aucune utilité pour l'Europe*".

[116]D'Herbelot (1830, p. 27), where the 1815 Constitution is referred to as: „*la charte octroyée par Alexandre*." It starkly contrasts i.e. with the case of the Belgian Constitution 1831 which was of popular origin and imposed far-reaching limitations on the power of the monarch, who, upon accepting the crown, had to concede to them—cf. in this respect: Deseure (s.a., pp. 119–120).

[117]Very ilustrative appears the formulation of Karamzin (1818, p. 10) "*Les Polonais légalement constitués en un people distinct et souverain, seraient plus dangereux pour nous que ne le peuvent être les Polonais sujets russes*" (retrieved by the author from Bibliothèque Polonaise de Paris (source number: BPP 344, pos. 6) and made available on the internet platform of the project under: http://sources.reconfort.eu/.

[118]As was for instance the case with i.e. with Statuto Albertino, where "*The need to discuss public matters created a real 'community of the word' and of print media*", cf. Mecca (s.a., pp. 177–183).

or journalistic commenting by the contemporaries. There can hardly be found any study books or monographs devoted to the legal analysis of this normative act stemming from the 1815–1830 period.[119] This situation renders it necessary to seek the legal positions towards this Constitution in dispersed stances made by the participants of the public life of the Polish Kingdom 1815–1830.

In this public life of the Kingdom it is important however and for the purpose of this article also sufficient to discern two major currents. The first one perceived the 1815 Constitution as a magnanimous gesture of the Russian tsar who kindly granted it to the Kingdom and is free to revoke it anytime he pleases.[120] Consequently, the inhabitants of the Polish Kingdom shall strive to peacefully cooperate with the Russian authorities, utilising the methods available to them within the existing political situation.[121] The second major current treated the Constitution as a mutual contract between the tsar (being simultaneously the polish king) and the polish society.[122] Based on those premises the representatives of this approach voiced their disapproval at every infringement of the highest normative act of the Kingdom.[123] After a fierce battle between those two attitudes on the Sejm in the year 1820[124] this liberal, opposing current started gaining momentum and became a catalyst for the military November uprising in 1830/1831.

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[119]Just before closing the editorial works upon this paper the author did encounter in the Central Archives of Historical Records in Warsaw (source number: fonds 391, number 1252a) a manuscript of the treaty written by *Tadeusz* (?) *Ostrowski*, Konstytucja Krolestwa Polskiego z r. 1815 in October 1823, being an attempt of the legal commenting upon this normative act. It is to be made available on the internet database of the project under: http://sources.reconfort.eu/ and possibly referred to in subsequent publications.

[120]Cf. e.g. Skarbek (1821), especially p. 121 (with a statement: "*the reincarnated, dear name of the homeland, returned due to the liberties of the grateful king*" a source retrieved and made available on the internet platform of the project under: http://sources.reconfort.eu/.

[121]Such as parliamentary election in order to choose the best possible representatives to Sejm with the purpose of creating good laws, cf. Skarbek (1820), a source retrieved and made available on the internet platform of the project under: http://sources.reconfort.eu/. It is worth stressing that such an approach was radically different than the one prevailing during the Polish Commonwealth, when, as A. Tarnowska observed: "*no thesis of the exclusive sovereignty of the monarch was ever raised in Poland, because this would have never been approved*", cf. Tarnowska (s.a., p. 249).

[122]Niemojowski (1818, p. 5), who admonished: "*Our government shall, following the fatherly inspiration of our blessed king, our beloved Lord, following strictly the granted to us Constitutional Charter, strive to increase the number of inhabitants of our country, it shall remove the obstacles* (…) *which are various arbitrary and unconstitutional burdens* (…)", cf. also Dyaryusz Seymu Królestwa Polskiego 1818, vol. III, Warszawa 1818, p. 51.

[123]Cf. Dziennik posiedzeń izby poselskiej w czasie Sejmu Królestwa Polskiego w roku 1820 odbytego, Warszawa 1820.

[124]Skowronek (1995) and his source: Julian Ursyn Niemcewicz, *Pamiętniki*, volume I, which according to J. Skowronek it is to be available in the Princes Czartoryski Library, the source number: 3514 IV.

4 Regulations in the 1815 Constitution Concerning the Criminal Law

The decisive constitutional normativity of the Constitutions as developed in the end of the 18th century expressed itself i.a. as the requirement that statutory law should be congruent with the hierarchically higher placed text of a written Constitution.[125] This idea—of a legal system as a system combining various levels of normativity where regulations on each level have to be in conformity with that placed above—has persevered, be it significantly more sophisticated,[126] until nowadays. Consequently, the particular laws, such as regulations in the field of private or criminal law can be perceived as an extension, development or concretisation of the constitutional principles.

Yet there is another important aspect of this hierarchical structuring of the legal system, namely that a written Constitution shall lie down the basic principles for all branches of law in order to enable to verify their "*constitutionality*", since otherwise this verification process could not effectively take place. Correspondingly, in order to comprehend the development of this decisive constitutional normativity in the field relevant for this paper it is necessary to outline those regulations of the 1815 Constitution of the Kingdom of Poland which pertain to the criminal law.

Careful perusal of this normative act gives little reason to expect that any more detailed regulations concerning the criminal law could be encountered here, since already in the Art. 4 its narrow regulatory scope appears to be laid down very precisely: "*The Constitutional Charter determines the manner, the principle, and the exercise of the sovereign authority*". Yet no later than in Chapter II of the Constitution, labelled "*General Guarantees*" lying down—as it has already been mentioned above—the basic rights in the Kingdom of Poland there are incorporated numerous regulations concerning both the criminal procedure as well as the substantive criminal law itself. Above all there is a towering proclamation of the Art. 17: "*The law shall protect every class of citizens, alike, without regard to their rank or condition.*" More specifically for the field of criminal law, the Art. 23 states that: "*No man shall be punished except in conformity with the existing laws and by the decree of the competent Magistrate.*" Further, Art. 26 in its third sentence declares that: "*Any person attempting to appropriate the property of another shall be held to be a disturber of the public peace and punished accordingly.*"

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[125]Müßig (2016, p. 1), who also conceptualised and explained there the term of "*Decisive Constitutional Normativity*" (DCN) as well as *Ulrike Müßig*, Preface, p. 2, where she observes that with the American Revolution: "*constitutional law and other kinds of law were conceptually differentiated*".

[126]Encompassing nowadays not only the vertical relationship between the written statutes and the Constitution, but also between the statutes and the executive acts or the Constitution itself and the acts of international law—cf. Olechowski (in print), cf. this book, pp. 238 and Footnote 14 who discusses the views of Alfred Verdross as the supporter of the monistic theory of national and international law.

Apart from those provisions, there can also be found some regulations concerning the legislative process in the field of the criminal law. Art. 90 expressly highlights the competence of Sejm (understood as the gathering of the two chambers of the polish Parliament) to consider the projects i.a. in the field of the penal legislation,[127] for which, according to art. 98 of the Constitution, separate Commissions should be established.[128]

More importantly for the very question of the precedence of the Constitution, the already discussed Art. 165 stated that: "*All anterior laws and institutions which maybe Contrary to the present charter are hereby abrogated*". This stipulation, combined with the regulation of Art. 55 and 82[129] which introduced personal responsibility of the members of regency and ministers for every act infringing the Constitution, were the most far-fetched regulations concerning the supremacy of this legal act, even though they were not explicit in their formulations.[130]

Analysing the Polish 1815 Constitution in a historical perspective, it has to be highlighted that its regulations in the matters of criminal laws were significantly more far-reaching than both the Polish Constitution of 3 May 1791 as well as the Constitution of the Duchy of Warsaw. The first one did not even stipulate formal equality before the law and was oblivious to such rudimentary principles of

[127]According to this statute: "*The diet* [i.e. Sejm—M. Byczyk] *shall take into consideration all proposed civil, criminal, or administrative laws; referred to it by the King, through the council of State* [Rada Stanu—M. Byczyk]. *It shall deliberate on all' proposed modifications or alterations of the duties of public offices and constitutional powers, such as those of the diet, the council of State, the judicial order, and the government commissions; such change or modification being referred to its consideration by the royal authority*".

[128]Cf. art. 98: "*For the discussion of these drafts, each chamber appoints three commissions of examination, which are composed in the senate of three members, and in the chamber of nuncios of five, to wit:*

Commission of finances.

Commission of civil and criminal legislation (…)".

[129]Cf. art. 55: "*The members of the regency of the kingdom shall be responsible in their persons and in their property for whatever they may have done contrary to the Constitutional Charter, or to the laws*".

Art. 82: "*The heads of departments and the members of government commissions are answerable to the Sąd Sejmowy for every infraction of the Constitutional Charter and the royal decrees of which they may have been guilty*".

[130]This ambiguity found its echo in the secondary literature, especially as Roztworowski (1915, pp. 34–35) spoke about "*new polish king Alexander, who from his own will granted to it a octroyed Constitution, and even, properly speaking, two constitutions: one, a provisional one, laid down already in Vienna, with the date 25th May 1815 under the name* "*Bases de la Constitution*", *second, final, with the date of 27th November 1815 in Warsaw, which entered into force on 24th December of that year.*" A final clarification of this issue took place with the resolution of the General Assemby State's Council (Zgromadzenie Ogólne Rady Stanu) on 18 March 1816, which stated that due to the promulgation of the 1815 Constitution the Principles of the Constitution lost their normative force.

criminal law as *nullum crimen sine lege*,[131] already explicitly recognised in the French Declaration of the Rights of Man and of the Citizen.[132] The second one was limited to formalising the political order of this newly established, Napoleonic state and did go little beyond founding formal equality before the law,[133] stating the openness for the public of the judicial cases in criminal matters and reserving the competence to enact new criminal legislation for the Main Sejm (Sejm Główny), the Polish Parliament of that time.[134] Furthermore, it has to be stated that in the 1815 Constitution of the Kingdom of Poland the regulations concerning the criminal law were noticeably more comprehensive and detailed than in the paradigmatic for the entire post-congress Europe French Constitutional Charter of 1814.[135] This strengthens the thesis that it had not been inspired by this post-revolutionary piece of legislation.[136]

5 The Enactment of the Polish Criminal Code of 1818

The idea to create a modern codification in the field of the criminal law in Poland can be traced back at least to the Constitution of 3 May 1791, which in its VIII Sect. 6 *in fine* promised to codify both criminal and civil laws of the country.[137] It was revived on the Sejm of Grand Duchy of Warsaw of 1809, where in the resolution taken on 18 March 1809[138] the application of the old Polish laws, and—on a

[131]Cf. *Marcin Byczyk*, Constituting the Polish Criminal Judiciary in the light of the Polish Constitutional debate of the late XVIII Centaury, speech held during the ReConFort Mid-term Conference on 20th September 2016.

[132]Cf. articles VII-IX of the Declaration of the Rights of Man and of the Citizen.

[133]Cf. art. 4 of the Constitution of the Duchy of Warsaw: "*The slavery is abolished. All citizens are equal in front of the law. The estate of the people remains under the protection of the tribunals*".

[134]Cf. art. 21 of the Constitution of the Duchy of Warsaw: "*To it belongs the proper conferring in respect to the tax law, also the law upon the fiscal income, in respect to the amendments which are to be made in the civil or criminal legislation or in the monetary system*".

[135]Which itself was very limited on the questions related to the field of criminal law, stating merely the principle of the public criminal trials (cf. art. 64) and freedom from an arbitrary prosecution (cf. art. 4).

[136]Similarly: Bardach et al. (1979, p. 368), opposite view was presented by Izdebski (1972, p. 132) who wrote that the Constituiton: „*cleraly patterned itself upon the Constitutional Charter of Ludwig XVIII*".

[137]Ustawa Rządowa, czyli nowa Konstytucya Polski, Volumina Legum, vol. IX, p. 224: "*We command that a new code of civil and criminal laws be drawn up by persons designated by the Sejm.*" There however had been earlier requests to change and codify both the substantial as well as procedural criminal law in the Kingdom of Poland starting from 1740 and subsequently clearly expressed in the resolution of the Sejm from the year 1776 (Volumina Legum, vol. VIII, p. 543)—cf. Michalski (1958, p. 287) et seq, Borkowska-Bagieńska (1986) and Szafrański (2007).

[138]Cf. the Diary of the Sejm 1809 to be available in the Central Archives of Historical Records in Warsaw, source number: Fonds 182—Sejm Księstwa Warszawskiego i Królestwa Polskiego; see on this matter: Śliwowski (1958, p. 14), on whose book—where possible—I have essentially relied

subsidiary basis—of the Prussian legislation was stipulated: "*as long as a proper for the Duchy of Warsaw Criminal Code cannot be elaborated*".[139]

In the dramatically changed political situation, with the establishment of the Kingdom of Poland after the Vienna Congress in the year 1815, tied by a real union to the Russian Empire, the works on a new Criminal Code were seriously commenced only after the Russian tsar via the minister or secretary of state of the Polish Kingdom made a formal request to the government of the Kingdom to prepare such an act in the year 1817.[140] One of the possible cardinal reasons for such a decision was the disparity existing between different laws which were in force in the Kingdom, encompassing Prussian and Austrian criminal statutes, what in turn significantly hampered the efficacious functioning of the criminal judiciary,[141] another: the long standing yearning of the Polish society for a modern codification of criminal law.[142]

It is certain however that the idea of elaborating an original Polish Criminal Code was abandoned due to the explicit decision of the governor of the Kingdom of Poland, Józef Zajączek, from 29 December 1817 and replaced with the subsequent endeavours to adopt the Austrian Criminal Code of 1803, after modifying it as to fit into the Polish social, legal and intellectual background.[143] The ensuing, hastily works led to preparing—within less than 3 months—a complete project of a criminal codification which was submitted to the Polish Sejm in a printed version on 30 March 1818, after its final acceptance by State's Council (Rada Stanu)

(particularly for the descriptive sections) in this and the next fragments of the paper, being also very indebted to J. *Śliwowski* for his valuable footnotes, which proved very helpful when investigating into the topic of this paper and the publication of some of the sources related with the codification process of the year 1818.

[139]Cited according to Śliwowski (1958, p. 14). Such an attempt of enacting a Criminal Code was undertaken in the year 1811, where a translation of the French Criminal Code, with absolutely slight changes (cf. Kodeks przestępstw i kar przetłumaczony z francuskiego z zlecenia JW. Jasińskiego, Warszawa 1811) was proposed and rejected as the Criminal Code for the Duchy of Warsaw. See in depth on this issue: Handelsman (1914).

[140]Barzykowski (1883, vol. I, p. 130) gives the date when those works were began, namely: 17th of September 1817, writing that on this day: "*the minister secretary of state for the first time convened the council of the ministers so that it shall prepare the projects of the laws*", yet without giving sources for this claim. Cf. also Hoffmann (1831, pp. 179–180) and Śliwowski (1958, pp. 39–40).

[141]Cf. Hube (1863, pp. 5–6).

[142]Cf. Michalski (1958).

[143]The exact reasons for such a decision remain unknown. While Śliwowski (1958, p. 40), writing in the times of communist regime speculated about the comfort of using foreign legislation which "*protected the class interests of the ruling estate*", it is much more probable that due to the lack of qualified polish lawyers there was no intellectual capacity to realise such a work within a reasonable period of time. This decision was also criticised subsequently by the polish lawyers since "*book I and II of the Code 1818 was in its greater part transformed into a simple translation of its original*", cf. Hube (1863, pp. 20–21). It indeed was to a great extend merely a translation of the Austrian original.

17 days earlier.[144] During the meeting of State's Council (Rada Stanu) on the 30 March it was also decided that the discussion on the project in Sejm shall not exceed 6 days.[145] Such a mode of proceedings significantly limited the possibility of any broader public debate and it renders it necessary to seek echoes of the discussions on respecting the constitutional principles in the to-be-enacted Criminal Code in the speeches of the members of the Deputies' Chamber and of Senate.

Consequently, it is necessary to analyse the parliamentary works of the Sejm in the year 1818. In the gathering of the Parliament of Kingdom of Poland in the year 1818 the project itself was worked upon in two separate stages. During the first stage it was analysed by the joint legislative Commissions of the Sejm; only later, at the second stage, it was debated on the general forum of the Sejm.[146] During this first phase there had been formulated altogether 58 propositions of amendments to the project, submitted to State's Council (Rada Stanu) for acceptance, out of which some are directly related with the questions of the precedence of Constitution and the division of powers.[147]

First of such amendments pertained to the proposition to change the wording of article 98 of the project of the Criminal Code in order to treat as a crime of abuse of power cases where a minister countersigns a decree of the king or of the governor which is "*against Constitution and the laws*" as well as to treat as such crimes the cases of issuing ordnances "*against the regulations of the Constitution, organic statutes, laws or the resolutions of the king or king's representative*"[148] by the ministers or members of the governmental commissions. The second proposed amendment concerned adding formulation in the aforementioned article that judges were to become culpable of the abuse of power if they neglected to act correctly and diligently, but at the same time did not curb the "*protected in the article 138 and 139 of the Constitution independence of the judiciary*".[149] Third likewise interesting amendment of the joint legislative Commissions was related with the open wording of the statute on robbery, which after mentioning different ways of acquiring

[144]According to Śliwowski (1958, p. 47) this project can be found in Central Archives of Historical Records in Warsaw, source number (according to current numeration): I Rada Stanu Królestwa Polskiego, microfilm A-22892.

[145]I.e. 3 days on the forum of the Sejm and 3 days in the joint legislative Commissions, cf. Protocol of the meeting of State' Council (Rada Stanu) on 30th March 1818, cited according to Śliwowski (1958, p. 463). It is symbolic for the role and the position of the Sejm in the Kingdom of Poland.

[146]Śliwowski (1958, pp. 157–161).

[147]Out of which 7 were rejected, cf. Protocols of the meetings of State's Council (Rada Stanu) on 16th and 17th April 1818, cited according to Śliwowski (1958, 465–473). The plenary discussions in Sejm concerned only this amended version of the project since it could not introduce any amendments to the project itself.

[148]Cited according to Śliwowski (1958, 466).

[149]Even though the speaker invokes the independence of the judiciary, the real sense of this change is unclear; maybe the proposed amendment was written down with a spelling error and in fact the intention of the joint Commissions was to propose: "*curbing*" instead of "*not curbing*". Cited according to Śliwowski (1958, p. 466).

possession of the goods ended with "etc". Such an open-ended statute was rejected by the Commission which wanted to prevent "*arbitrariness of the judges*" and demanded that the addition "etc." shall be dropped.[150] This last proposed amendment appears to be very significant since it testifies to the awareness of the representatives to the Parliament ("Sejm") of the high value of strict interpretation of the legality principle, an attitude that was even going beyond the regulations of the Constitution of 1815, being itself still far from explicitly acknowledging the *nullum crimen sine lege certa* doctrine. Yet it was, together with the second amendment presented above, rejected by State's Council (Rada Stanu) and did not become binding law.[151]

This aspect of the judiciary as the constituted power, with the endeavours to bind the judges to the greatest possible extend by the formulations of the codified statutes was raised once again during the second phase of the legislative process, namely in the discussions on the forum by the representatives in the Deputy Chamber of the Sejm.[152] Closer scrutiny of this plenary debate, which took place on 18, 20 and 21 April 1818 reveals the fact that this was a recurrent leitmotif in the speeches of the deputies, starting from the very first discourse opening the debate on the project of Criminal Code pronounced by the Sejm Marshall, who highlighted the fact that: "*In the constitutional countries the law should be clear and enlightened, leaving no freedom for a judge, since otherwise he will govern according to it and not according to the law and therefore he will become omnipotent*".[153]

But the discussions were not limited to that problem. In fact, while fiercely debating upon the project of the Criminal Code, the representatives to the Parliament ("Sejm") were quite frequently resorting in their speeches to the Constitution. Those references were made in several contexts and in different manners.

First argumentative strategy[154] is used to clearly manifest that the project of the Criminal Code is consistent with the 1815 Constitution of the Kingdom of Poland. Representatives to the Parliament ("Sejm") bring it forward in form of general

[150]Protocol of the meetings of Rada Stanu on 16th April 1818, cited according to Śliwowski (1958, p. 467).

[151]Protocol of the meetings of Rada Stanu on 16th April 1818, cited according to Śliwowski (1958, pp. 468–470). Only the first amendment was accepted into the enacted version of the Codex, cf. The Criminal Code of 1818 was published i.a. as Kodex karzący dla Królestwa Polskiego: z dodaniem praw kryminalnych później uchwalonych, reiestru porządkowego i alfabetycznego, przypisków wskazuiących artykuły związek z sobą maiące, Warszawa 1830, p. 22; this issue is also freely available in the Internet under: http://ebuw.uw.edu.pl/dlibra/docmetadata?id=210, last accessed: 25.10.2017.

[152]Those discussions have not been so far analysed in the literature apart from a very brief chapter in the book of Śliwowski (1958, pp. 210–213), who essentially limited himself to the presentation of voices of five deputies, discussing mainly the questions of punishibility for crimes against religion in the light of the Polish 1815 Constitution.

[153]Diary of the Sejm of the year 1818, Volume II, p. 49.

[154]I understand "*argumentative strategies*" in line with the very perception of argumentation typical for non-English languages as formulated by van Eemeren (2010, p. 26), i.e. as: "*deliberate efforts to resolve a (real or projected) difference of opinion by convincing the addressee(s) in a reasonable way of the acceptability of the standpoints at issue*".

remarks: Wincenty Krasiński stresses the fact that the project "*not only aims at securing the constitutional laws, but also will supply us with national laws, appropriate for our existence*".[155] For Ksawery Potocki the project is "*inspired by the old and the new laws which we are familiar with* (…) [and is] *tailored to the Constitution*"[156] and there is no punishment in form of "*an expulsion from the country since Art. 25* [of the Constitution] *states clearly that a sentenced person will serve his sentence in the Kingdom*".[157] Similarly Ksawery Potocki during session held on 20 April 1818 underlines: "*Confiscation as contrary to the Constitution is at no place prevalent in the Codex.*"[158] For Mr. Hakenszmidt the project is "*completely tailored to the Constitution, encompassing protection from the arbitrariness of the clerks*",[159] an argument repeated by Duke Komorowski [160] and in a more general manner by Mr. Jasiński.[161]

The Constitution is also invoked for more specific issues, particularly in order to justify the punishment for certain crimes.[162] Consequently, for Mr. Obniski "*the religion of our ancestors is protected according to the Constitutional Charter* (…) *suicide is not forgotten and the polygamy and the perjury is counted as a felony*".[163] The division introduced in the project between the felonies, offences and misdemeanours is said to be coherent with Art. 146 and 149 of the Constitution.[164]

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[155]Diary of the Sejm of the year 1818, Volume II, p. 49.

[156]Diary of the Sejm of the year 1818, Volume II, p. 50. Similarly Mr. Faltz stresses that: "*It is necessary that there would be an equal criminal law in the entire country, it is necessary that punishing laws were consistent with the constitutional charter*", see Diary of the Sejm of the year 1818, Volume II, p. 109. It also is consistent with our "*liberal Constitution*" for Mr. Nowakowski, see Diary of the Sejm of the year 1818, Volume II, p. 106 and is "*at no point contrary to the constitution*", see the speech of Mr. Grabowski, Diary of the Sejm of the year 1818, Volume II, p. 121.

[157]Diary of the Sejm of the year 1818, Volume II, p. 55.

[158]It is very interesting to note the semantics used by the representatives to the Polish Sejm in the year 1818. As it has been excellently observed by U. Müßig, one of the key issues for the development of the precedence of the Constitution in XVIII century was the fact the development of a new language, with different meanings of "*constitutionality*" and "*legality*", cf. *Ulrike Müßig*, Preface, p. 2, Footnote 23. This new constitutional semantics, which was a product of revolutionary upheaval in the second part of the XVIII centuries (cf. in this respect i.a. quotations from James Iredell *Ulrike Müßig*, Preface, p. 2, Footnote 12 and from Lord Bolingbroke, Stourzh (2017), cf. this book, p. 252, Footnote 11) testifies that a new era in the Polish constitutional discourse had already begun.

[159]Diary of the Sejm of the year 1818, Volume II, p. 67.

[160]Diary of the Sejm of the year 1818, Volume II, p. 82.

[161]Diary of the Sejm of the year 1818, Volume II, pp. 105–106.

[162]Such as for the crime of art. 91, which rendered it a prohibited act to help—without the knowledge of the state's administration—the local inhabitants of the Kingdom of Poland to leave the country in order to settle abroad, see speech of Mr. Oebschelwitz, Diary of the Sejm of the year 1818, Volume II, p. 129.

[163]Diary of the Sejm of the year 1818, Volume II, p. 59.

[164]Diary of the Sejm of the year 1818, Volume II, p. 54. However both those articles refer only to the general questions of organisations of the judiciary: According to art. 146: "*There shall be civil*

Another specific issue is raised by those speakers who point to the fact that this project strengthens the constitutional freedoms. Among this group of speeches Mr. Chmielewski praises the project for "*being support for the constitutional freedoms*".[165] Further still: "*it is a new honour for the project that it so clearly protects our Constitution*".[166] The interesting issue concerning the constitutionally guaranteed equality before the law has been brought forward by Mr. Oebschelwitz, who pointing to the different criminal laws in force in Kingdom of Poland in the year 1818 (principally Austrian and Prussian) reaches the conclusion about the violation of the constitutional principle of the equality as laid down in Art. 17 of the Constitution,[167] what urges to adopt a new, uniform Criminal Code. The same speaker stroke down the argumentation that a Criminal Code cannot be adopted unless a Code of Criminal Procedure has been elaborated by highlighting the necessity to develop the organisation of the judiciary as outlined in the constitutional order in the first place.[168]

All of that presented stances corroborate the fact that the vision of the Constitution as a primary and preceding normative act with which the Criminal Code should be coherent is clearly respected. Further still, there can be found a view that the Code shall also be interpreted and applied consistently with the Constitution: it is deputy Hakenszmidt who during the last day of the discussion on the project in the lower Chamber of the Sejm stresses the fact that the punishments which are projected in the Codex shall be meted out equally since "*The constitutional statue does not distinguish between the estates*".[169]

The same argumentative strategies centring on the Constitution were also implemented by the adversaries of the project. Here it can also be distinguished between the general references to the Constitution, sometimes verging on purely rhetorical figures, and references made in very particular constitutional questions.

As for the case of the first approach, it was raised that the project, being inspired by the Austrian laws: "*is contradictory to this spirit, which exists in our entire*

tribunals and tribunals of the police, in every commune and in every town, to take adjudicate transactions not exceeding five hundred florins" and according to Article 149: "*For criminal causes, and affairs of correctional police, there shall be several criminal tribunals in each palatinate*".

[165]Diary of the Sejm of the year 1818, Volume II, p. 69.

[166]Speech of Mr. Linde, Diary of the Sejm of the year 1818, Volume II, p. 67.

[167]Diary of the Sejm of the year 1818, Volume II, p. 129.

[168]Diary of the Sejm of the year 1818, Volume II, p. 129. This argumentation is very interesting, since already in the year 1814 *Antoni Bieńkowski* in his memorandum stated: "*The change in the jurisprudence and its new organisation brings with it new propositions of the procedure.* (…) *the laws would not serve anyone for nothing if* (…) *their defence did not have a pointed way*", (cf. the source retrieved by the author and made available on the internet platform of the project under: http://sources.reconfort.eu/: *Antoni Bieńkowski*, Uwagi Bieńkowskiego złożone na piśmie przeciwko zaprowadzeniu teraz nowej procedury i organizacji sądownictwa, 16.10.1814, The Princes Czartoryski Library source number: 5236 IV, 246–247.

[169]Diary of the Sejm of the year 1818, Volume II, p. 115.

Constitution"[170] or simply "*possibly less consistent with the Constitution then the laws in force at the moment*".[171] Clear illustration of the second type of the argumentation is provided by the speech of Mr. Biernacki, who advocates that there "*can be no punishments for the persecutors as well as for the clerks, since the persecutors are judicial magistrates and the independence of the judiciary is the most beautiful characteristics of the Constitution*".[172] It is also rather the Code of the Criminal Procedure where "*most clearly the blessed results for the Constitution can manifest themselves*"[173] than the Criminal Code itself. However, there can be found even more radical voices, which implicitly charge the government with working in detriment to the country, in breach of the Constitution and attempting to vilify the project as insufficient to protect the constitutional interest of the Kingdom, since according to Mr. Krysiński "*the offences are quite often a result of the activity of the government itself*".[174] There are also fears whether the crimes which consist in breaching the Constitution will be unveiled at all.[175]

Other main argumentative strategy is based on underlining the fact that the project is congruent with the principles already recognised in the Polish Constitutionalism[176]. In this sense Mr. Obniski refers to the fact that: "*the arbitrariness of the judge has been limited since the law clearly prescribes him what penalty for any kind of felony should be meted out, it can be neither a more severe nor a milder one than the one that the law prescribes*".[177] It is also the attitude of another representative in the Deputies' Chamber, Mr. Chmielewski, who calls for considering whether the project "*will not serve the judges* [as pretext] *for arbitrariness*".[178] Even more surprising, according to yet another speaker[179] the

[170]Speech of Mr. Krysiński, Diary of the Sejm of the year 1818, Volume II, p. 111, being a possible allusion to the fact that the Austrian Empire at that time was not a constitutional monarchy.

[171]Speech of Mr. Krysiński, Diary of the Sejm of the year 1818, Volume II, p. 114.

[172]Diary of the Sejm of the year 1818, Volume II, p. 63.

[173]Speech of Mr. Krysiński, Diary of the Sejm of the year 1818, Volume II, p. 65.

[174]Diary of the Sejm of the year 1818, Volume II, p. 63. He continues as to say that the Criminal Code was to be enacted without investigating the reasons of the criminality, what had been "*neglected by the Rada Administracyjna* [Administrative Council]".

[175]Speech of Mr. Łabędzki, Diary of the Sejm of the year 1818, Volume II, p. 87, similarly Mr. Godlewski, Diary of the Sejm of the year 1818, Volume II, p. 126.

[176]To avoid all the misunderstandings, I would like to clarify that I understand the term "*Polish Constitutionalism*" as referring to the set of ideas upon the basic regulations upon the division and organization of powers, sovereignty and political accountability as developed by the Polish politicians and intellectuals since the year 1764.

[177]Diary of the Sejm of the year 1818, Volume II, p. 59.

[178]Diary of the Sejm of the year 1818, Volume II, p. 69.

[179]In the available sources from the both Digital library of the Jagiellonian University (http://jbc.bj.uj.edu.pl/dlibra/docmetadata?id=275449&from=publication, last access 18.11.2016) as well as the Wrocław Digial Library the pp. 90–99 of the Diary of the Sejm of the year 1818 are missing, what makes it at this moment impossible to find out who that speaker was.

acceptance of the project will lead to developing the principle of periodical revival of the Constitution, as established by the Constitution of 3rd May.[180] For those speakers who are more positive towards the existing political state of the Kingdom of Poland the elaboration of the draft of Criminal Code can be seen as a further development of the Constitution, just as the reform of the courts' organisation.[181]

By the same token, the references to the inheritance of Polish Constitutionalism are also exploited by the adversaries of the project, who stress that it shall be rejected since it is "*contrary to our way of thinking, our liberal Constitution*".[182] The large scope of the punishments that can be chosen from by the judges is criticised as being catalyst for their arbitrariness whereas in a "*constitutional nation* [it is the] *law* [which] *should judge the misdemeanours and the crimes of a man*".[183]

The semblance of those diverse argumentative strategies can be easily found in the discussion devoted to the project of Criminal Code in Senate. Yet here the number of the presented views was limited significantly owing to the simple fact that the discussion was taking place solely during one day, i.e. on 23 April 1818.[184] Support for the project was manifested by pointing to the Constitution as its foundation[185] or praising leaving the apostasy of the catholic religion besides the scope of the criminalisation,[186] while the scepticism towards the proposed codification was manifested by emphasising that the Code infringes the constitutional principle of equality before the law[187] or the principle of the constitutional protection of the Christians religions[188] or even highlighting the incongruity of the corporal punishments with "*the nature of the constitutional government*".[189]

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[180]Diary of the Sejm of the year 1818, Volume II, p. 100. It is not entirely clear what is meant here, however this reference to the Constitution of 1791 shows the continuity in the Polish Constitutionalism and awareness of its significance for the ordinary legislation.

[181]Speech of Mr. Wolicki, Diary of the Sejm of the year 1818, Volume II, p. 118.

[182]Speech of Mr. Szpietowski, Diary of the Sejm of the year 1818, Volume II, p. 89.

[183]Speech of Mr. Przyłuski, Diary of the Sejm of the year 1818, Volume II, p. 102.

[184]Diary of the Sejm of the year 1818, Volume III, p. 24.

[185]Speech of Mr. Wyszkowski, Diary of the Sejm of the year 1818, Volume III, p. 25.

[186]Speech of Mr. Matuszewicz, Diary of the Sejm of the year 1818, Volume III, p. 34.

[187]Speech of Mr. Gliszczyński, Diary of the Sejm of the year 1818, Volume III, p. 30. His argumentation is based on a profound understanding of the project, since he points to the fact that the only way for poor people to avoid imprisonment was the corporal punishment of flogging, which, according to art. 219, 224 of the Criminal Code could shorten the sentence for up to 4 months for men and 8 months for women, whereas the richer perpetrators could make use of regulations of its art. 227, which will be discussed in detail below (cf. Fn 200).

[188]Speech of Mr. Gliszczyński, Diary of the Sejm of the year 1818, Volume III, p. 31. Little later the same speaker invokes the incongruity of the particular regulations of the project with "*the spirit of our Constitution*".

[189]Speech of Mr. Gliszczyński, Diary of the Sejm of the year 1818, Volume III, p. 32. Similarly it was pointed out that punishment in a form of a deportation, even though prevalent in the Austrian Code, was not incorporated into the project since it would be in breach of the art. 25 of the Constitution cf. speech of Mr. Gliszczyński, Diary of the Sejm of the year 1818, Volume III, p. 35.

The above presented voices of the representatives in the gathering of the Polish Parliament in 1818 provide explicit evidence that 1815 Constitution was perceived as a supreme law which ordinary legislation has to respect and be consistent with. It also manifests the growth of the Constitutionalism perceived here as the legalist position demanding that the Constitution of the Polish Kingdom shall be respected any time and under any circumstances,[190] the position which will be bolstered in the subsequent years by liberal opposition on the Sejm under the lead of the Niemojowscy brothers. For the purposes of this brief study it remains to be verified how this constitutional approach was reflected in the text of the enacted Criminal Code itself.

However before this question will be approached, is worth stressing that the Criminal Code of 1818 was not the only example of the Polish criminal legislation in the Kingdom of Poland. The important case of other regulation in this field is provided by the military criminal law. The statues which were in force here included the Criminal Code for the Polish Army of the Kingdom[191] as well as the official translations of several French military statues, which were continued to be applied, irrespectively of the fall of the Duchy of Warsaw.[192]

The most characteristic feature of this part of the criminal legislation was the fact that it had been introduced without any formal legislative procedure and gave powers to an army's general in charge to enact further criminal statues for the soldiers under his command.[193] Therefore, it constituted a grave violation of the constitutional principles, especially of the principle of the legality. It was also illustrative for both the political and the legal situation of the Kingdom of Poland where the military, under the leadership of the brother of Russian tsar Alexander I, Duke Konstantin Pavlovich had a special status, clearly violating the stipulated and proclaimed constitutional order.

[190]Equally well a term "*legalism*" could be applied, but due to the special context of the 1818 parliamentary debate, so much centered about verifying the compatibility of the to-be-enacted Criminal Code with the Polish Constitution 1815, this name appears to be more appropriate.

[191]Kodex kryminalny dla woyska polskiego or Artykuły do czytania woysku przed wykonaniem przysięgi. Instrukcya dla J.P.P. Oficerów Artylleryi, pełniących obowiązki audytorów, iako też dla officerów wszelkiéy broni, mogących bydź w potrzebie zastąpienia audytorów, Warsaw 1826.

[192]Prawa Karzące Woyskowe wypisane z Księgi Praw pod tytułem: Le Guide des Juges Militaires przez Xawerego Krysińskiego Audytora Generalnego Woysk Polskich przełożone z dołączeniem wzorów: skarg, inkwizycyi, wotowań i wyroków. w Warszawie w Drukarni Woyskowey 1824. Formally speaking, it was a selection and translation of the French laws prepared by a military official, de facto applied in the polish army of the Kingdom.

[193]Czyżak (2012, p. 5).

6 The Evaluation of the Congruity of the Criminal Code of 1818 with the 1815 Constitution of the Kingdom of Poland

Having made the preceding considerations, it shall be analysed now to which extend the enacted criminal law[194] was consistent with the presented regulations of the 1815 Constitution. Such an analysis appears to be particularly interesting bearing in mind the fact that it was almost a unique example of a codification of an entire branch of law in the Kingdom of Poland,[195] and so far it has not been analysed more closely in this respect.[196]

The 1818 Code of Criminal Law generally accepted[197] the principle of equality before the law, but it did encounter some minor exceptions. Most notably, according to the Art. 156, 160a-b of the Code, theft, nominally a misdemeanour, shall be considered as felony when it was committed through the servants to the detriment of their masters or by the apprentices to the detriment of their crafts' masters.

This regulation had been criticised both in the legal literature contemporary to the enactment of the 1818 Code[198] as well as in the only XX-century monographic study on the Code, being classified as a remnant of feudalism, infringing the formal equality before the law.[199] Nevertheless, it has to be noticed that this particular mode of committing a theft stands out for abusing a special relationship of trust that should exist between a master and a servant and is getting close to embezzlement, what enables to understand treating it more severely. Similarly, it would be hard to consider the regulation of Art. 227 of the 1818 Criminal Code, which stated that: "*If the fortune of a sentenced person is sufficient, the punishment of an arrest in a public house can be converted to a pecuniary punishment, but only there, where the*

[194]The Criminal Code of 1818 was published i.a. as Kodex karzący dla Królestwa Polskiego: z dodaniem praw kryminalnych później uchwalonych, reiestru porządkowego i alfabetycznego, przypisków wskazuiących artykuły związek z sobą maiące, Warszawa 1830.

[195]It has been praised in the literature as being "*besides the introduction of the Napoleon's Code the greatest event of the legal life on the polish soil in the first half of the XIX centaury*", cf. Śliwowski (1958, p. 390).

[196]There can be found some valuable remarks upon the regulations of the 1818 Criminal Code which will be discussed below, such like art. 156 and 160, in Śliwowski (1958)—cf. pp. 281, 286–288, 366–368, 377 but they were made from an entirely different perspective, i.e. in the light of the marxist perception of legal history as the fight between the estates.

[197]One of its very clear examples was delivered by art. 44, which stressed that consequences of the punishments in form of civil death or loss of political rights did not reach the "*innocent wife or husband*".

[198]Dzierożyński (1830b, pp. 269–391) (partially wrong page numeration in the article), where (cf. pp. 374–378) the author directly refers to collision of the criminal law with general morality for the justification of his stance. This source has been obtained and scanned by the author and made available on the internet platform of the ReConFort project under: http://sources.reconfort.eu/.

[199]Śliwowski (1958, p. 281).

law explicitly enables for such a change"[200] as such a type of an infringement, since even in the contemporary criminal law the delivered sentence can be commuted on numerous reasons and in very different manners.[201]

The Code of Criminal Law of 1818 respects the principle of *nullum crimen sine lege* poenali,[202] expressed in its Art. 6: "*As a felony, offence or misdemeanour only such a deed can be considered and punished, which according to this law has been found to be a felony, offence or misdemeanour*". This rule was further supplemented by Art. 48-49, 60 and 225 which guaranteed that no other punishment can be meted out as that which had been explicitly mentioned in the Criminal Code.[203]

However there were notable exceptions to this approach: firstly, the rule was not respected in case of the misdemeanours, since art. 588 of the Code stated that "*all the police misdemeanours which are not encompassed in this book shall be, according to their nature, considered to be belonging to one of the three chapters of this book und punished according to the punishments specified there.*"[204] In case of the misdemeanours the 1818 Code also did not specify the required mental requirement of the perpetrator, but it hardly can be considered to be a breach of the legality principle.[205] Nonetheless, to some degree this principle was infringed by two other statues, Art. 362 and 382 which stated that: "*All other acts or omissions in respect to the security of human life, which endanger the natural and common duties of every man or which had been committed contrary to the explicit regulations of the law, which due to the number of their cases cannot be specified* (…) *shall be punished*".[206] Very similar approach can be found in the art. 186, which stated that: "*Even though the cases of fraud and falsification due to their great*

[200]Quite interestingly, among the lawyers of that time it was a contentious issue whether the perpetrator himself could choose what kind of penalty (i.e. between a public house and a pecuniary punishment) he will be serving [that was the view advocated by Brzeziński (1830)] while rejected by Hube (1829).

[201]In the contemporary European continental legal systems for every modification of a legally binding sentence a decision of judge is necessary and it is impossible to avoid serving a prison sentence by paying a given sum of money, cf. e.g. art. 60 or 155 of the contemporary Polish Kodeks karny wykonawczy (Dz. U. z 1997 r. Nr 90, poz. 557 z późn. zm.).

[202]Declared in the article 23 of the Constitution 1815, cf. above part II of the article.

[203]A further development of those regulations could be found in the specific provisions concerning the particular additional penalties, where, like in the case of a whipping post, it could be pronounced only when expressly stipulated by the law (cf. art. 36 of the Criminal Code 1818 *in fine*).

[204]Already the contemporary lawyers pointed to the fact that this regulation is contradictory to art. 1, 2 and 6 of the Criminal Code 1818, cf. Dzierożyński (1830a, p. 24), who wrote there about: "*new doubts that sometimes grant almost unalloyed arbitriness to a judge*".

[205]*Jerzy Śliwowski* considers that due to this omission it had to be assumed that negligence was sufficient as the minimal threshold of the mental attitude of the perpetrator, cf. Śliwowski (1958, p. 308), what appears to be a correct view.

[206]The wording of Article 382 was almost identic, yet aimed at offences against human body or health: "*All other acts or omissions in respect to the security of human life, which infringe the natural and common duties of every man or which had been committed contrary to the explicit regulations of the law, which due to the number of their cases cannot be specified* (…) *shall be punished*".

number cannot be enumerated, the crime of falsification is committed when: (…)" giving only an exemplary and not complete list of the cases of frauds and falsifications.

Further, the 1818 Code did contain numerous provisions which elaborated the constitutional principle of the protection of the property, as specified in Art. 26 of the 1815 Constitution. This was guaranteed by a hoist of different offences specified in Chapter XI of the II Book of the Criminal Code.[207]

Interestingly, the Criminal Code of 1818 did contain a very specific provision about the criminal activity against the Constitution itself, namely Art. 247, according to which: "*Who maliciously, by the means of scoffing writings or prints gives rise among the inhabitants of the country to disdain of the Constitution or attempts to give rise to such a disdain, shall be punished with arrest in a public house between 3 months and one year*". This regulation clearly testifies how highly valued this legal act was, but also corroborates the persevering existence of an illusion that within the framework of the constitutional order of the Kingdom of Poland certain reasonable *modus vivendi* with the Russian Empire could be achieved.

Finally, it is worth stressing the fact that the Code already did adhere to several modern principles of the criminal law, such as *cognitationis nemo patitur*,[208] going even beyond the text of the Constitution itself and possibly paving the way for the development of future Polish Constitutionalism and human rights.[209]

Briefly summarising the above presented implementation of the principles of the 1815 Constitution of Kingdom of Poland into the Criminal Code of 1818, it has to be stated that they did not amount to seriously contradicting the provisions of the adopted codification und could be easily revoked by a means of a simple subsequent amendment of this codification, being the more probable as the science of the Criminal law in Poland was starting to germinate at this time.[210] Yet the changing political circumstances rendered the further development of the legislation in line with the established constitutional principles simply impossible.

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[207]Art. 383-429. They were characterised by a very casuistic regulation, becoming the second longest chapter in the entire Criminal Code.

[208]Art. 26 stated explicitly that: "*For bad thoughts, that is for a bad intention without any external acts or without intentional omission of what is prescribed by the law nobody can face criminal responsibility* (…)".

[209]Especially, it could provide material for the development of the interpretation of the article 23 of the 1815 Constitution, which, as it has been stated above, provided that: "*No man shall be punished except in conformity with the existing laws and by the decree of the competent Magistrate*." so as to encompass the requirement of punishibility solely for external human acts which have at least an abstract potential to generate some harm to the legally protected interests, cf. in this respect the recent decision of the Polish Constitutional Court from 17th July 2014, SK 35/12 going in this direction (printed in: OTK ZU 7A/2014, poz. 74).

[210]A fact to which the establishing of the University of Warsaw on the 19th November 1816 with a separate Faculty of Law and Administrative Sciences following the decree of Alexander I (cf.: Postanowienie naznaczające założenie Szkoły Głównej pod imieniem Królewskiego Uniwersytetu z dnia 7 (19) listopada 1816 r.—Dz.Pr.K.P. Volume XIII, Nr 51, pp. 90–95) contributed significantly.

7 Conclusions

The above analysed proceedings concerning the elaboration and implementation of the Criminal Code of 1818, outstanding for being the first example of the Polish modern codification of substantial criminal law, did reveal profound respect for and importance of the regulations Polish 1815 Constitution. It manifested itself in the only available expression of the public debate in the given political circumstances, namely on the Parliaments' forum.

Even though there can be hardly found any printed essays or newspapers articles considering the issue of the congruence of the 1818 Criminal Code with the Constitution, undoubtedly among the representatives of the Polish voters in the Parliament ("Sejm") of 1818, irrespectively whether they were in favour of the codification—voters being proportionally the most numerous in that time in continental Europe—the idea that a Criminal Code should implement and develop the principles of this fundamental law was wholeheartedly accepted. Even though for the Russian authorities, including the tsar Alexander I Romanov, the Constitution was merely a pretence meant to appease the Polish society in its longing for independence, an utterly instrumental subterfuge, which could be one-sidedly amended[211] and disrespected when convenient, for the Polish society and especially for the elected representatives to Sejm it was perceived as veritable supreme law in the country, which shall be respected and implemented by the ordinary legislation. This striking contrast between the legalist position of the Polish society and arbitrariness of the growing Russian despotism eventually incited the people of Kingdom to resort to the last possible means in defence of the 1815 Constitution—to a military uprising.[212]

It clearly shows the strength of the Polish Constitutionalism, not subdued by the difficult political circumstances and can be an inspiring example for our times.

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[211]The best illustration of such a one-sided amendment is the addition to the Constitution by the Russian tsar Alexander I Romanov in a form of an "*additional article to the constitutional law from 13 February 1825*" („Arykuł dodatkowy do ustawy konstytucyjnej królestwa Polskiego z dn. 13 lutego 1825 r.") which made the debates of the Sejm secret, cf. Handelsman (1915, pp. 58–59).

[212]The most solemn expression of this attitude is the Manifesto of the Polish People, proclaimed on the Sejms session of 20.12.1830, i.e. 21 days after the outbreak of the November Uprising, specifying the reasons for this military resistance: cf. Sejm Królestwa Polskiego, Manifest Narodu Polskiego, p. 9: "*Après tant d'affronts, a prés une violation si manifeste des guaranties jurées, violation qu'aucun gouvernement légitime, dans aucun pays civilise, ne se serait permise impunément, et qui, à plus forte raison, peut justifier notre soulèvement contre une autorité impose par la force, qui ne pensera que cette autorité a rompu toute alliance avec la nation, qu'elle lui a donné le droit de romper à chaque instant ses chaînes et d'en forger des armes*?", which in paraphrased translation reads: "*After so many violence, after the trampling of all the guarantees, which could justify not only an uprising against the power imposed by force, but which no rightful government in any civilised country could accept without punishment, who will not judge that the entire contract between the power and the nation has not been ruptured, that this nation became a slave, which any time could throw off the chains and convert them into weapons*?".

8 Summary (Polish)

Studium poświęcone jest zagadnieniu hierarchicznej nadrzędności Konstytucji Królestwa Polskiego z roku 1815. Artykuł podzielony został na trzy zasadnicze części.

W pierwszej, wprowadzającej części omówiona została geneza Konstytucji roku 1815. W opracowaniu objaśniono zagranicznemu czytelnikowi w oparciu o ustalenia polskiej literatury sekundarnej, opierając się na ustaleniach takich autorów jak S. Smólka, S. Askenazy, H. Izdebski (w zasadniczej mierze), D. Nawrot, że Konstytucja Królestwa Polskiego z roku 1815 została wykoncypowana jako narzędzie propagandowe w zabiegach o poparcie polskiego i litewskiego społeczeństwa w trakcie wojen napoleońskich. Omówiono bliżej jej genezę, wskazując, iż była ona opracowywana począwszy od roku 1811 z udziałem polskich polityków orientacji pro-rosyjskiej, takich jak A Czartoryski, książę F. K. Drucki-Lubecki, M. K. Ogiński, czy L. Plater. Po przełomowym zwycięstwie szóstej koalicji z udziałem Alexandra I nad wojskami francuskimi, stała się kamieniem węgielnym odrodzonego na Kongresie Wiedeńskim, wieczyście połączonego z Cesarstwem Rosyjskim Królestwa Polskiego.

W kolejnej partii opracowania dokonano dla czytelnika zagranicznego naszkicowania zasadniczych postanowień Konstytucji z roku 1815 ze szczególnym uwzględnieniem tych regulacji, które odnoszą się do kwestii nadrzędności Konstytucji oraz prawa karnego.

Trzecia, właściwa cześć opracowania omawia zagadnienie nadrzędności Konstytucji 1815 rokuna przykładzie procesu legislacyjnego jedynej pełnej kodyfikacji całej gałęzi prawa (obok Kodexu Cywilnego Królestwa Polskiego z 1825 r., stanwiącego, jak wiadomo, w istocie drobną nowelizację Kodeksu Napoleona) jaka została przyjęta w Królestwie Polskim: Kodeksu Karzącego z roku 1818. Analiza stanowisk posłów i senatorów na Sejmie roku 1818 wprost potwierdziła, iż zarzut niekonstytucyjności tudzież argument o zgodności z Konstytucja był szeroko powoływany zarówno przez zwolenników jak i przez przeciwników projektu tej ustawy. Zgłoszone przez posłów poprawki dowodzą dążności posłów do możliwie dalekiego związania władzy sadowniczej normą prawnokarna w myśl rygorystycznie pojmowanej zasady *nullum crimen sine lege certa* i oświeceniowego ograniczania roli sędziego w sferze wykładni przepisów prawno-karnych.

Stad też skonstatować należy, iż zrodzona w Oświeceniu koncepcja hierarchicznej nadrzędności Konstytucji była już wtedy—przynajmniej wśród przedstawicieli polskiego Sejmu—rozpowszechniona. Uwidacznia to semantyka występująca w wypowiedziach posłów, którzy nierzadko odwołują się do „konstytucyjności" (zgodności z Konstytucją) proponowanego projektu, sematyka mająca przecież czytelną, późnooświeceniową prowenieniecję. Co więcej, analiza samego tekstu uchwalonego Kodeksu Karzącego dowodzi, iż stanowił on akt normatywny dostosowany do postanowień obowiązującej Konstytucji, a normy prawne, które mogłyby budzić wątpliwości jako sprzeczne z tym nadrzędnym aktem normatywnym występują absolutnie wyjątkowo.

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Constitutional Precedence and the Genesis of the Belgian Constitution of 1831

Brecht Deseure

Contents

Abstract Constitutional precedence constitutes a defining element of modern constitutionalism. This chapter aims to elucidate the way in which this idea was embedded in the Belgian Constitution of 1831. It does so by combining a historical-genealogical approach with a legal one. The chapter begins with a discussion of the genesis of the Belgian Constitution in relation to the Fundamental Law of the United Kingdom of the Netherlands. It shows how the Belgian opposition's constitutional resistance to government policy created a debate over the interpretation of the Fundamental Law, which in turn provided the conceptual building blocks for the understanding of constitutional precedence in the 1831 Constitution. After examining the concept of legal order, the chapter explains how, in the eyes of the

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Belgian revolutionaries, the Belgian Constitution could be a legitimate replacement for the Fundamental Law as the foundational document of the state. The concern for constitutional precedence was expressed furthermore by recurring debates within the National Congress and the press over the constitutionality of the acts of both the constituting and constituted powers. The chapter then turns to the constitutional text and analyzes the way the precedence of the Constitution was legally anchored into the Belgian state system. Constitutional precedence was expressed by a combination of measures concerning (a) the special status and the endurance of constitutional law as compared to ordinary law and (b) the Constitution's status as the legally binding ground rule for the constituted powers. Finally, the precedence of the Constitution was symbolically expressed by a discourse of respect for the Constitution as the ultimate guarantee of the wellbeing of the state.

1 Introduction

In 1852 a lavishly illustrated edition of the Belgian Constitution was published at the behest of Prime Minister Charles Rogier.[1] It was only one of many government-sponsored initiatives to harness popular support for the Constitution in the years following the eventful year 1848.[2] In stark contrast to its neighboring countries, the revolutionary wave failed to stir up any serious unrest in Belgium.[3] The Constitution, the fruit of the Belgian Revolution of 1830, was credited for the young state's remarkable institutional stability. Its liberal character was supposed to have prevented the outburst of a popular revolt. The Constitution was thus celebrated in various forms, including the erection of the Congress Column in Brussel and the publication of the ornate illustrated edition of 1852.

The 1852 volume opens with an allegory depicting Belgium as a maiden. She wears a city crown and is accompanied by the Belgian lion, which rests its paw on the broken chains of slavery.[4] Above her head she holds the biblical Tables of the Law inscribed with the words "Constitution de la Belgique 1831". The shield on which she sits is supported by Belgians of various professional classes: a farmer, a soldier, a judge, a militia member and an artisan. Iconological analysis has shown that Belgian and constitutional imagery are inextricably linked in this image, making it hard to separate the one from the other.[5] And that was undoubtedly the message intended by its creators: indeed the Belgian state and its Constitution were linked to each other to such degree as to make the existence of the one directly dependent on the other. As the reference to the broken chains makes clear, the

[1]Brown and Lagye (1852). On Rogier: Discailles (1907).

[2]Huygebaert (2015) and Janssens (2001, p. 52).

[3]Witte (2010).

[4]On the political imagery of the young Belgian state see: Dubois (2005a) and Janssens (2005).

[5]Huygebaert (2015).

Constitution consolidated the achievements of the Belgian Revolution of 1830, which was itself the founding event of the Belgian state. The Constitution thus incarnated the principles on which Belgian independence hinged, and guaranteed their endurance. The maintenance and the defense of the conceptual pair *country* and *Constitution* was a task entrusted to the Belgian people, depicted in the lower level.[6] The image thus expresses both sacred respect for the Constitution and popular support by the Belgian people.

The exceptional position of the Constitution in the Belgian state system was not merely rhetorical. As this chapter aims to show, the symbolic precedence of the Constitution reflected the real, legal precedence it enjoyed in practice. The Constitution in Belgium was not like ordinary law: it was the founding document of the new state, legally anchoring the unalterable rights of the citizens and the division and exercise of power. Thus it constituted the ultimate juridical basis for both the legal and political order of the new state. The members of the National Congress, Belgium's constituent assembly, were acutely aware of the foundational character of the nascent constitutional document, calling it "an arch of alliance" on which the future wellbeing of the state would rest for generations to come.[7]

Precedence of constitution is here defined as the concept of establishing the political and legal order in a positive and uniform legal text which constitutes a prior and binding legal norm. The idea of constitutional precedence, a defining feature of modern constitutionalism, was still relatively new at the time of the Belgian Constitution's genesis. Its main historical competitor and conceptual antithesis, monarchical sovereignty, was ubiquitous in Restoration Europe.[8] The Belgian Constitution was proclaimed on 7 February 1831 in the name of the Belgian people and in the absence of a ruling monarch.[9] As this chapter will show, the triumph of the concept of constitutional precedence resulted from the power vacuum created by the Belgian Revolution against Dutch rule. Moreover, the Belgian opposition's resistance against government policy, based on the Fundamental Law of 1815, provided the conceptual building blocks for the understanding of constitutional precedence in the 1831 Constitution.

This chapter will use a genealogical approach to explain the emergence of constitutional precedence in Belgium in 1831. It will first turn to the Fundamental Law of 1815 and the debate over its interpretation, which gave rise to the Belgian constitutional opposition.[10] After looking at the concept of "legal order", it will explain how the Belgian Constitution could, in the eyes of the Belgian revolutionaries, legitimately replace the Fundamental Law as the foundational document of the state.

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[6]Cf. Footnote 151.

[7]Huyttens (1844–1845), vol 3, p. 369, 01/07/1831.

[8]Kirsch (1999), Mirkine-Guetzévitch (1831), Müβig (2013) and Prutsch (2013).

[9]Deseure (2016a, p. 12).

[10]See Delbecke's argument in *De lange schaduw van de grondwetgever*: *perswetgeving en persmisdrijven in België* (*1831–1914*), p. 93 that the press legislation in the Belgian Constitution cannot be understood without taking into account the Belgian opposition to the press policy of the Dutch minister Van Maanen.

Secondly, the chapter will turn to the constitutional text, analyzing the way in which the precedence of the Constitution was legally anchored into the Belgian state system.

2 From Fundamental Law to Belgian Constitution

2.1 The Fundamental Law and the Question of Royal Sovereignty

On 12 October 1830 the Constitutional Commission convened for the first time in Brussels to draw up a Constitution for the new country.[11] The Provisional Government had created the Commission a few days after declaring Belgian independence from the United Kingdom of the Netherlands.[12] In just two weeks the Commission produced a draft Constitution which went on to serve as the guiding document for the constituent debates in the National Congress. Most of the basic principles of the final Constitution were already present in this draft.[13] Knowing that only a few months earlier the idea of Belgian independence was wholly alien to most participants in the political debate, this short span of time may be surprising.[14] With the exception of the republican journalist Louis de Potter, even the most radical members of the Belgian opposition had not seriously suggested the option of a Belgian secession from the Kingdom of the Netherlands.[15] Neither did the commissioners have previous experience with constituent work. Nevertheless, they managed to produce a balanced constitutional document containing a clear and consistent vision on the functioning of constitutional monarchy.

This result was only possible because the Commission started its activities after a period in which such issues had been widely discussed. During the fifteen years of its existence, the United Kingdom had seen much political debate on the basic features of the state. Especially in the years 1814–1817 and 1827–1830, the institutions and the Constitution of the Kingdom had been the object of intense discussion. Profound theoretical reflection on the nature and the architecture of constitutional monarchy had been produced. The members of the Constitutional Commission and the National Congress could draw on excellent political treatises such as the ones written on constitutional monarchy and ministerial responsibility by Joseph Lebeau, Jean-François Tielemans and Charles-Hippolyte Vilain XIIII, among others.[16] In short, both ideological camps within the Belgian opposition,

[11]Van den Steene (1963).

[12]Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique (1830), no. 5, p. 13, decree of 6 October 1830.

[13]Gilissen (1967, p. 60). The most fundamental difference with the final Constitution concerned the presence of an aristocratic Senate, which gave it a more conservative character.

[14]Aerts (2006) and Witte (2006, p. 59).

[15]Juste (1874).

[16]Lebeau (1830), Tielemans (1829) and Vilain (1830).

Catholics and Liberals, had ample time to develop their political-theoretical views by the time the convention started.

The question of the interpretation of the Constitution had indeed been at the core of the conflict between government and opposition that eventually led to the ad hoc separation of the Kingdom. The experience of debating the Constitution in the face of an ever more autocratic government had provided the Belgian elites with training in political and constitutional matters.[17] In his opening speech for the National Congress, Louis de Potter spoke of "the arbitrariness of the ministers, which has forced us to advance every day more into a career of constitutional opposition".[18] Etienne de Gerlache, president of the Congress and member of the Constitutional Commission, called the experience useful for the political education of the Belgians:

> (…) despite its exclusive and obtrusive character, the fifteen years of this semi-liberal, semi-absolutist regime proved to be useful for our political education.[19]

When the Belgian Revolution broke out, the ideas developed in the previous years could be put into practice.[20] One must therefore look to the Fundamental Law and the debates it engendered when trying to understand the genesis of the modern concept of the Constitution in Belgium and its defining characteristic, namely constitutional precedence.

At first sight a constitutional document entitled Fundamental Law seems to relate more to the *Ancien Régime* than to Restoration constitutionalism. From the sixteenth century on, the *leges fundamenales*, which could be either written or unwritten, came about as the successors to the medieval state treaties (*Herrschaftsverträge*).[21] Although they did constitute general rules of sorts for the government of the early modern kingdoms, these fundamental laws cannot be compared to modern constitutions. Far from constituting a prior set of unified and legally binding rules reflecting an underlying political theory, they were the pragmatic and changeable outcome of politically and historically informed negotiations between monarchs and their subjects.

The name given to the Constitution of the Kingdom of the Netherlands is deceptive however. In the constitutional construction devised by Gijsbert Karel Van Hogendorp (1762–1834), deliberate allusions to continuity with the prerevolutionary past were manifold. Van Hogendorp was the architect of the new Dutch state established after Napoleon's defeat at Leipzig.[22] His constitutional draft,

[17] Witte (2016, p. 43).

[18] "(…) des progrès que l'arbitraire ministériel nous forçait chaque jour à faire dans la carrière de l'opposition constitutionnelle". Huyttens (1844–1845), vol. 1, p. 100, 10/11/1830.

[19] "(…) ce régime de quinze années, semi-libéral, semi-absolu, malgré sa tendance exclusive et envahissante, ne laissa pas d'être utile à notre éducation politique". De Gerlache (1859), vol. 2, p. XXIII.

[20] Marteel (2009, p. 411), Van Sas (1992, p. 434) and Witte (2016, p. 16).

[21] Stourzh (1977, p. 61).

[22] Breukelman (1912) and Slijkerman (2013, pp. 123–192).

written in 1812, served as the blueprint for the Fundamental Law.[23] His 'Burgundian vision' was based upon an idealized view of the time when the Netherlands had been united under a single sovereign monarch.[24] The names he introduced for the new institutions reflected that vision: Estates General (for the Parliament), Provincial Estates (for regional assemblies), knighthoods (for the representation of the nobility within the Provincial Estates). The Republic of the United Netherlands' venerable constitutional document, The Union of Utrecht, was not resurrected however. For Van Hogendorp, restoring the 'natural order' of the Burgundian Netherlands entailed bypassing the republican past.[25]

Van Hogendorp's invention of traditions is indicative of his conservatism and of his nostalgia for the prerevolutionary national past. At the same time the references to an idealized past served to conceal what was a modern conception of the Constitution.[26] The successive constitutional experiments of the Batavian Republic and the Kingdom of Holland, followed by the annexation to the French Empire, had all left their traces on the post-revolutionary constitutional order.[27] Van Hogendorp intended the Constitution to be a binding basic rule for the state's institutions and the exercise of power.[28] When Prince William Frederick of Orange-Nassau, the son of the last stadtholder, was invited to take power in Holland in 1813 as 'Sovereign Prince', it was made clear to him that the conditions for his rule were to be laid down in a binding Constitution.[29] When making his entry into Amsterdam, William himself made his acceptance of the throne conditional on "the guarantees provided by a wise constitution".[30] The Constitution was debated by a Constitutional Commission presided over by Van Hogendorp, and was adopted by an assembly of notables convened in Amsterdam on 29 March 1814. William was inaugurated as Sovereign Prince only after swearing an oath on the Constitution, the next day. At this time there was a clear awareness that the Fundamental Law constituted a binding contract between the monarch and the Nation, which rested on an implicit agreement between both parties.[31]

Sovereignty was not explicitly defined in the Fundamental Law. Van Hogendorp's vision of the Constitution relied, not on abstract theory or universal

[23]Colenbrander (1908), vol. 1, pp. 1–14.

[24]Aerts (2006, p. 25), Marteel (2012, p. 38), Slijkerman (2013, p. 157), Tamse and Witte (1992, p. 10), Van Sas (2004a, p. 462), Van Velzen (2005, p. 23), Van Zanten (2004, p. 26), and Worst (1992, p. 58).

[25]Van Velzen (2005, p. 23).

[26]Marteel (2009, p. 27) and Slijkerman (2013, p. 138).

[27]Aerts (2016, p. 47) and Velema (1998).

[28]Slijkerman (2013, pp. 195–196).

[29]Van Sas (1992, p. 179), Van Velzen (2005, p. 57). For a different opinion, see: Bos (2009, p. 86).

[30]Proclamation of the Sovereign Prince, 2 December 1813. Colenbrander (1908), vol. 1, p. 26. See: Koch (2013, p. 233) and Van Sas (2004b).

[31]Van Velzen (2005, p. 422). Koch argues that William considered the Constitution as a mere façade for monarchical government from the very beginning. His influence on the deliberations of the Constitutional Commission has moreover been considerable. Koch (2013, p. 247).

principles, but on the organic order of government based on history and national traditions.[32] In his view, explicit reflection on political theory could only serve to obscure the right ideas on the exercise of power. It is no coincidence that Van Hogendorp was an admirer of the Enlish model of constitutional monarchy, the principles of which he tried to introduce in the Dutch context.[33] The result was a model of mixed monarchy. Whereas the monarch was sovereign, his power was limited by an aristocratic and a (very moderately) democratic element. Royal power was not absolute since it was subject to the Constitution, which defined the preliminary rules of the political game for all actors including the King.

The uncertainties of the domestic political situation hardly permitted the monarch to make a bid for absolute sovereignty. When the Dutch regained national independence by shaking off French rule, a new form of state needed to be improvised on the spot. William could not know what was awaiting him on the other side of the Channel when he accepted the Dutch throne.[34] The domestic situation and the international political context were uncertain. William's inauguration on 30 March 1814 preceded both Waterloo and the Congress of Vienna, marking the final defeat of Napoleonic France and the establishment of a Restoration order based on the monarchical principle respectively.

The consolidation of the Restoration order, from 1815 onward, allowed William to wield monarchical power in a more self-confident manner.[35] The London Protocol of 21 June 1814 decided on the unification of Belgium and the Netherlands. On 16 March 1815, anticipating the final act of the Vienna Congress, William assumed the title of King of the Netherlands.[36] When Van Hogendorp lost his place as the King's privileged counselor to Cornelis Felix Van Maanen (1769–1846), a gradual theoretical shift began.[37] Van Maanen, former Minister of Justice under the Kingdom of Holland and president of the Imperial Court in The Hague, had been a faithful servant of the centralist imperial regime.[38] His unshakeable belief in the principle of absolute royal authority induced him to develop a concept of monarchical sovereignty that preceded the Constitution. Peter Van Velzen has termed this innovative concept 'preliminary sovereignty'.[39] According to Van Maanen, the King had already been fully sovereign before the introduction of the Constitution. He had, in fact, freely consented to constitutional limitations on his royal power.[40] Van Maanen did not go so far as to call the

[32]Aerts (2016, 48).

[33]Slijkerman (2013, p. 140) and Van Velzen (2005, p. 17).

[34]Koch (2013, p. 226), Lok (2011) and Van Sas (1992, p. 179).

[35]Van Sas (1992, p. 179) and Van Velzen (2005, p. 151).

[36]Colenbrander (1908), vol. 2, pp. 64–65. William had already supplied for the temporary government of Belgium since 1 August 1814 at the request of the allied powers. Rotteveel Mansveld and Velle (2016, p. 9).

[37]Van Velzen (2005, p. 53).

[38]Blok (1914, pp. 803–805).

[39]Van Velzen (2005, pp. 151–173).

[40]Aerts (2016, 52).

Constitution a *charte octroyée* which could be withdrawn at will, since the King had sworn an oath to uphold it.[41] Nevertheless, he considered the King to be the only source of sovereignty and interpreted the Fundamental Law accordingly.

An increasing tendency towards autocratic and authoritarian government accompanied this theoretical shift.[42] William did not consider the Nation as a contracting party, but as a passive receiver of royal benefactions. This meant that he systematically increased the royal competences in government using the argument that all the residual powers—those powers not explicitly attributed by the Constitution—were the exclusive competence of the King.[43] In addition to interpreting the Constitution in a way that allowed for a maximum development of royal power, the government also took legislative initiatives to undermine the checks on royal power prescribed by the Fundamental Law. Parliamentary control over the budget was hollowed out, while the 'Blanket law' of 1818 and the 'Conflict law' of 1822 allowed the King to settle a major part of the decision-making by royal decree.[44] Indeed, after 1822, the government rarely consulted Parliament.

The monarchical interpretation of the Fundamental Law defended by Van Maanen relied on a literal reading. Van Hogendorp, who no longer played a role in government, gradually came to contest this reading.[45] He argued that it did not conform to the intentions of the Constitutional Commission. He conceded that the absolutist interpretation was facilitated by the lacunas and ambiguous formulations of the constitutional text itself.[46] Indeed, these weaknesses enhanced the Fundamental Law's failure to effectively limit monarchical power.[47]

The most prominent issue which had not been convincingly resolved was that of ministerial responsibility. The issue touched the very nature of constitutional monarchy, since it was all about the degree to which the government could be held accountable by the representatives of the Nation. Art. 177 of the Fundamental Law of 1815 specified the juridical responsibility of ministers for crimes committed during the exercise of their functions.[48] The accusation was put forward by the Public Prosecutor (whose appointment was a royal prerogative) before the High Court. Parliament needed to consent to the prosecution of a minister but it could not take the initiative. Peter Van Velzen has shown that both Van Hogendorp and the Belgian members of the Constitutional Commission of 1815 were confused on the exact implications of the article.[49]

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[41]Van Velzen (2005, p. 157; 267).

[42]Koch (2015).

[43]Worst (1992, p. 71).

[44]Breukelman (1912), Van Velzen (2005, p. 248; 423), Marteel (2009, p. 207) and Van Zanten (2004, p. 104).

[45]Breukelman (1912) and Van Velzen (2005, p. 232).

[46]Van Velzen (2005, p. 233).

[47]Aerts (2016, p. 52).

[48]I.e. article 104 of the Fundamental Law of 1814.

[49]Van Velzen (2005, pp. 36–53).

Van Hogendorp had intended the article to allow for parliamentary initiative, so that the juridical responsibility of ministers would automatically result in (individual) political responsibility to Parliament. He also expected the ministers to be liable to prosecution for violating the Constitution. In his view, this was the ideal system of constitutional monarchy, as it had existed in England in the second half of the seventeenth and the first half of the eighteenth century.[50] It guaranteed strong royal power tempered by respect for the Constitution and a certain degree of parliamentary control. He rejected the principle of royal inviolability however, since that combination threatened to result in parliamentary government and merely symbolic royal power in the long run. On the other hand, he did assume that royal inviolability would develop in practice.[51]

Discussion on these issues was rekindled by the presence of Belgian members in the Constitutional Commission of 1815, which was convened to adapt the Fundamental Law to the new reality of the integration of the Belgian territories. The liberals among them were strongly inspired by the political theory of Benjamin Constant. Objections were raised against the absence of a number of stipulations which they considered essential for a constitutional monarchy, including royal inviolability, ministerial responsibility to Parliament for violations of the Constitution and parliamentary confidence for ministers.[52] These questions laid bare a fundamental division of opinions between the Northern and Southern members of the Commission. In the ensuing discussions, the Belgians were placated and led to believe that their demands were implied by Art. 177, without explicitly being mentioned in the constitutional text.

The curious confusion over the real implications of Art. 177 had grave consequences for the future of the United Kingdom of the Netherlands.[53] It set the stage for the fundamental constitutional discussions of the following years, which shook the Kingdom to its foundations. The constitutional uncertainty would contribute to the Belgian opposition against the Dutch government and, eventually, set the agenda for the Belgian constituent debates in 1830. Central to these debates were the issues of the position of the Constitution as prior legal norm for governmental action and, following from it, the accountability of the King's government to Parliament.

[50]Van Velzen (2005, pp. 7–19).

[51]Van Velzen (2015, p. 121).

[52]Van Velzen (2005, pp. 36–53).

[53]In 1817 King William tried to come to terms with the opposition by offering to include the parliamentary initiative for the prosecution of ministers in the Constitution. For strategic reasons the opposition refused the offer, and argued that the parliamentary initiative was presupposed by the Constitution. Marteel (2009, p. 209) and Van Velzen (2005, pp. 99–130). For the development of ministerial responsibility in the Netherlands after 1848: Slijkerman (2011).

2.2 *'Constitutionals' Versus 'Ministerials': Belgian Constitutional Opposition*

The introduction of the Fundamental Law in the Belgian part of the Kingdom was controversial from the start. The unification of Belgium and Holland had been decided under the condition of establishing an "intimate and complete amalgam" between both territories.[54] As mentioned above, the 1814 Fundamental Law was adjusted to the new territorial situation by a Constitutional Commission made up of Dutch and Belgian members. Among the most prominent changes introduced at the behest of the Belgian members was bicameralism. In order to obtain legitimacy for the new Constitution among the Belgians, King William decided to submit it to an assembly of notables, in the absence of a regular body representing the Nation in the Belgian territories. 796 of the 1323 notables who cast their vote rejected the Fundamental Law.[55] The main reason for the rejection—and of the unpopularity of the Constitution with the Belgian population at large—was religious.[56] Unification with the predominantly Protestant North was an unwelcome prospect to many Belgian Catholics. The Belgian bishops, headed by the intransigent archbishop of Mechelen, had openly campaigned against it because of its introduction of the freedom of worship.[57] The King reacted by changing the outcome of the vote. He decided that abstentions should be counted as approvals, and that protest against the freedom of worship was an invalid reason for rejection, since that principle was one of the conditions imposed by the London Protocol.[58] Thus, the Fundamental Law was introduced against the opinion of the conservative Belgian elites. The overtly Machiavellian manipulation of the plebiscite led large parts of Belgian public opinion to question the legitimacy of the new Constitution. Even those who agreed with it in principle were critical of the King's actions.

During this period, conservative Catholic thinking was strongly anti-constitutionalist, and harked back to prerevolutionary ancient constitutionalism and Gallicanism.[59] However, a modern, liberal point of view developed alongside it. This strand of thinking embraced constitutional monarchy and welcomed the prospect of unification. The most important constitutionalist thinker in those years was Pierre-François Van Meenen, editor of the journal *L'Observateur politique, administratif, historique et littéraire de la Belgique*.[60] Van Meenen's thorough theoretical analyses of constitutional monarchy influenced a whole generation of Belgian liberals, many of whom would later take

[54]Colenbrander (1908), vol. 2, p. 27.

[55]Colenbrander (1908), vol. 2, p. 617.

[56]Gilissen (1958, p. 59) and Marteel (2009, p. 98).

[57]Demoulin (1989) and Marteel (2006, p. 46).

[58]The Protocol had in fact been drawn up by William himself and his Secretary of State Anton Falck. Koch (2013, p. 268).

[59]Marteel (2009, pp. 95–110).

[60]Le Roy (1897), Marteel (2006, p. 49), Van den Steene (1963, pp. 17–19).

part in the Belgian Revolution.[61] The writings of Benjamin Constant were obviously an inspiration to this group.

Van Meenen and his followers were shocked to find that the Fundamental Law did not allow Parliament to hold the government accountable for its actions—especially given the absence of parliamentary initiative for the prosecution of ministers.[62] *L'Observateur* began a campaign of systematic opposition to the government, lobbying for ministerial responsibility and freedom of the press. In the face of the increasingly autocratic government of William I, this initiative failed to achieve practical results, but it did succeed in laying the theoretical groundwork for the large-scale Belgian opposition of later years.

L'Observateur's last issue appeared in 1820. In the same year the Estates General approved the decennial budget, their only real check on government policy. The opposition did not manage to take a stand in the following years, despite its protest against the Conflict Law of 1822 and the continued postponement of the creation of a High Court for the judgment of ministers. The Estates General were too divided along North-South lines to allow for organized opposition against the government.[63] Moreover, economic prosperity in the South took away much of the oppositional drive.

The middle of the 1820s marked a turnabout. In 1815, political consciousness in Belgium had been relatively limited, a majority of the population remaining indifferent towards politics, but around the middle of the next decade, a new generation of liberal intellectuals entered the scene. These men were mostly born and educated under French or Dutch rule and had no active memories of the Old Regime.[64] The first sign of the growing political awareness of this group was the foundation of the newspaper *Mathieu Laensberg* in Liège, which commented critically on political and constitutional issues.[65] These younger liberals remained strongly under the influence of the older generation who had already embraced modern constitutional theory, especially as formulated by Benjamin Constant.[66] Around the same time, a fundamental shift, triggered by recent political events, occurred within the Catholic intelligentsia and the Catholic opposition embraced a liberal-constitutional discourse.[67] Both oppositional movements joined forces in 1827.

From 1828 on, debate between the Belgian opposition and the government flared up, both in the Estates General and in the press. The question of accountability of government was central to the controversy. This issue came to the fore in debates

[61]Marteel (2009, p. 49).

[62]Van Velzen (2005, p. 99).

[63]Fear for Belgian domination in the United Kingdom led most Northern members to support the government and to swallow their criticism on governmental and constitutional policy. Van Velzen (2005, p. 200).

[64]Marteel (2009, p. 326).

[65]Harsin (1930, p. 37). For the separate developments in Brussels and Liège: Marteel (2009, p. 281; 328).

[66]Marteel (2009, p. 327), Marteel (2012, p. 59) and Van Velzen (2015).

[67]Marteel (2009, pp. 265–310).

over ministerial responsibility to Parliament and the freedom of the press, which were strongly related.[68] The press trials instigated by Minister Van Maanen were a major point of contention. Journals taking a critical stance towards the governments were increasingly being prosecuted for sedition and lese-majesty. The government argued that attacking the government equated to attacking the King, since the King was not inviolable and the minsters were responsible only to him. The newspapers on the other hand argued that the Fundamental Law implied ministerial responsibility to Parliament, much as Van Hogendorp has initially intended.[69] As a consequence, they considered it legitimate to attack the ministers without harming the King.

These controversies and argumentations have been extensively described elsewhere. What counts for the present chapter is the ubiquitousness of the Fundamental Law in the debates.[70] Both camps based their arguments on the Constitution, but they interpreted it in a fundamentally different way. By arguing that all their major demands were guaranteed by the Fundamental Law, the opposition tried to show that the King and the government behaved unconstitutionally. Real or supposed provisions of the Fundamental Law were therefore cited time and again, both in Parliament and in the press.[71] The government reacted by refuting these arguments and promoting an alternative reading of the Constitution.

Whereas the government had previously been reluctant to make explicit statements on constitutional principles, it now actively engaged in the debate.[72] In the session of the Estates General of 20 December 1827, Minister Van Gobbelschroy defended the gradual increase in royal power by stating that all competences that were not mentioned in the Constitution, were the domain of the King.[73]

In 1828, the oppositional newspaper *Courrier des Pays-Bas* published a vehement critique on the address from the throne.[74] It accused the ministers of compromising the monarch by turning him into the mouthpiece for their own faulty interpretation of the Fundamental Law. Instead of recognizing the role of the press as the watchdog of constitutional government, they took all kinds of measures to curb public debate. The newspaper feared for the maintenance of the constitutional liberties, and argued that the address from the throne clearly illustrated "the profound ignorance of the ministerial writers in matters of our constitutional laws and the historical principles from which they emanate".[75]

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[68]Delbecke (2012, p. 44).

[69]Harsin rejects this interpretation: Harsin (1937, p. 167).

[70]Harsin (1937, p. 174), Van Velzen (2005, p. 422) and Witte (2016, p. 43). This was also true for the political press in the North: Van Sas (2004b, p. 467).

[71]Harsin (1930) and Marteel (2006, p. 46).

[72]Worst (1992, p. 63).

[73]Handelingen Tweede Kamer 1827–1828, pp. 117–119. Van Velzen (2005, p. 270).

[74]*Courrier des Pays-Bas,* no. 302 (29/10/1828), Marteel (2009, p. 365).

[75]"la profonde ignorance des écrivains ministériels en ce qui a rapport à nos lois constitutionnelles et aux principes historiques dont elles émanent".

The debate on press freedom was reopened during the parliamentary session of 28 November 1828 when the Belgian MP De Brouckère argued for the abolishment of the much-hated press laws. In the ensuing debate, other Belgian members expanded the discussion into an inquiry on the nature of constitutional government itself. De Gerlache stated that he could not conceive of "a *tempered monarchy* without the *separation of powers*, or an *inviolable* King without a *responsible* minister".[76]

He refuted the government's argument that the public law of the United Kingdom exclusively allowed those principles that were explicitly inscribed in the Fundamental Law:

> They say that the separation of powers exists in England because it is formally inscribed in the Constitution, whereas this is not the case in our country. The opposite is true, however. There, the separation is considered a necessary condition for constitutional government. It has been introduced by the power of circumstance, since nowhere will you find it in writing.[77]

In his view, constitutional government presupposed a set of principles without which it could not exist, regardless of the exact wording of the Constitution.

In the session of 2 December 1828, Minister Van Maanen denied the existence of ministerial responsibility, by relying on a literal reading of the Fundamental Law:

> The Fundamental Law of the Kingdom of the Netherlands is the only compass which should guide us in these matters. Many orators have powerfully defended the principle of ministerial responsibility, but none of them has been able to demonstrate that this responsibility is based on our Fundamental Law.[78]

By confirming the primacy of the Fundamental Law, Van Maanen accused the opposition of violating the Constitution by positing principles that were not explicitly mentioned in it. Indeed, he condemned the opposition's invocation of so-called absolute principles of constitutional government. Constitutional government was a relative concept, he contended, and exclusively related to the prescriptions of each Constitution individually:

> (…) the concept of *constitutional government* is not undetermined and vague, but *relative* and dependent on the fundamental laws, constitutions or charters of each nation in

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[76] "J'avoue franchement qu'il m'est impossible de concevoir la *monarchie tempérée* sans la *distinction des pouvoirs,* de concevoir un Roi *inviolable* sans un ministre *responsable*". Handelingen Tweede Kamer 1828–1829, p. 63.

[77] "En Anglerre, dit-on, la séparation des pouvoirs existe, parce qu'elle est formellement consacrée par la constitution; et il n'en est pas ainsi chez nous. C'est tout le contraire qui est vrai: cette séparation y est regardée comme une condition nécessaire du gouvernement constitutionnel. Elle s'y est introduite par la force des choses, car vous ne la trouvez écrite nulle part". Handelingen Tweede Kamer 1828–1829, p. 64.

[78] "La loi fondamentale du royaume des Pays-Bas seule doit nous servir de boussole dans cette matière; aussi est-il vrai que de tous les orateurs qui se sont si fortement prononcés pour le principe de la responsabilité ministérielle, aucun n'a démontré ni n'a pu démontrer que cette responsabilité est basée sur notre loi fondamentale". Handelingen Tweede Kamer 1828–1829, p. 114. Van Velzen (2005, p. 289).

> particular. These fundamental laws constitute our only measure to determine what is constitutional and what is unconstitutional for this or that people.[79]

Jean-François Tielemans published an open letter to Van Maanen in reaction to the latter's speech.[80] He started by citing Van Maanen's words on the position of the Fundamental Law as the sole guiding document for establishing the principles of state. He further developed this thought by underlining the inviolability of the Constitution, "the supreme law of all". Since it constituted a binding legal rule for all subjects, any violation of the Fundamental Law automatically implied criminal liability, whether or not the infraction was specified in the Criminal Code:

> She must be inviolable, and so she is. He who violates her, be he a King, a Minister, a Magistrate or a private individual, is guilty towards society. The culpability exists, whether or not the act which constitutes the violation is foreseen by the penal code. It exists by the mere fact of the violation of the Fundamental Law, and the culprit henceforward falls under the jurisdiction of the tribunals and of the decent citizens.[81]

He also referred to stipulations in the Criminal Code that made every servant of the state punishable for violations of the Constitution, and to a regulation for the Council of Ministers which prescribed constitutional review for all laws, regulations and administrative measures.[82]

An additional guarantee for the observance of the Fundamental Law had been provided in the form of the oath on the Constitution sworn by every civil servant, from the King down to the humblest clerk. The oath explicitly made the mandate of the servants of the State, including the ministers, juridical. It was intended to make the Fundamental Law even more inviolable:

> To be sure, this oath is useless, because in principle it is enough for a law to exist in order for it to entail the obedience of all. But the Fundamental Law of the Netherlands has been placed under the safeguard of the oath so as to make its execution even surer and the rights it consecrated even more inviolable. We must therefore admit that our country possesses a

[79]"(…) l'idée d'un gouvernement constitutionnel n'est pas indéterminée et vague, mais relative et basée sur les lois fondamentales, constitutions ou chartes de chaque nation en particulier, parce que ces lois fondamentales seules nous donnent la mesure pour déterminer ce qui est constitutionnel ou inconstitutionnel pour tel ou tel peuple". Handelingen Tweede Kamer 1828–1829, p. 113.

[80]On Tielemans: Freson (1932) and Van den Steene (1963, pp. 18–19).

[81]"Elle doit être, elle est inviolable; et celui qui la viole, Roi, Ministre, Magistrat ou particulier, est coupable envers la Société. Pour que la culpabilité existe, il n'est pas nécessaire que l'acte, qui constitue la violation, soit prévu par un code pénal; elle existe par cela même que la loi fondamentale a été violée, et le coupable tombe dès lors sous la jurisdiction des tribunaux ou des honnêtes gens". Tielemans (1829, p. 5).

[82]Tielemans (1829, p. 17).

> supreme law, which is sacred, common and superior to both those who govern and those who are governed. He who violates it is responsible towards society, the base of which he undermines, and towards the individuals whose interests and rights he injures.[83]

It followed that the mere fact that the Constitution existed meant that ministers were accountable for any violation of it. The oath simply made this responsibility explicit and legally binding. Tielemans implicitly suggested that, by arguing to the contrary, Van Maanen had in fact denied the Fundamental Law's authority. He insisted that both ministerial responsibility and royal inviolability were inherent in constitutional government.[84] The alternative was non-responsible government, or in other words, despotism.

The radical politician Adelson Castiau made a similar argument in two pamphlets on ministerial responsibility.[85] Putting the development of constitutional monarchy in a historical perspective, he emphasized the conceptual unity of royal inviolability and ministerial responsibility as a guarantee for responsible government and a bulwark against despotism. The monarch had received his hereditary mandate and his extensive powers from the Nation, and in return the Nation desired responsible government.[86] Castiau, too, contented that these principles, although not being prescribed by the letter of the Fundamental Law, were clearly present in its spirit. Ministerial responsibility to Parliament was automatically implied by the idea of representative government, he argued:

> Let us never forget that representative government means the government of the opinion, and that as long as it will boldly and resolutely follow the constitutional ways opened up to its expression, the reign of unpopular ministers will be short.[87]

Castiau called the theory of "ministerial irresponsibility" defended by the ministry "a doctrine which is destructive of representative government and undermines all monarchical stability".[88] He accused those who argued for it of being "blinded by a Judaic respect for the text of our fundamental law, the spirit of which they fail

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[83]"Ce serment, à la vérité, était inutile, puisqu'en principe il suffit qu'une loi existe pour qu'elle entraine forcément l'obéissance de tous; mais en plaçant la loi fondamentale des Pays-Bas sous la sauve-garde du serment, on a pensé que l'exécution n'en serait que plus sûre, et les droits qu'elle consacre plus inviolables. Nous devons donc le reconnaître: notre pays possède une loi suprême, sacrée, commune et supérieure aux gouvernans comme aux gouvernés. Quiconque la viole est responsable envers la société dont il ébranle la base, et envers les individus dont il blesse les intérêts et les droits". Tielemans (1829, p. 5).

[84]Tielemans (1829, p. 10).

[85]On Castiau: Philippart (1984).

[86]Castiau (1829a, p. 2).

[87]"N'oublions jamais que le gouvernement représentatif est le gouvernement par l'opinion, et qu'aussi longtemps qu'elle suivra, avec fermeté et hardiesse, les voies constitutionnelles ouvertes à son expression, le règne d'un ministre impopulaire sera de courte durée". Castiau (1829a, p. 28).

[88]"une doctrine destructive du gouvernement représentatif et subversive de toute stabilité monarchique". Castiau (1829a, p. 10).

to understand".[89] Castiau emphasized the legally binding character of the Fundamental Law on which these principles were based. Those officials who denied their existence made themselves guilty of perjury, legitimizing revolt and anarchy. Indeed, he reminded the ministers that the Nation automatically had the right to resist the government in case the latter violated the legal order:

> (…) they know, as we do, that on the day when power abandons legality, legality moves over to the side of the resistance.[90]

With this last quote, Castiau anticipated the arguments that would later serve as the legitimation for the Belgian Revolution.

For Tielemans, Castiau and their sympathisers, the Fundamental Law implied all the principles of modern constitutional monarchy. This meant, according to them, that it should be read in the spirit of Benjamin Constant. Not doing so, they contended, automatically resulted in paradoxes and absurdities. The principles in question therefore did not need to be spelled out in the Constitution in order to be logically presupposed. Many in the opposition called for an explicit mentioning of ministerial responsibility in the laws, in order to prevent the ministers from further exploiting the ambiguities of the existing formulation. Castiau rejected this proposal though, stating that the Constitution already contained sufficient guarantees.[91] In his view, it was an illusion to think that a more explicit formulation would stop ministers from abusing their powers. An admirer of Constant, he counted on the active surveillance of an independent national representation and a well-informed public opinion as the only effective means to control the government.

In their defense of the government, the ministerial pamphleteers targeted this supposed spirit of the Constitution. By appealing to a minimalistic interpretation, they succeeded in keeping its status as legally binding basic rule intact, while at the same time restricting its impact radius to a minimum.[92] The ministerial point of view was expounded in a range of pamphlets, all of which explicitly referred to the Fundamental Law. In his speech of 2 December 1828, Van Maanen set the tone by disclaiming any constitutional principle that did not literally figure in the Constitution. Ministerial authors developed this argument, accusing the opposition of intentionally misinterpreting the Constitution for their own particular interest.

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[89]"aveuglés pas un respect judaïque pour le texte de notre loi fondamentale, dont ils méconnaîtraient l'esprit". Castiau (1829a, p. 10).

[90]"(…) ils savent, comme nous, que le jour où le pouvoir abandonne la légalité, cette dernière passe du côté de la résistance". Castiau (1829a, p. 12).

[91]Castiau (1829a, pp. 24–39). He made an exception for the ministerial countersign, judging that the silence of the Constitution on this issue was deplorable. However, since neither the English nor the French Constitutions contained provisions on this point, he denied that it could be used as an argument against the existence of ministerial responsibility. Castiau (1829b, pp. 17–18).

[92]Marteel (2009, p. 365) and Van Zanten (2005, p. 290).

Such was the reasoning of C. Asser, in his anonymously published pamphlet *De la responsabilité ministérielle d'après le droit public du Royaume des Pays-Bas*.[93] He started with a worried remark on the newspapers' perversion of the most precious constitutional prerogatives:

> Every Belgian who loves his country and who attentively examines the spirit and the tendency of some of our newspapers, must be troubled by the deplorable abuse made of our most precious constitutional prerogatives.[94]

Such exaggerated claims as those made by the oppositional newspapers could only be the work of foreign troublemakers

> who, being indifferent to the prosperity of our fatherland, and having no knowledge at all of our customs and of our laws, apply principles which our Fundamental Law refutes to our public law.[95]

Since the Constitution did not contain any article in support of their claims, these people invoked the constitutions of England and France instead. By doing so however, they seemed to forget that the Fundamental Law constituted the sole legal ground of public law in the United Kingdom:

> (…) the rights of the Belgian subjects, as well as the rights of the government, are determined only by the pact concluded between the head of state and the Nation. These rights are mutually sealed under the oath.[96] We must rely only on the principles of OUR public law, and exclusively invoke the dispositions of our Fundamental Law.[97]

The principles of the Fundamental Law could be deduced exclusively from the articles and dispositions it contained. It could not be induced from any theory of constitutional monarchy outside of the constitutional text. For Asser, claiming that constitutional government by definition implied ministerial responsibility was the same as pretending that:

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[93]Van Kuyck (1914). Asser was a public servant at the Council of State and a personal friend of Van Maanen. The brochure was published on the latter's initiative to support Van Maanen's denial of ministerial responsibility in the Estates General on 2 December 1828. Van Velzen (2005, p. 290).

[94]"Tout Belge, ami de sa patrie, qui examine d'un œil attentif l'esprit et la tendance de quelques-uns de nos journaux, s'afflige sans doute de l'abus déplorable que l'on fait d'une de nos prérogatives constitutionnelles les plus précieuses". Asser (1828, p. 1).

[95]"qui sont indifférent à la prospérité de notre pays et qui, sans aucune connaissance de nos mœurs et de nos lois, viennent appliquer à notre droit public des principes repoussés par notre Loi Fondamentale". Asser (1828, p. 1).

[96]"(…) les droits des sujets belges, aussi bien que ceux du gouvernement, sont uniquement déterminés par le pacte conclu entre le chef de l'Etat et la nation, et réciproquement scellé sous la foi du serment". Asser (1828, p. 2).

[97]"(…) nous ne devons nous appuyer que sur les principes de NOTRE droit public, et n'invoquer que les dispositions de notre Loi Fondamentale". Asser (1828, p. 3).

> the words *Fundamental Law*, *Charte*, *Constitution*, are not *undetermined* expressions when taken individually, and that it is possible to understand their meaning, their nature and their extent by other means than by the principles and dispositions which they contain.[98]

The King himself had insisted on limiting his power by introducing a liberal Constitution, but he was completely free to act within the circle of his constitutional competences.

The government reacted to the *Courrier des Pays-Bas*' criticism in a anonymously published pamphlet entitled *Quelques observations fondées sur les termes exprès de la Loi Fondamentale*.[99] The title perfectly illustrates the way in which the ministerial writers turned the opposition's constitutional logic to their advantage. The author, Tielman Olivier Schilperoort, repeated Van Maanen's state theory by stating that sovereignty emanated from the King only. The latter had granted a Constitution of his free will.[100] The opposition's mistake was to confuse constitutional government with representative government. Sovereignty consisted of both the legislative and executive powers and was entirely in the hand of the monarch:

> The great goal of a Fundamental Law in a constitutional state is to prevent those shocks and revolutions, by expressly determining the exercise of sovereignty (…), not by the separation of powers but by their union.[101]

It followed that the Fundamental Law did not allow for ministerial responsibility to Parliament. Having sworn to maintain the Constitutional in all its aspects, it was the King's duty to refute the unfounded and unconstitutional demands of the opposition:

> In his inaugural oath, the King swears, among other things, that he will not tolerate any deviation from the Fundamental Law, on whatever occasion and on whatever pretext. Thus, the King has personally engaged himself to maintain the fundamental pact against every aggression, even those instigated by ignorant or exaggerating writers.[102]

Baron Goubau d'Hovorst defended the ministerial point of view in his speech for the First Chamber on 16 May 1829.[103] The goal of his intervention was to

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[98]"les mots de Loi Fondamentale, Charte, Constitution, n'étaient pas des expressions indéterminées lorsqu'on les prend isolément, et comme s'il était possible de connaître leur sens, leur nature et leur étendue, autrement que par les principes et les dispositions dont elles sont composées". Asser (1828, p. 14).

[99]Olivier Schilperoort (1828), *Some observations founded on the express terms of the Fundamental Law*. Zuidema (1921) and Van Velzen (2005, p. 289).

[100]Olivier Schilperoort (1828, p. 12).

[101]"Le grand but d'une Loi fondamentale d'un état constitutionnel est de prévenir ces chocs et ces révolutions, en déterminant d'une manière expresse l'exercice de la souveraineté, non (…) par la séparation des pouvoirs, mais par leur union". Olivier Schilperoort (1828, p. 10).

[102]"Le Roi (…), par le serment inaugural, (…) jure entr'autres qu'il ne souffrira pas qu'on s'écarte de la Loi Fondamentale, en aucune occasion, ni sous aucun prétexte. C'est ainsi que le Roi a pris l'engagement personnel de maintenir le pacte fondamental contre toutes agressions, voire même celles de l'ignorance ou de l'exagération des écrivains". Olivier Schilperoort (1828, p. 5).

[103]Varenbergh (1884–1885) and Van Velzen (2005, p. 315).

investigate whether the oppositional demands, expressed in the recent petitioning campaign, were admissible.[104] Not surprisingly, he systematically rejected the demands, grounding his refutation on articles of the Fundamental Law. On the subject of the role of the government in the organization of public education, he disclaimed the opposition's demand by pointing out that it harmed the constitutional order:

> This reverses the order instated by Art. 226 of the Fundamental Law, and it evidently harms both the ancient and the modern rights of the Sovereign of the Netherlands.[105]

On the same grounds he argued against ministerial responsibility:

> Those who demand ministerial responsibility are blinded: given the organization of our Kingdom and the way in which things are being done here, introducing it would require changing the Fundamental Law.[106]

Such a system was not admissible without a change of Constitution. Goubau-d'Hovorst, also refuted the idea that a constitutional government was impossible without ministerial responsibility:

> Our government will be a constitutional government of a special kind (…). As long as it exists, one must march with it just as it is, and religiously adhere to the prescriptions of the Fundamental Law on which it is founded.[107]

He concluded by warning against the dangers of the petition movement, which aroused passions and effervescence in the people. All this militant invocation of constitutional rights reminded him of the Brabant Revolution, which he had witnessed himself, and its Northern counterpart, the Patriot uprising against stadtholder William V:

> What we are witnessing today is taking the same turn as in those times when one spoke of nothing else but the Joyeuse Entrée, just like today one speaks of nothing else but the Fundamental Law.[108]

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[104]On the petition campaigns: Harsin (1930, p. 53), Tamse and Witte (1992, p. 36), Wils (2009, p. 50) and Witte (2006, p. 79).

[105]"C'est renverser l'ordre établi par l'art. 226 de la Loi Fondamentale, et porter évidemment atteinte aux droits tant anciens que modernes du Souverain des Pays-Bas". Goubau-d'Hovorst (1829, p. 18).

[106]"Ceux qui demandent cette responsabilité parlent en aveugles: d'après la manière que notre Royaume est organisé et que les affaires s'y traitent, pour l'introduire, il faudrait changer la Loi Fondamentale". Goubau-d'Hovorst (1829, p. 23).

[107]"Notre gouvernement sera un gouvernement constitutionnel d'un genre particulier (…). Tant qu'il existe, il faut marcher avec lui tel qu'il est, et se tenir religieusement à ce que prescrit la Loi Fondamentale sur laquelle il est basé". Goubau-d'Hovorst (1829, p. 25).

[108]"Ce que nous voyons aujourd'hui prend la même marche que dans ces temps-là, on n'avait à la bouche que la Joyeuse Entrée, comme aujourd'hui on n'a à la bouche que la Loi Fondamentale". Goubau-d'Hovorst (1829, p. 50). The Joyous Entry was the inaugural charter of the Dukes of Brabant, on which the Brabant revolutionaries based their claims.

To allow the petition movement to continue would be to expose the state to the danger of another disorderly uprising based on a faulty reading of the Constitution.

Time and again the ministerial apologists denied the opposition's claim that constitutional government implied a fixed set of unalterable principles, and that the Fundamental Law consecrated these principles by necessity. Only the letter of the Constitution defined the state system of the United Kingdom. Appeals to any other source, text or theory than the Constitution itself were ipse facto irrelevant. Indeed, every Constitution needed to be understood and analyzed individually, and not on the basis of a set of presupposed common principles:

> Let us conclude from what precedes that, since every constitution must be judged after its own tenor and its own spirit, we can never invoke the institutions of other nations when commenting on our Fundamental Law and determining the nature and the implications of its dispositions. These nations share with us only the fact of being ruled by constitutional laws. Apart from that, they are far from finding in these laws the same guarantees as we do in ours.[109]

In his Royal Message of 11 December 1829, the King himself confirmed the views on sovereignty propagated by his government, and formally denied the existence of ministerial responsibility to Parliament.[110]

2.3 *Towards a New Legal Order*

As we have seen, respect for the existing legal order based on the Fundamental Law was central to the argumentation of both the government and the opposition. Over time, both Liberals and Catholics within the Belgian opposition turned to modern constitutionalism as the surest way to realize their respective programs. Liberal campaigning for modern constitutionalism in the spirit of Benjamin Constant already began in 1814, with Van Meenen's publication on the topic.[111] The next generation of Liberals built upon his ideas and further developed them in newspapers such as *Le Politique*, *Le Courrier des Pays-Bas* and *L'Emancipation*.[112] Catholic thinking underwent a more fundamental transformation over time, as

[109]"Tirons de ce qui précède la conséquence que, toute constitution devant être jugée d'après sa teneur et son esprit, nous ne pouvons jamais, lorsqu'il s'agit de commenter notre Loi Fondamentale et de déterminer la nature et l'étendue de ses dispositions, invoquer les institutions d'autres nations qui n'ont de commun avec nous que d'être également régies par des lois constitutionnelles, mais qui, au reste, sont loin de trouver dans ces lois les garanties qui nous ont été assurées par les nôtres". Asser (1828, p. 20).

[110]Bijlagen Handelingen Tweede Kamer 1829–1830, pp. 741–743. Marteel (2012, p. 54), Van Velzen (2005, p. 329) and Worst (1992, p. 72).

[111]Le Roy (1897), Marteel (2009, p. 49), Van den Steene (1963, pp. 17–19).

[112]Harsin (1930), Vermeersch (1992), Witte (1979) and Wouters (1958).

Stefaan Marteel showed in his meticulous reconstruction of the development of Catholic thought under the United Kingdom.[113] The Old Regime ideal of a Catholic state Church dwindled as Belgian Catholics were confronted with a Protestant King intent on closely supervising the spheres of religion and education.[114] The idea that the autonomy of the Church would be better guaranteed by a separation of Church and State and the proclamation of absolute religious freedom, gained popularity.

Despite their radically different outlooks on society, the oppositional groups came to agree on the central importance of the constitutional text. When both groups joined forces in 1827, their key demand was the exact implementation of the Fundamental Law in all its points.[115] This implied not only recognition of the liberties and the division of powers enshrined by it, but also of its binding legal force. The issue of ministerial responsibility, which raised the most controversy between the two parties, went to the core of this idea. It implied making the Constitution's role as the normative rule for the actions of the executive power legally enforceable. As mentioned before, Art. 177 of the Fundamental Law foresaw the creation of a High Court for the judgement of ministers accused of violating the Constitution. The article remained a fiction however, since the government postponed the creation of the Court indefinitely.[116] The opposition in turn accused it of causing legal insecurity. Likewise, the opposition opposed the absence of legal means to dispute the introduction of unconstitutional laws, such as the ones against the freedom of the press.

The course of events suggests that the government only explicitly adopted a constitutional discourse in reaction to the opposition's incessant claims based on the Fundamental Law. It succeeded in turning these claims to its advantage by developing its own, minimalist interpretation of the Constitution and using it to denounce the oppositional demands as illegal. The logic of legal order turned to the opposition's disadvantage at the moment when events took a revolutionary turn. Riots broke out in Brussels against the Dutch government during the night of the 25 August 1830.[117] In the succeeding weeks new power structures emerged on the local level which gradually replaced the official ones. The government tried to appease the rioters by giving in to many of the opposition's demands, including the dismissal of the unpopular minister Van Maanen.[118]

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[113]Marteel (2009).

[114]Marteel (2009, pp. 265–320).

[115]Marteel (2009, p. 347).

[116]Van Velzen (2005, p. 175). Marteel, on the other hand, argues that the debate on the High Court had no bearing on the Southern opposition's demand for ministerial responsibility. Marteel (2009, p. 242).

[117]Witte (2006, p. 51).

[118]Van Velzen (2015, p. 58), Witte (2006, p. 57), Witte (2016, p. 16). Although William I went as far as to dismiss Van Maanen, conceding on the point of ministerial responsibility was impossible for him. It would have changed the very nature of his rule, which he saw as the ultimate guarantee for the country's stability. The opposition continued to press this point, as a fundamental transformation in the exercise of power was exactly what it aimed for.

In the meantime, the opposition was confronted with the paradox of on the one hand invoking the Fundamental Law and on the other hand, waging armed—and thus illegal—protest. The oppositional press continued to refer to the Fundamental Law to legitimatize their demands. The newspaper *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". It confirmed that what the opposition desired was respect for the will of the Fundamental Law, and added: "We repeat that we are neither waging a revolution nor an insurrection".[119] The *Courrier de la Sambre* called on the Fundamental Law to protest against the convocation of the Estates General in The Hague instead of Brussels even though it was the latter city's turn to serve as the capital:

> The convocation of the Estates General in The Hague is a formal violation of the Fundamental Law. In the present circumstances, this violation may produce fatal results unless it is legally resisted.[120]

The French newspaper *Le Constitutionnel* commented: "The insurrection is definitely national and constitutional".[121] Radical newspapers on the other hand accused the Belgian members of the Estates General attending the meeting of the Estates in The Hague of being in league with a government that repressed the rights of the Belgian Nation.

The legitimacy of the opposition was at stake. Thus far, the Fundamental Law had provided the ultimate legal basis for its claims. By opting for open rebellion, the opposition risked invalidating its whole enterprise, as well as alienating those citizens who wished to remain within the legal order. King William put the finger on the sore spot when, in his proclamation of 5 September 1830, he denounced the insurgents' revolt against the legal order. William called the opposition's "return into the legal order" a precondition for opening negotiations over the Belgian demands.[122] The proclamation caused a change in tone in the oppositional newspapers, who took offense at the King's minimisation of the conflict and his use of the term insurgents. As the government seemed to refuse to take the Belgian grievances seriously, the legality of the existing order itself was increasingly called into question. The *Courrier des Pays-Bas* commented:

> We are no longer under the legal order organized by the Minister Van Maanen, because that legal order was tyrannical for us. Since it is nothing but organized oppression

[119]"Nous le répétons, nous ne sommes ni en révolution, ni en insurrection". *Courrier des Pays-Bas* no. 244, 01/09/1830.

[120]"La convocation des états-généraux à La Haye est une violation formelle de la loi fondamentale, violation qui pourrait dans l'état des choses avoir les plus funestes résultats, sil l'on ne s'y opposait légalement". *Courrier de la Sambre* no. 134, 6/09/1830.

[121]"L'insurrection est décidemment nationale et constitutionnelle". Quoted in: *Courrier de la Sambre* no. 140, 13/09/1830.

[122]*Courrier des Pays-Bas* no. 252, 09/09/1830.

> covered with a varnish of legality, this supposed legal order must be modified and changed.[123]
>
> We must return into the legal order. The legal order! It is easier said than done. This order, which Mr. Van Maanen had organized so well, and which is the fruit of fifteen years of oppression, is exactly the object of our complaints.[124]

The newspaper contested the legality of the existing order on account of its tyrannical character and of the harm it caused to the Belgian Nation.[125] *Le Vrai Patriote* maintained that a people was free to choose a new leader when the social contract was violated.[126] As the opposition left the legal order behind, the rights of the nation were cited as the only legitimate source of authority. The *Courrier de la Sambre* wrote:

> Do not tell us that we need the consent of the Estates General. We are now outside of the legal order. Every measure is legal at present, as soon as it is founded on the approval of the nation.[127]

The bloody September Days in Brussels brought about the final turnabout. 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. The Provisional Government of Belgium was created in the wake of the events. The *Courrier des Pays-Bas* proclaimed that the only legitimate source of authority in the contemporary world was the people's right to self-determination.[128] From that moment on, respect for the old legal order need not concern the Belgians any more, the newspapers agreed:

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[123]"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". *Courrier des Pays-Bas* no. 256, 13/09/1830.

[124]"Il faut rentrer dans l'ordre. L'ordre! C'est chose aisée à dire, mais cet ordre que M. Van Maanen a si bien arrangé et qui est le fruit de quinze ans d'oppression, c'est précisément l'objet de nos plaintes". *Courrier des Pays-Bas* no. 260, 17/09/1830.

[125]"Cet ordre, c'est l'oppression de le Belgique systématiquement organisée avec un faux semblant de légalité". *Courrier des Pays-Bas* no. 260, 17/09/1830.

[126]*Le Vrai Patriote* no. 29, 10/11/1830.

[127]"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". *Courrier de la Sambre* no. 137, 09/09/1830.

[128]"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". "*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*".

> (…) 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.[129]

The opposition overcame the revolutionary paradox by basing its legitimacy on a natural law norm that transcended the legal order: the rights of the Nation. Since the existing legal order, enshrined by the Fundamental Law, seemed only harmful to its interests, the Nation legitimately demanded the establishment of a new one. Henceforward, the despotism of the Dutch government was invoked as the legal ground for Belgian independence.[130] On 4 October 1830, the Provisional Government declared Belgian independence in the name of the revolutionary Belgian people.[131] Two days later, it decreed elections for a National Congress and the creation of a Constitutional Commission to draw up a draft Constitution.[132] It was stressed that the present situation was a provisional one, aimed at establishing a legal order consecrated by a new Constitution drawn up by the representatives of the Nation.

Although the Fundamental Law was discarded in the process, the discourse of constitutional legitimation remained intact. The constituent debates received priority in the National Congress even though the young state was faced with pressing political, economic and military needs. Despite the fact that many were critical of both the draft Constitution's conservative slant and the "excessive" time spent on debating it, protests against prioritizing the constitutional issue were few and far between.[133] Newspapers articulated high expectations for the new Constitution, while many private individuals published their own constitutional drafts or addressed them to the Congress.[134] The Belgian Constitution was clearly expected to become what the Fundamental Law had failed to be: an immutable basic rule (a "law of laws" according to the *Journal d'Anvers*) which, by guaranteeing the liberties of the citizens and clearly defining the division of powers, assured the future wellbeing of the state.[135]

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[129]"(…) 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". *Courrier des Pays-Bas* no. 278, 05/10/1830.

[130]See the opening speech of Louis de Potter for the National Congress on 10 November 1830, Huyttens (1844–1845), vol. 1, p. 100. E.g. the speech by Etienne de Gerlache as president of the Congress at the occasion of the inauguration of the Regent on 25 February 1831: "Il est arrivé qu'un prince, plein de préjugés et d'entêtement, s'est imaginé qu'une nation lui appartenait parce qu'on la lui avait cédée par traités; il a cru pouvoir la tromper toujours, avec un système de constitution qu'il tournait et violait à son gré, lui imposer sa langue, sa religion, ses créatures: cette nation fait une révolution, et le prince est renversé et puni". Huyttens (1844–1845), vol. 2, p. 595.

[131]Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique (1830), no. 4, p. 3, decree of 4 October 1830.

[132]Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique (1830), no. 5, p. 13, decree of 6 October 1830.

[133]Magits (1977), vol. 1, p. 391.

[134]Magits (1977), vol. 1, pp. 333–379.

[135]*Journal d'Anvers,* 18–19 October 1830.

The discourse of the Belgian newspapers on the Fundamental Law underwent a drastic transformation in the meantime. Independence, and the prospect of a new Constitution, left the Fundamental Law bereft of the support it had formerly enjoyed in Belgium. Not only had it been introduced against the will of the Nation, as the newspapers were keen to remember, it had also failed to protect the Nation against royal despotism. It came to be considered the tool of a Machiavellian regime. On the eve of the proclamation of the Belgian Constitution, the radical newspaper *Courrier de la Sambre* wrote:

> This work of iniquity called the Fundamental Law, was destined to be the straightjacket of two peoples (…). There was no other option than to bow to this Machiavellism for fifteen long years, and even, in the last years, to invoke it as the anchor of salvation.[136]

The newspaper considered it ironic that the Belgians had been reduced to calling on the Fundamental Law as their last resort against royal despotism, when it had served as the support of that very regime in the first place.

Only one year earlier, on 22 January 1830, the same newspaper had written about the Fundamental Law in strikingly different terms:

> All demand the pure and simple execution of the Fundamental Law, and should the government dare to boldly lay violent hands on this sacred arch, and venture to commit a coup by suspending and annulling the Constitution….[137]

In his history of the United Kingdom of the Netherlands, Etienne de Gerlache later commented that the extreme disdain with which the Belgian founding fathers treated the Fundamental Law was unwarranted, since the problem was not the charter itself but its interpretation.[138] De Gerlache's analysis is confirmed by the fact that no less than 40% of the articles of the Belgian Constitution were copied from the Dutch Fundamental Law.[139] Indeed, what had been at stake for the Belgian opposition was not the exact wording of the Fundamental Law but the recognition of the principles of modern constitutionalism which it considered to lay at its base. Because of the government's refusal to recognize these principles, the

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[136]"Cette œuvre d'iniquité, qui, sous le nom de loi fondamentale, devait être la camisole de force de deux peuples. (…) Force fut donc de ce soumettre pendant 15 longues années à ce machiavelisme; force même fut, dans les dernières, de l'invoquer comme ancre de salut". *Courrier de la Sambre*, 6/02/1831.

[137]"(…) tous réclament l'exécution pure et simple de la Loi fondamentale: et si le pouvoir avisait de porter une main téméraire sur cette arche sainte et se permettait de frapper un coup d'état en suspendant la constitution et en la déclarant anéantie (…)". *Courrier de la Sambre*, 22/01/1830.

[138]"La loi fondamentale de 1815, amalgame des vieilles idées belges et hollandaises, et des nouvelles idées françaises, ne méritait peut-être pas le dédain extrême avec lequel la traitèrent nos constituans de 1831. Ce ne fut point tant cette charte qui engendra les griefs, que le mauvais esprit qui l'interprétait". De Gerlache (1859), vol. 2, p. XXIII. Louis de Potter started his opening speech for the National Congress by calling to mind the despotic way in which the Fundamental Law had been "forced by Holland" upon the Belgians. However, he conceded that its failure to secure liberty in Belgium was not so much due to its inherent character as to the fact of its incomplete execution. Huyttens (1844–1845), vol. 1, p. 100.

[139]Gilissen (1967, p. 60).

Fundamental Law had not succeeded in creating the immutable legal and political order of which it was supposed to be the guardian.

2.4 Constituent Power

The new Constitution was debated and adopted in a relatively short span of time. After being accepted on 7 February 1831, it was solemnly promulgated on 11 February. The completion of the Constitution raised questions about the mandate of the Congress, and about the question of whether or not it should retain its constituent power. There was a general desire that the Constitution should enter into force and become the single legal norm for the new country. However, the political situation was not yet settled: a candidate for the throne still needed to be found, and the international situation remained unclear. Some members argued that now that the constituent work was done, the Congress no longer had a reason to exist. However, most objected to this view and insisted that order should return before elections for a regular Parliament could be called. In the meantime the Congress would continue to legislate.[140]

The provisional state of affairs was hard to reconcile with the desire for an immutable basic rule. It had originally been decided that the Constitution would come into force on the eleventh day after its proclamation, just like ordinary decrees.[141] At several points in time, questions arose over the constituent mandate of the Congress. For as long as it retained its constituent power, the Constitution was susceptible to change. Van Meenen therefore proposed to immediately promulgate the Constitution, but to make it obligatory only from the moment when the Congress proclaimed its own dissolution. He rejected the idea, favored by some, that only the monarch's acceptance of the Constitution could render it binding. Although he conceded that the Constitution established a contract between the monarch and that Nation, he denied that the former should be allowed to have any influence on its content. His accession to the throne depended on his prior acceptance of the Constitution in all its points:

> It has been suggested that the Constitution will only become definite upon its acceptance by the head of state. It is true that a contract is being 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 in this case is the collective being that is the constituted Nation. The [King's] acceptance cannot call into question parts of the contract. Otherwise, every employee, when entering into function, could simply refuse to accept the laws he was called upon to execute unless modifications were made.[142]

[140] Huyttens (1844–1845), vol. 2, p. 501, 11/02/1831.

[141] Huyttens (1844–1845), vol. 1, 27/11/1830.

[142] "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

Destouvelles made a similar comparison in order to stress the monarch's subordination to the Constitution, and to insist that he had no other choice than to accept its terms: "a Constitution is only the specification of that acceptance".[143] The Congress confirmed this reasoning by deciding for the Constitution's immediate promulgation, but making it obligatory only ten days after the dissolution of the Congress. There could be no doubt that the future monarch derived his powers exclusively from the Constitution as a prior legal norm, and not from any extra-constitutional source of sovereignty (as in the case of William I's 'preliminary sovereignty').

The decision entailed a new debate on the question of whether or not proclaiming the Constitution meant that the Congress would abandon its constituent powers. Van Meenen maintained that the Congress should not be allowed to make any further changes to the Constitution after its proclamation, except for filling the gaps it inevitably contained. He was supported by, among others, Lebeau, who said that this was the best way to prevent external powers (namely the London Conference and/or the future monarch), from pressuring the Congress into adapting the Constitution to its wishes. The republican members Van Snick and De Robaulx objected to this measure, maintaining that a Congress vested with constituent powers would always be able to retract previous decisions, including those pertaining to the text of the constitution. The reason for their protest was clear enough. Since the Constitution specified that Belgium was a "representative, constitutional monarchy", a binding proclamation would stand in the way of the introduction of the republican form of government. Anticipating the Duc de Nemours' refusal of the Belgian Crown, De Robaulx brought forward a bill in favor of the immediate proclamation of the republic. He pointed out that the Congress was not a normal legislative assembly but a sovereign constituent assembly. Since it was omnipotent, its powers could not be bound even by its own decisions:

> If I were to make a proposal contrary to a constitutional decree in a legislative assembly, I could imagine that one moves to the previous question; but in a constituent assembly, this is inadmissible, since we are sovereign judges, and have the power to reform ourselves.[144]

The proposal was not taken into consideration.

The Duc de Nemours's refusal, which De Robaulx had predicted, meant that the preconceived timing could not be followed. The search for a candidate for the

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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". Huyttens (1844–1845), vol. 2, p. 492, 08/02/1831.

[143]"une constitution n'est que le cahier des charges de cette acceptation". Huyttens (1844–1845), vol. 2, p. 492, 08/02/1831.

[144]"Si, dans une assemblée législative, je faisais une proposition contraire à un décret constitutionnel, je concevrais que l'on pût invoquer la question préalable; mais dans une assemblée constituante, elle est inadmissible parce que nous sommes juges souverains, et en possession du pouvoir de nous réformer nous-mêmes". Huyttens (1844–1845), vol. 2, p. 512, 14/02/1831.

throne needed to be reopened, and the Congress would continue to convene. However, the Congressmen wished more than anything to leave the provisional order behind and put the Constitution into force. The credibility of the new state depended on it, both domestically and towards its neighbors. Van de Weyer stated: "it will signal the coming into force of our institutions. It will signal the organization of a regulated and truly constitutional power".[145]

On the proposal of Lebeau, and in concordance with Art. 85 of the Constitution, it was decided that a Regent should be appointed.[146] Since the Constitution would enter into force from the moment the Regent took the oath, this would put an end to the provisional state of affairs. The Congress nevertheless retained constituent power until a King was inaugurated, at which moment it would adjourn and elections for a regular Parliament would be called. The Congress would only be dissolved definitively when the new Parliament was installed.

2.5 The Question of Constitutionality

The temporary state of affairs created another complication with regard to the precedence of Constitution, namely the issue of constitutionality. Even before the Constitution was promulgated, the question arose whether or not the constituent Congress should act in accordance with it. For a start, a debate emerged on the issue of whether or not the proposed regency needed to be organized along the lines of article 85 of the Constitution. The constituent Congress did not really match the prescriptions of the article, which had been drawn up with a normal legislative assembly in mind. Nothomb argued that the Congress was entirely free to instate a regency according to its own wishes:

> The regency we wish to install does not figure in the fundamental law; the existence of the Congress vested with constituent powers makes our situation totally exceptional. In this regard, the Congress is not bound by any Constitution. We can neither abdicate the constituent power, nor delegate part of it. We are bound by our mandate.[147]

Since the Congress was an omnipotent constituent power, it acted outside of any Constitution, even the one it had itself created. Alexandre Gendebien objected that, since the Constitution provided for the possibility of a regency, the Congress was bound to abide by its prescriptions:

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[145]"(…) ce sera le signal de la mise en pratique de nos institutions, ce sera le signal de l'organisation d'un pouvoir réglé et vraiment constitutionnel". Huyttens (1844–1845), vol. 2, p. 580, 23/02/1831.

[146]Huyttens (1844–1845), vol. 2, p. 580, 23/02/1831.

[147]"La régence que nous voulons instituer n'est pas dans la loi fondamentale; l'existence du congrès investi du pouvoir constituant rend notre situation tout à fait exceptionnelle; le congrès est à cet égard en dehors de toute constitution. Nous ne pouvons abdiquer le pouvoir constituant, ni le déléguer en partie. Nous sommes liés par notre mandat". Huyttens (1844–1845), vol. 2, p. 581, 23/02/1831.

> Your Constitution is ready, now it must be put into action. You are short of a King though. Article 85 of the constitution prescribes that, when the throne is vacant, the administration of the realm is provided for by a regency.[148]

Not to do so would be to violate the Constitution even before it came into force:

> To allow for the proposals which have been brought before you would be unconstitutional, and I do not think you wish to violate the fundamental pact even before it is put into action.[149]

The Congress finally followed Nothomb's reasoning. It instated a regency of its own design, with a Regent who did not possess all the constitutional powers of the head of state. Thus, the Congress's predominance over the executive power remained assured until the moment when a King would be found. The decision implied that the constituent power of the Congress was, by definition, unbounded.

The debates illustrate how the Constitution immediately acquired a position of prominence that was both legal and symbolic: it became the one standard against which the legality of all actions of the constituted powers could be measured and it even served as a rule for the constituting powers. As a consequence, the categories 'constitutional' versus 'unconstitutional' gained importance in political debate. The question of constitutionality was especially important in the period between the Constitution's promulgation in February and the inauguration of King Leopold in July 1831. The competencies of the Congress and the government respectively were debated in terms of their constitutionality. Accusing political opponents of making unconstitutional proposals became an efficient tactic for delegitimizing these proposals.

The maintenance of the new Constitution was jealously guarded by public opinion and the press as well. For example, on 11 March 1831, the *Courrier de la Sambre* published an article entitled "A violation of the Constitution". The article signaled that a few days earlier a decision of the government had been countersigned, not by the responsible minister, but by a high-placed functionary. This did not conform to the constitutional rules on ministerial responsibility:

> The Regent be warned that the most profound respect for our new fundamental law and a strict observation of this law are required of his position, and the position of the country. Every transgression will be fatal, and must immediately be signaled and repressed.[150]

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[148]"Votre constitution est prête, il faut la mettre en vigueur. Pour cela, il vous manque un roi. Aux termes de l'article 85 de la constitution, quand le trône est vacant, on pourvoit à l'administration du royaume par une régence". Huyttens (1844–1845), vol. 2, p. 567, 22/02/1831.

[149]"Admettre les propositions qui vous sont soumises serait inconstitutionnel, et je pense que vous ne voulez pas violer le pacte fondamental avant qu'il ne soit en vigueur". Huyttens (1844–1845), vol. 2, p. 567, 22/02/1831.

[150]"Que M. le Régent y prenne garde, le respect le plus profond pour notre nouvelle loi fondamentale, une observation stricte de cette loi, lui sont commandés par sa position et celle du pays; toute transgression serait fatale, et doit être instantanément signalée et réprimée". *Courrier de la Sambre* no. 291, 11/03/1831.

Equally instructive is the debate over the acceptance of the peace treaty with the Netherlands on 1 July 1831, which was an essential condition for the consolidation of Belgian independence. The competency of the ministers with regard to this question was discussed in terms of their constitutional mandate. Drawing on a religious vocabulary, De Robaulx warned against what he called "constitutional heresies":

> I hurry to respond to the observation of M. Duval, which is a constitutional heresy. (…) This matter involves touching the Constitution. Be warned that the Constitution is an arch of alliance; touch it and you will be struck death. Yes, you will be struck death by public opinion.[151]

In the session of 12 April 1831, the question of whether legislative elections should be called was debated. It was argued that the Congress had reached the term of its mandate: since a Constitution had been drawn up and all the conditions for giving it its full execution were fulfilled, the constituent assembly should be dissolved.[152] Isidore Fallon defended this argument, saying that the Congress's original mandate was limited to drawing up and promulgating a Constitution. After that it was obliged to resign. Otherwise, it committed an act of unconstitutionality and abuse of power:

> In the present state of affairs, let us be careful. Because by reserving this competence for the Congress any longer (…), it may later be accused of unconstitutionality or usurpation of power.[153]

[151]"Je me hâte de répondre à l'observation de M. Duval, qui est une hérésie constitutionnelle. (…) C'est qu'il s'agit maintenant de toucher à la constitution. Prenez-y garde, la constitution, c'est une arche d'alliance; si vous y touchez, vous serez frappé de mort. Oui, vous serez frappé de mort par l'opinion". Huyttens (1844–1845), vol. 3, p. 369, 01/07/1831. This remark reflects the idea of the article 123 of the draft Constitution. Although it was finally not adopted, its spirit clearly remained: "The maintenance of the constitution and all the rights it consecrates are entrusted to the patriotism and the courage of the militia, the army, the magistrates and of all Belgians". Cf. Footnote 6.

[152]The Provisional Government decided to create the National Congress in its decree of 4 October 1830: "Un congrès national, où seront représentés tous les intérêts des provinces, sera convoqué. Il examinera le projet de constitution belge, le modifiera en ce qu'il jugera convenable, et le rendra, comme constitution définitive, exécutoire dans toute la Belgique". Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique (1830), no. 4, p. 3. In the decree on the elections for the Congress of 10 October 1830, its task was defined as follows: "Considérant que le congrès appelé à décider des intérêts de la Belgique (…)". Bulletin des arrêtés et actes du Gouvernement Provisoire de la Belgique (1830), no. 7, p. 5.

[153]"Dans un pareil état de choses, prenons garde, en réservant plus longtemps au congrès cet acte important à la consolidation de notre indépendance et à l'affermissement de nos institutions, qu'on puisse un jour l'attaquer d'inconstitutionnalité ou d'usurpation de pouvoir". Huyttens (1844–1845), vol. 3, p. 87, 12/04/1831.

Fallon further insisted that the Regent should be able to exercise his functions in the way provided for by the Constitution, instead of being subjected to the will of the omnipotent Congress: "He must finally be able to govern by virtue of the Constitution and not by the will of the Congress alone".[154]

Nothomb protested that dissolving the Congress at that point in time would be the exact opposite of completing the mission with which it had been entrusted by the Nation. The great task of the Congress was to safeguard the gains of the Belgian Revolution and to consolidate them by establishing a stable state upon their base:

> Our fellow citizens have invested us with complete social powers; they have consigned constituent power to us, they have charged us with the foundation of Belgian nationality; in short, they have entrusted the entire September Revolution to us.[155]

Given the pressing military, political and economic needs, these circumstances could not be said to have been attained: "Is Belgium's fate fixed because we have added one more Constitution to the long list of constitutions which the XIXth century has produced?".[156]

Unless the necessary conditions for the survival of the Constitution were fulfilled, all the Congress's efforts would have been in vain.

On 20 July 1831, one day before the inauguration of the King, the different modalities for the dissolution of the Congress were discussed one last time. Fallon proposed to definitely dissolve the Congress directly after the King's inaugural oath. Other members argued that the King should not be left in charge without a legislative assembly. Therefore they proposed to let Congress retain the legislative power until the election of the first regular Parliament, but to adjourn it in the meantime. Its constituent powers on the other hand would cease after the inaugural oath. Devaux and Nothomb proposed the latter option, but added that the Congress could only be convened on the King's initiative.[157] Fallon objected that the King was exclusively bound by his oath on the Constitution, and that therefore the Congress was obliged to surrender its powers:

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[154]"Il faut enfin qu'il puisse gouverner en vertu de la constitution, et non par la volonté seule du congrès". Huyttens (1844–1845), vol. 3, p. 88, 12/04/1831.

[155]"Nos concitoyens nous ont investis de la plénitude des pouvoirs sociaux; ils nous ont revêtus de la puissance constituante, ils nous ont dit de fonder la nationalité de la Belgique; ils nous ont, en un mot, confié la révolution tout entière de septembre". Huyttens (1844–1845), vol. 3, p. 87, 12/04/1831.

[156]"Le sort de la Belgique est-il fixé parce que nous avons ajouté une constitution à la longue liste des constitutions qu'a engendrées le XIXe siècle?". Huyttens (1844–1845), vol. 3, p. 87, 12/04/1831.

[157]"Le congrès national s'ajournera immédiatement après la prestation de serment du roi; il sera dissous de plein droit le jour de la réunion des chambres. Jusqu'à l'époque de cette dissolution, le roi seul aura le droit de convoquer le congrès, qui ne pourra plus exercer désormais que la partie du pouvoir législatif que la constitution attribue aux chambres". Huyttens (1844–1845), vol. 3, p. 612, 20/07/1831.

> The only condition imposed on the King is the oath on the Constitution. Neither our constituent power nor our legislative power can subsist. The power of the Congress is a constitutional power.[158]

Beyts, in favor of dissolution, argued that it was unconstitutional to let a single Chamber exercise the legislative power. In the absence of an elected Parliament, a constitutional legislative power could not exist: "The King has no sanction in the presence of a single Chamber. He has sworn loyalty to the Constitution; let us also be loyal and leave".[159] Forgeur likewise maintained that Nothomb and Devaux's proposal, which was finally approved by the assembly, was unconstitutional.

3 Precedence in the Belgian Constitution

We have seen how the idea of precedence in the Belgian Constitution was informed by the political opposition against the Dutch King in the years preceding the Belgian Revolution. The Belgian opposition called upon the Fundamental Law in an effort to legitimize its resistance to royal authoritarianism. When this tactic failed, it established a new legal order with a new Constitution at its base. The next question then, is how this precedence was laid out in the Constitution itself. The Belgian Constitution is exceptional in that it does not have a preamble, which would be the most logical place for statements on the status of the constitutional text in relation to ordinary law.[160] Instead of being explicitly proclaimed, the precedence of the Constitution is expressed by several articles within the

[158]"La seule condition imposée au roi, c'est le serment à la constitution: notre pouvoir constituant ni législatif ne peut subsister. Le pouvoir du congrès est un pouvoir constitutionnel". Huyttens (1844–1845), vol. 3, p. 611, 20/07/1831.

[159]"Le roi n'a pas de sanction avec une chambre unique. Il jure fidélité à la constitution; soyons-y également fidèles et allons-nous-en". Huyttens (1844–1845), vol. 3, p. 611, 20/07/1831.

[160]In the session of 18 November 1830, Boucqueau de Villeraie proposed to draw up a manifesto that would serve as a preamble to the Constitution. The manifesto was to contain a legitimation of the Belgian Revolution, as well as the decrees on Belgian independence and the deposition of William I. The proposal was adopted and a commission, composed of Trentesaux, Théophile Fallon, Charles-Hippolyte Vilain XIIII, Forgeur, Van Crombrugghe, Lecocq, De Ryckere, Count Vilain XIIII, De Gerlache and Boucqueau de Villerain was charged with the task. The commission never convened however. In the session of 13 April, the National Congress renewed its intention to draw up a manifesto containing "the grievances of the Belgian people". The commission was reshuffled but again failed to produce results. In the meantime, during the session of 24 February 1831, Devaux proposed to include the decrees of 18 and 24 November (on national independence and the exclusion of the Nassau dynasty from succession to the Belgian throne) in the Constitution. On Beyts's proposal, and with a view to preventing their later modification by constitutional revision, the decrees were not included into the Constitution however, but were granted constitutional status: "nous les rendons irrévocables; ils ne feront pas partie de la constitution, mais ils seront comme la base sur laquelle elle repose". The decision was published in the *Bulletin Officiel* on 24 February. A preamble was never drawn up. Bulletin Officiel des décrets du Congrès national de la Belgique et des arrêtés du pouvoir exécutif (1830–1831), vol. 3, no. XVI, p. 187, decree of

constitutional text. Their tendency and formulation often bespeaks the influence of British constitutional law, as reformulated by Constant. We will list these articles and explain them by looking at the constituent debates and at constitutional manuals.

3.1 *Differentiation from Normal Legislation*

- The Constitution cannot be suspended.

Art. 130: *The Constitution cannot be wholly or partially suspended.*[161]

This article was not included in the draft of the Constitutional Commission. It was added during the Congress debate of 5 February 1831 upon the suggestion of Van Snick. Van Snick first proposed the following article, borrowed from Benjamin Constant:

> The constitutional powers only exist by virtue of the Constitution. They cannot, in whichever case or under whichever pretext, suspend its action.[162]

He supported his suggestion by referring to the political and institutional instability of France, where every regime violated and suspended the constitutions of its predecessors, under the motto *Salus populi suprema lex esto*. Instead, Van Snick argued that the wellbeing of the people was "always attached to the inflexible execution of the laws, especially of the fundamental law".[163] His proposal was meant precisely "to prevent such infractions, such suspensions and coups".[164]

The proposal was approved, but a discussion developed over its formulation. De Robaulx considered prohibitive measures illusory, since constitutions could ipse facto only be violated by illegal means.[165] The article was thereupon reformulated so as to better express its intention to prevent the constituted powers from

24 February 1831; Huyttens (1844–1845), vol. 1, pp. 180–182, 18/11/1830; p. 261 (23 November 1830); p. 388 (11 December 1830) and vol. 2, p. 586, 24/02/1831; pp. 94–97 (13 April 1831).

[161]"La constitution ne peut être suspendue en tout ni en partie". See: Ergec (1987), Errera (1918, pp. 17–19), Huberlant (1982, pp. 337–338) and Van Drooghenbroeck (2006).

[162]"Les pouvoirs constitutionnels n'existant que par la constitution, ils ne peuvent dans aucun cas, ni sous aucun prétexte, en suspendre l'action". Huyttens (1844–1845), vol. 2, p. 464, 05/02/1831.

[163]"toujours attaché à l'inflexible exécution des lois, et surtout de la loi fondamentale".

[164]"de prévenir ces infractions, ces suspensions et ces coups d'État".

[165]"Une constitution ne peut être violée que par un coup d'État ou une révolution. Toute disposition prohibitive me paraît illusoire" (A constitution can only be violated by a coup or by a revolution. Prohibitive measures seem illusory to me). Huyttens (1844–1845), vol. 2, p. 464, 05/02/1831.

suspending the Constitution. Lebeau agreed, arguing that even the possibility of a violation needed to be precluded.[166]

- Constitutional revision is impossible during a regency.

Art. 84: *No constitutional revision is admitted during a regency*.[167]

The article was based on Art. 233 of the Fundamental Law.[168] It was passed without discussion, with the clear intention of preventing constitutional change in times of crisis.[169]

- Special revision procedure.

Art. 131: *The legislative power has the right to declare that there are reasons to revise such constitutional provision as it determines.*

Following such a declaration, the two Houses are automatically dissolved.

Two new Houses are then convened, in accordance with Article 71.

These Houses make decisions, in common agreement with the King, on the points submitted for revision.

In this case, the Houses can only debate provided that at least two thirds of the members who make up each House are present; and no change is adopted unless it is supported by at least two thirds of the votes.[170]

The procedure for constitutional revision was rather rigid.[171] New elections and a special majority were obligatory. Discussion on this article was limited and it was accepted without change. The only debate concerned the measure of flexibility of the procedure. Lebeau objected to the separate vote in both chambers, which would allow one chamber to block the revision wished for by the other. This he considered dangerous for the stability of the institutions.[172]

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[166]"Si la charte française avait contenu un semblable article, jamais les ministres de Charles X n'auraient pu trouver un prétexte pour suspendre la charte" (If the French Charte had contained a similar article, the ministers of Charles X would not have found a pretext for suspending the charter). Huyttens (1844–1845), vol. 2, p. 465, 05/02/1831.

[167]"Aucun changement à la Constitution ne peut être fait pendant une régence".

[168]Descamps (1981, p. 45).

[169]Errera (1918, p. 22) and Thonissen (1879, p. 227).

[170]"Le pouvoir législatif a le droit de déclarer qu'il y a lieu à la révision de telle disposition constitutionnelle qu'il désigne. Après cette déclaration, les deux chambres sont dissoutes de plein droit. Il en sera convoqué deux nouvelles, conformément à l'article 71. Ces chambres statuent, d'un commun accord avec le Roi, sur les points soumis à la révision. Dans ce cas, les chambres ne pourront délibérer si deux tiers au moins des membres qui composent chacune d'elles ne sont présents; et nul changement ne sera adopté s'il ne réunit au moins les deux tiers des suffrages".

[171]Errera (1918, pp. 20–22) and Thonissen (1879, pp. 338–340).

[172]"S'il n'y a pas de moyen de faire des changements à la constitution, dès que l'opinion se sera prononcée contre elle, elle sera ou enfreinte, ou méprisée" (If there is no way to make changes to the Constitution, she will either be violated or despised, as soon as public opinion pronounces against her). Huyttens (1844–1845), vol. 2, p. 461, 4 February 1831.

- Abolishment of all contrary previous legislation.

Art. 137: *The Fundamental Law of 24 August 1815 and all the provincial and local statutes are abolished*.[173]

Art. 138: *From the day when the Constitution enters into force, all the laws, decrees, decisions, resolutions and other acts that contravene it, are abrogated*.[174]

The second part of Art. 137 was based on the Fundamental Law of 1815, whereas Art. 138 was based on Art. 70 of the French Charter of 1830.[175] Both were approved without motivation or debate. They are logical measures to establish precedence of the Constitution over all previous or contradictory legislation.[176]

3.2 The Oath on the Constitution

Art. 80: *The King attains his majority upon his eighteenth birthday.*

The King only accedes to the throne after having sworn the following oath before the united Houses: "I swear to observe the Constitution and the laws of the Belgian people, to preserve the country's national independence and its territorial integrity".[177]

The article was based on Art. 38, 52 and 53 of the Fundamental Law.[178] The oath on the Constitution was the prerequisite for the King to ascend to the throne. Between the death of the King and the inauguration of his successor, the powers of the head of state were exercised by the council of ministers in the name of the Belgian People and on their responsibility. The draft Constitution did not contain the oath: it followed that the royal power was directly inherited by his successor. This was changed by the National Congress. The Congressmen who insisted on the introduction of the oath and the public inauguration stressed the fact that the oath constituted a legal ground for deposing the monarch in case he violated the Constitution.[179] This rule had existed under the Old Regime, as several members observed. References were made to the Old Regime clause of the ancient

[173]"La loi fondamentale du 24 août 1815 est abolie, ainsi que les statuts provinciaux et locaux. Cependant les autorités provinciales et locales conservent leurs attributions jusqu'à ce que la loi y ait autrement pourvu".

[174]"A compter du jour où la Constitution sera exécutoire, toutes les lois, décrets, arrêtés, règlements et autres actes qui y sont contraires, sont abrogés".

[175]Descamps (1981, p. 41; 46).

[176]Errera (1918, p. 270) and Thonissen (1879, pp. 343–344).

[177]"Le Roi est majeur à l'âge de dix-huit ans accomplis. Il ne prend possession du trône qu'après avoir solennellement prêté, dans le sein des chambres réunies, le serment suivant: 'Je jure d'observer la Constitution et les lois du peuple belge, de maintenir l'indépendance nationale et l'intégrité du territoire'".

[178]Descamps (1989, 44–45).

[179]Huyttens (1844–1845), vol. 2, pp. 67–68, 09/01/1831; p. 487, 07/02/1831.

constitution of the Duchy of Brabant which freed subjects of their loyalty to the prince when he did not respect his constitutional oath.

The discussion came about at the subject of the inviolability of the head of state. The formulation proposed by the Constitutional Commission seemed to suggest that the King could not in any way be deposed. The formulation of Art. 39 on the inviolability of the head of state was therefore adapted into "The King's person is inviolable; his ministers are accountable", which included the possibility of deposition.[180] Destouvelles proposed copying the oath of the ancient constitution of Brabant which released the subjects of their fidelity to the prince in case he violated the Constitution.[181] Beyts followed the same reasoning when proclaiming that he did not want "a king without a contract": "I can 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 has not sworn the oath".[182]

In other words, the oath turned the Constitution into the measure for the legality of the king's every action. Apart from the oath, the Old Regime inauguration ceremony in the presence of the assembled people was revived.[183] The goal was to make the oath on the Constitution "more sacramental". In addition, the Congress introduced an oath to the Constitution for all members of Parliament, magistrates, army officers and civil servants.[184] These oaths were prescribed by decree however and not included in the Constitution.[185] Interestingly, the members of Parliament only swore to the Constitution, whereas the others also needed to swear loyalty to the laws and the King. This resulted from the fact that the Constitution was the only limit on the legislative power of Parliament, which neither the laws nor the King could bind.

3.3 Judicial Review

There is no mention of judicial review in the Constitution, nor in the debates of the National Congress. However, Art. 28 and 107 offer indications as to the opinion of the Congress in this matter. Art. 28 states that only the legislative power may decide the interpretation of the law, or in other words the *référé législatif*: "Only the

[180]"La personne du chef de l'État est inviolable; ses ministres sont responsables". Huyttens (1844–1845), vol. 2, 09/01/1831.

[181]Huyttens (1844–1845), vol. 2, pp. 67–68, 09/01/1831.

[182]"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". Huyttens (1844–1845), vol. 2, p. 487, 07/02/1831. On the absence of this principle in the Belgian Constitution: Errera (1918, p. 199).

[183]On these references, see: Deseure (2016b), Dubois (2005b, pp. 238–241), Dumont (1981) and De Lichtervelde (1930, p. 13).

[184]Huyttens (1844–1845), vol. 3, pp. 608–609, 20/07/1831.

[185]Errera (1918, p. 323).

legislative power can give an authoritative interpretation of the laws".[186] The context of this stipulation is the following:

> The law can only have been intended in one sense by the legislator; the other senses that one wishes to attribute to it are by necessity wrong.
>
> When the Court of Cassation and the other courts and tribunals are divided about the sense of the law, the intervention of the legislative power is necessary[187]

Art. 107 states that the tribunals may only apply decisions of the executive power when they conform to the law. However, they do not have the power to annul or invalidate these decisions: "The courts and tribunals only apply the general, provincial and local decisions and rulings to the extent that they conform to the law".[188]

These articles do not refer to the question of the conformity of the law to the Constitution but they do make clear that the judicial power is not entitled to interfere in the spheres of action of the legislative and executive powers. It has been supposed by analogy that tribunals do not have the competence of judicial review.[189] This is a logical outcome of the importance attached to the separation of powers in the Belgian Constitution.[190] Judicial review would contradict Art. 26 which states that the legislative power is exercised by the Chambers and the King collectively. This is a classical argument against the establishment of Constitutional Courts (cf. debates on the American Supreme Court). In the Belgian context the lawgiver is protected against interference of the judiciary.

Given that Parliament cannot be forced to respect the Constitution, it has unrestricted legislative power.[191] In other words, it has the power to make unconstitutional law. However, the Congress clearly expected future parliaments to act in accordance with the Constitution. The Congressmen believed that the respect of succeeding assemblies for the Constitution would be too great to ever allow the introduction of unconstitutional laws.[192] In addition, the oath for members of Parliament on the Constitution, as well as part 2 of Art. 25 ("All the powers

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[186]"L'interprétation des lois par voie d'autorité n'appartient qu'au pouvoir législatif". For a discussion of this article: Neut (1842, p. 161).

[187]"La loi ne peut avoir qu'un seul sens dans l'intention du législateur; les autres sens qu'on veut lui attribuer sont nécessairement faux"; "Lorsque la cour de cassation et les autres cours et tribunaux sont divisés sur le sens de la loi, l'intervention du pouvoir législatif est nécessaire". Report of the Central Section, by Jean-Joseph Raikem, on the judicial power. Huyttens (1844–1845), vol. 4, p. 96.

[188]"Les cours et tribunaux n'appliqueront les arrêtés et règlements généraux, provinciaux et locaux, qu'autant qu'ils seront conformes aux lois". Le Jeune (1857) and Van den Steene (1963, p. 55) and Warlomont (1929).

[189]Thonissen (1879, p. 133).

[190]See De Maeyer (1994, p. 51), for the discussion between Eugène Verhaegen and Charles Faider on the question of unconstitutional laws.

[191]Errera (1918, p. 270) and Stengers (1949, p. 681).

[192]For the same reason, Charles Faider, one of the most prominent Belgian lawyers of the nineteenth century, thought the introduction of judicial review was useless. Stengers (1949, p. 692).

emanate from the nation. They are exercised in the manner established by the Constitution") did constitute a legal restraint of sorts on the power of the legislative branch.[193] As we have seen, as soon as the Constitution was promulgated, 'constitutionality' became an important argument in the debates over new legislation.

4 Epilogue: Constitutional Discourse After 1831

The history of the Constitution after 1831 illustrates that it effectively functioned as the single, fundamental law binding the legal and political order. Only in 1914–83 years after its promulgation—was the first unconstitutional law passed by the Belgian lawgiver.[194] Moreover, the Constitution proved to be stable: only twice in the nineteenth century was the procedure for constitutional revision used, both times mainly in order to adapt the suffrage conditions to social reality.[195] Revisions affecting the foundations of the state only followed after WWII.

The resilience of the Constitution can at least partly be explained by the symbolic prestige it enjoyed. Both in the Congress and in the press the new Constitution was heralded as Belgium's ultimate guarantee of liberty. It was presented as the foundation of the new state and the guarantor of the wellbeing of its inhabitants. A typical example appeared in the newspaper *Courrier de la Sambre*:

> Our beautiful Constitution, masterpiece of our worthy representatives, will be respected, it will be the sacred arch that will remain as an eternal monument to our courage and to the energy with which we have shaken off a degrading yoke.[196]

Constitutionality (as opposed to unconstitutionality) and respect for the Constitution remained important legitimizing categories in Belgian political discourse throughout the nineteenth century.

The ruling classes actively promoted respect for the Constitution by the establishment of a popular cult, including monuments and hymns. In the words of Congressman Beyts, the Constitution was in effect sacralized.[197] Although this quasi-sacred reverence for the Constitution existed from the very beginning, it gained strength especially after the revolutionary wave of 1848. During the first two decades after the Revolution, public state celebrations focused more on the martial side of the revolutionary events, with the memory of the fallen heroes of the 'September Days' of 1830 as the centerpiece.[198] In the year 1848 the focus shifted.

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[193] Errera (1918, p. 270).

[194] Stengers (1949, p. 694).

[195] Gilissen (1958, p. 18).

[196] "Notre belle constitution, chef-d'œuvre de nos dignes représentans, sera respectée, ce sera l'arche sainte qui restera comme un monument éternel de notre courage et de l'énergie avec laquelle nous avons su secouer un joug avilissant". *Courrier de la Sambre* no. 406, 24/07/1831.

[197] Huyttens (1844–1845), vol. 2, p. 487, 07/02/1831.

[198] Huygebaert (2013, p. 154) and Janssens (2001, p. 52).

The introduction of a few liberal measures prevented an outbreak of revolution: the franchise was widened by lowering the suffrage requirements to the constitutional minimum, and public service was made incompatible with a parliamentary mandate so that the Parliament grew more independent from the government. The measures succeeded in quelling the modest revolutionary unrest in Belgium.[199] As a result—and partly under the influence of better relations with Holland—the government turned to celebrating the stability of the country's institutions rather than the revolutionary feats of 1830.

The Constitution was hailed as the unshakeable foundation of the state, which, due to its liberal character and just repartition of power, had averted the danger of insurrection.[200] The Constitution thus grew into the symbolic alpha and omega of the Belgian state system. The culmination of the constitutional cult was the creation of the Congress Column monument in 1850. The Column, a grandiose monument designed by the architect Joseph Poelaert, commemorated the founding of the Belgian state and the creation of the Belgian Constitution by the National Congress in 1831. The major dates of the Belgian Revolution, the names of the members of the Congress and the Provisional Government, and key passages from the Belgian Constitution were inscribed on its pedestal. On the four corners of the pedestal sat gigantic bronze statues of the four 'cardinal liberties' proclaimed in the second title of the Constitution.[201]

This chapter has shown that constitutional precedence was not projected on the Constitution post factum. The idea was tightly bound up with the genesis of the Belgian Constitution itself, and at least partly resulted from the political theory developed by the Belgian opposition against the rule of the Dutch King. The debates over sovereignty and accountability of the government were waged in constitutional terms by both the opposition and the government, but resulted in completely opposite interpretations. The Belgian Constitutional Assembly was careful to prevent a repetition of this debate by combining the idea of constitutional precedence with a desire for clarity: royal inviolability and ministerial responsibility were spelled out in the Constitution, while sovereignty was safely vested in the Nation.[202] Above all, they ensured that the Constitution acted as the basic rule of the legal and political order. As the expression of the will of the sovereign Nation, it excluded every other claim to power. Thus, the ambiguity, typical of Restoration

[199]The population stayed calm, while the only attempt at armed attack on the system—the invasions of the country from France by an improvised battalion of a few hundred revolutionaries—gloriously failed. Witte (2006).

[200]Huygebaert (2015).

[201]The 47 m high column was originally to be crowned by a representation of the Constitution, until Parliament decided upon a statue of King Leopold instead.

[202]Remarkably, the political responsibility of ministers to Parliament (as opposed to the juridical responsibility) was not made explicit in the Constitution, despite being clearly intended by the National Congress. The political responsibility only developed as a result of political practice in the first years after independence. Deseure (2016a, p. 125), Ganshof Van der Meersch (1950, p. 183), Harsin (1937, p. 166) and Müβig (2011, p. 499).

constitutionalism, between national sovereignty on the one hand and monarchical sovereignty on the other, was overcome. This idea was expressed by the inaugural oath, which unequivocally sealed the terms of the social contract, as well as by a series of measures aimed at guaranteeing both the precedence and the endurance of the Constitution.

5 Summary (Dutch): Grondwettelijke Voorrang en het Ontstaan van de Belgische Grondwet van 1831

Het idee van grondwettelijke voorrang is een kernidee van het moderne grondwetsbegrip. Het wordt hier gedefinieerd als het vastleggen van de politieke en wettelijke orde in een uniforme, positiefrechtelijke tekst die het karakter heeft van een wettelijke bindende, voorafgaande rechtsnorm. Dit hoofdstuk onderzoekt de manier waarop het concept van grondwettelijke voorrang werd verankerd in de Belgische grondwet van 1831. Het doet dit vanuit het standpunt van de genese van de grondwet in de context van de Belgische Revolutie. Een historisch-genealogische benadering wordt daarbij gecombineerd met een juridische.

Het eerste deel gaat in op het ontstaan van de Belgische grondwet in oppositie met de Fundamentele Wet, de grondwet van het Koninkrijk der Verenigde Nederlanden. Het laat zien dat het verzet van de Belgische oppositie tegen het beleid van de regering van koning Willem I tot een debat leidde over de interpretatie en het karakter van de Fundamentele Wet. Zowel de overheid als de oppositie beriepen zich op de grondwet om hun respectievelijke claims te legitimeren, maar ontwikkelden daarbij een volstrekt tegengestelde interpretatie ervan. De overheid onderstreepte de rol van het monarchale macht in het staatsbestel via een letterlijke lezing van de grondwet, in combinatie met het idee van voorafgaande monarchale soevereiniteit. De oppositie daarentegen, geïnspireerd door de constitutionele theorie van Benjamin Constant, beriep zich op de geest van de grondwet in een poging om de koninklijke macht aan banden te leggen. Deze tweestrijd beïnvloedde vervolgens de opvatting van grondwettelijke voorrang zoals die tot uiting kwam in de debatten van de Belgische constituante.

Het discours van de Belgische oppositie over de Fundamentele Wet onderging een transformatie op het moment dat het verzet tegen de Nederlandse overheid uitmondde in revolutie. De revolutionairen legitimeerden het breken met de wettelijke orde door een beroep op de rechten van de Belgische Natie, die de Fundamentele Wet in haar ogen niet voldoende wist te garanderen tegen koninklijk despotisme. Het idee van grondwettelijke voorrang bleef evenwel intact en vond vervolgens zijn neerslag in de nieuwe Belgische grondwet. Dit blijkt uit de debatten in het Nationaal Congres en in de pers. Grondwettelijkheid werd, vanaf de goedkeuring van de grondwet op 7 februari 1831, een belangrijke categorie om het optreden van de constituerende en geconstitueerde machten mee te beoordelen.

Het tweede deel onderzoekt de manier waarop grondwettelijke voorrang werd verankerd in de grondwetstekst zelf. Bij gebrek aan preambule wordt het speciale karakter van de gronwetstekst niet explicitiet uitgedrukt. Wel komt het idee tot uiting in een reeks grondwetsartikelen die betrekking hebben op (a) de bijzondere status van het grondwettelijk recht ten opzichte van gewone wetgeving (onder meer in de modaliteiten voor grondwetswijziging) en (b) de status van de grondwet als wettelijk bindende norm voor het optreden van de geconstitueerde machten (onder meer via de grondwettelijke eed van de monarch).

Tot slot werd de grondwettelijke voorrang ook symbolisch uitgedrukt door middel van een semi-religieus discours waarin de grondwet werd voorgesteld als de stichtingsakte van de staat en de ultieme garantie voor haar toekomstige welzijn. Na 1848 culmineerde dit discours zelfs in een volwaardige grondwetscultus.

6 Summary (French): La Primauté de La Constitution et La Genèse de La Constitution Belge de 1831

La conception moderne de Constitution est fondée sur sa primauté. La primauté de la Constitution est ici définie comme l'établissement d'un ordre politique et légal au moyen d'un texte uniforme de droit positif véhiculant une norme prioritaire et juridiquement contraignante. Ce chapitre étudie la manière dont le concept de la primauté de la Constitution a été ancré dans la Constitution belge de 1831. Pour ce faire, il suivre une approche tant historique et «généalogique» que juridique.

La première partie est consacrée à la genèse de la Constitution belge en opposition avec la Loi Fondamentale du Royaume des Pays-Bas Unis. Elle montre comment l'opposition belge, en résistance envers le gouvernement du Roi Guillaume Ier, a ouvert un débat sur l'interprétation et le caractère de cette Loi Fondamentale. Tant le gouvernement que l'opposition se référaient à la Constitution pour légitimer leurs points de vue respectifs, mais en l'interprétant de manière contradictoire. Le gouvernement soulignait le rôle du Roi dans le fonctionnement de l'Etat, en appelant à une lecture littérale de la Constitution et à l'idée d'une souveraineté monarchique préalable. L'opposition, quant à elle, inspirée par la théorie constitutionnelle de Benjamin Constant, se référait au contraire à l'esprit de la Constitution dans le but de limiter le pouvoir royal. Ce conflit a eu une profonde influence sur la manière dont l'idée de la primauté de Constitution a été envisagée au sein de la constituante belge.

Le discours de l'opposition belge sur la Loi Fondamentale s'est fortement transformé au moment où la résistance contre le gouvernement néerlandais a pris le caractère d'une révolution. La rupture des révolutionnaires avec l'ordre légal se légitimait par la nécessité de protéger les droits de la Nation belge, que la Loi Fondamentale ne parvenait pas, à leurs yeux, à protéger suffisamment contre le despotisme royal. L'idée de la primauté de la Constitution restait néanmoins intacte et se retrouvait dans la toute nouvelle Constitution belge. Les débats menés au

Congrès National et dans la presse en témoignent. À partir de l'approbation de la Constitution le 7 février 1831, le concept de 'constitutionalité' devient un élément important d'appréciation du comportement des pouvoirs constituants et constitués.

La deuxième partie est dédiée à la manière dont la primauté de la Constitution est inscrite dans le texte lui-même. En l'absence de préambule, le caractère spécial de la Constitution n'est pas exprimé de manière explicite. Par contre, il est mis en avant dans une série d'articles qui traitent (a) de la particularité du droit constitutionnel par rapport à la législation ordinaire (entre autres via les modalités de la révision de la Constitution) et (b) du statut de la Constitution comme norme emportant une contrainte juridique pour l'action des pouvoirs constitués (entre autre via le serment constitutionnel du monarque).

Enfin, la primauté de la Constitution est exprimée de manière symbolique au moyen d'un discours semi-religieux représentant la Constitution comme le document fondateur de l'Etat belge et comme la garantie ultime de son bien-être futur. Discours qui, après 1848, culmine dans un culte constitutionnel à part entière.

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Inaugurating a Dutch Napoleon? Conservative Criticism of the 1815 Constitution of the United Kingdom of the Netherlands

Frederik Dhondt

Contents

Abstract The 1815 constitution of the United Kingdom of the Netherlands established a deferential control on the sovereign power to declare war and conclude treaties. Following articles 57 and 58, international agreements could be concluded and ratified by the monarch, save for peacetime cessions of territory. The constitutional committee's debates treat the matter rather hastily. William I (1772–1843)'s role at the establishment of the Kingdom of the United Netherlands had been so decisive, that the advent of a less qualified successor seemed inconceivable. The monarch personified the common interest. Foreign policy, the privileged terrain of princes and diplomats, was judged unsuitable for domestic political bickering. Finally, the Estates Generals' budgetary powers were seen as an indirect brake on

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potential royal martial ardours. The incidental objections formulated by Jan Jozef Raepsaet, a Southern conservative publicist, show the more structural deficiencies of the constitution as a pact between the monarch and the nation. Leaning both on feudal law and law of nations doctrine, Raepsaet demonstrated how William I had been dressed in Napoleon's clothes. The King had a nearly unchecked competence in foreign affairs, beyond the usual Old Regime safeguards, contrary to Enlightenment criticism of autocratic rule. John Gilissen aptly labeled William I as a "monocrat". Vattel or Pufendorf's opinion on the ruler as a mere usufructuary seemed to have evaporated. Raepsaet's arguments on the inconsistent nature of Art. 57 and 58 are echoed in the 1831 Belgian constitution's Art. 67—subjecting most treaties to parliamentary consent—as well in Thorbecke's criticism of the document.

1 Introduction

The Constitution of the United Kingdom of the Netherlands of 1815 ranks as one of the restoration constitutions of post-Napoleonic Europe. Looked at from a distance, the text is the product of a creative moment of European statecraft. The Congress of Vienna (1814–1815) crafted a new state as the cornerstone of its system of collective security. The Catholic Belgian provinces united with the mostly Protestant Dutch, under the wings of a newly-created sovereign King, descendent from a German dynasty, the house of Nassau. The restoration had to incorporate some *acquis* of the French Revolution.[1] Even before the beheading of Louis XVI in 1793, the French monarch had agreed to the constitutionalization of the monarchy of Divine Right. If the monarchy could return after Napoleon, it would have to accept the presence of the nation.

The story of the 1815 constitution is at the crossroads of two theories on the limitation of monarchical power. On the one hand, Old Regime thinking on collective government, divided between the monarch and his loyal elites, as exemplified in Montesquieu's *De l'Esprit des Lois*, or in Fénelon's criticism of Louis XIV's authoritarian reign.[2] On the other hand, revolutionary theories of national representation, as embodied in Siéyes' writings. From a genealogical perspective, William I's constitutions of 1814 and 1815 contained many elements prevalent in the Belgian Constitution of 1831,[3] or of present-day constitutional orders. Yet, its modernity can also be questioned. The most evident angle of approach is that of the lack of balance between the legislative and executive power in the domestic field. This contribution proposes to add a less-studied, but crucial aspect of sovereignty: the right to wage war and conclude treaties. I argue that this case embodies all aspects of the ambiguous relationship between monarchical rule and national

[1] De Waresquiel (2015).

[2] Bély (1996, 243–257).

[3] 40% of all articles, see Gilissen (1979a, 405).

representation. If constitutional precedence was an issue, it counted as such for both sides. Both for those who favored a stronger restoration monarch, and for elite resistance to the acquis of the revolutionary and Napoleonic regimes.

If the discussions on the constitutional regime of foreign relations have been rather scarce, our attention should be aroused by the radical change in formulation between the 1815 constitution and the 1831 Belgian constitution, or, at an even further distance, the 1848 constitution of the Kingdom of the Netherlands.[4] At one end of this spectrum, political liberalism has introduced ministerial responsibility and the primacy of the legislative branch over the executive. Yet, surprisingly, some liberal criticisms echo those of more conservative, Old Régime-thinking.[5] In the middle, the 1815 constitution has put William I in Napoleon's clothes.[6] In the words of Cornelis Van Maanen (1769–1846), president of the highest jurisdiction in the North and William's minister of Justice, "*Den prins in den plaats van den Keizer stellen"* (putting the Prince in the Emperor's place).[7] William's monarchy was 'tempered' by a Constitution, but was in no way a representative regime.[8]

The discussion on power sharing in foreign affairs necessitates a synthesis of two strands in legal history. On the one hand, constitutional history. On the other, the history of international law. The main difference in narrative between these two angles lies precisely in the modern nature of restoration constitutions. Whereas the *acquis* of the French Revolutions seems evident in the domestic sphere, this is not the case for international relations. Looked at as a system of horizontal interaction between sovereign entities, international law did not undergo a fundamental transformation at the Congress of Vienna. The French Convention tried to subvert the principle of non-intervention between sovereign states, by calling for the liberation of populations all over Europe.[9] The Congress of Vienna had the exact opposite intention: the restoration of the *Droit public de l'Europe*.[10] Legitimate dynasties could return where they had been chased. Constitutional arrangements were an affair of every state distinctly. Intervention was approved in the following meetings of the Great Powers (Aachen, Verona, Laibach), when the repression of liberal revolts was on the agenda. Movements in Spain, Italy or Germany were forcefully struck down. The Fundamental Act of the German Confederation even forbade constitutional provisions undermining the monarch's right to rule.

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[4]Van Sas and Te Velde (1998).

[5]Witte (2016a).

[6]Reproach by Van Hogendorp to Van Maanen, Koch (2013, 241); Thorbecke judged that the French period had been of greater importance to the Dutch state than anything achieved after 1813 or before 1848, Worst (1992).

[7]Van Hogendorp, *Geheime Aanteekeningen*, quoted by Colenbrander (1908), I, xliii. This can be explained by a 'lack of schooling in public law' in the Northern delegation. See further in this chapter on the seemingly ill-thought through design of the constitution to William I's benefit. Bornewasser (1983b, 228).

[8]Bornewasser (1983b, 233); See further De Haan et al. (2013).

[9]Steiger (2015, 170), Bélissa (1998).

[10]Gentz (1806).

Starting from this opposition, one would expect the provisions of the 1815 constitution to allot a greater competence to the national representation, to the detriment of the monarch. Conversely, it would not come across as illogical for Old Régime doctrine and case law to consecrate the King's exclusive right to govern international relations. In the following paragraphs, I will first sketch the general characteristics of the 1815 constitution (2) and its international context (3), before turning to the right to conclude treaties and to declare war, as seen from the angle of the law of nations (4). In domestic opposition to Dutch centralizing ideas, the figure of the conservative catholic publicist Jan Jozef Raepsaet should attract our attention (5). Finally, I will briefly consider the differences with the situation post 1831 (conclusion).

2 The Dutch-Belgian Constitution of 1815

The adoption of the 1814 Constitution in the North guided institutional developments. Whereas the North had known a decentralized, almost confederal system under the Dutch Republic (1585–1795), the Batavian Revolt of 1795 had turned this upside-down, by installing a centralized regime.[11] This type of administration was alien to the constitutional traditions of the South, which relied on privileges and freedoms, regularly invoked against the monarch. The opponents to Joseph II (1741–1790) and the French Revolution clung to a system of a '*liberté sage et bien ordonnée*', not to '*ces droits pompeux et extravagans de l'homme, que les Français ont proclamés que pour les fouler aux pieds*'.[12] Yet, in the eyes of 19th century liberals, such as the legal scholar Thorbecke (1798–1872), the constitution of 1814 was nothing more than '*a Napoleonic regulated state with a constitutional façade*'.[13] A radical change had thus taken place.

The merger of North and South was legitimized with historical arguments. Yet, the divergent options taken at crucial instances of the early modern and revolutionary periods turned this into a hybrid and ill-conceived memorial reconstruction. The constitution maintained the precedence among provinces adopted under Emperor Charles V (1506–1555), referred to the Southern tradition of inaugurations, mirroring a tradition of contractual monarchy, but chose a radically different path in its essential provisions. The emphasis on provincial autonomy in the preamble, as if a return to the situation of 1572 would have been possible, was only symbolical.[14] In reality, central administrative supervision put these authorities, erstwhile the most powerful in both North and South, under tutelage (art. 155). Gijsbert Karel Van Hogendorp (1762–1834), who had invited William to return to the North in 1813,[15] would soon see his invented tradition evaporate. Van Maanen's centralized bureaucracy would take over.

[11] Van Sas (2005).

[12] Colenbrander (1908, I, XXXIX).

[13] Bornewasser (1983a, 208).

[14] Bornewasser (1983a, 216), Judo and Van de Perre (2016).

[15] Bornewasser (1983a, 213).

The text adopted in July 1815 by the Joint Constitutional Committee was considerably longer (234 articles against 146 in the 1814 Constitution[16]), but did not differ on fundamental points. A specific prescription for the monarch's submission to the national representation was lacking.[17] Legislative powers were jointly exercised by the monarch and the Estates-General (Art. 105), representing the nation as in the French 1791 constitution (Art. 77). Yet, the repartition between the executive (where the King acted alone) and legislative branches had been left to constitutional practice. A few situations were directly attributed to the Estates-General, but they constituted exceptions.[18] Conformable to e.g. the 'Monarchical principle' enshrined in Art. 57 of the Vienna Final Act on the German Confederation,[19] the King had the residuary competence to act in all cases not explicitly attributed to the legislature.[20]

This created a *besluitenregering* (government by decree), one of the main causes of the Belgian insurrection of 1830.[21] A supplementary lacuna was William's right to deliver dispensations with regards to legislative acts, after consulting the highest court of the realm, the *Hoge Raad*. This was conceived as an exceptional clause, for cases where the delegates of the Estates would not be able to meet in time. Even more, due to William's *conflictenbesluiten* ('conflict of attribution'-decrees), issued in 1822, the King excluded judicial review of administrative acts, claiming the competence for himself, as head of government. Provincial Governors had the duty to intervene in court cases where the judge threatened to scrutinize administrative acts, and order for the case to be conferred to the King.[22] Regarding the relationship of the executive branch to the Estates-General, ministerial responsibility was not a case of the national representation, but the King's affair. Prevention of abuse relied on the personal discretion of the monarch, and on nothing more.[23]

The Constitution of 1815 was rejected by the assembled 'notable' figures in the South.[24] 796 negative and 527 positive votes were however turned around in a

[16]Raepsaet (1838, 273–300).

[17]Alen (1984, 664).

[18]Alen (1984, 665).

[19]Bornewasser (1983b, 234).

[20]Gilissen (1979a, 402).

[21]Gilissen (1979a, 404), note 1 cites 1710 royal and 1075 ministerial decrees published in the official journal *Pasinomie*, against 381 laws voted by the Estates-General. See also Koch (2015).

[22]William took this decision against the majority of his Council of State, which he clearly saw as an Ancien Régime-council *a latere principis*, wherein the (qualitatively) *sanior pars* could ultimately prevail over a quantitative majority, Bornewasser (1983b, 242). Governors were agents of William's central administration, and counterbalanced the provincial estates. This system had been explicitly excluded by the Constitutional Committee in 1815. See Alen (1984, 692).

[23]Alen (1984, 666).

[24]Since a national representation had been lacking, an assembly of 1604 'notable' figures, representing grosso modo 0.02% of the population, had been composed on the advice of Van der Capellen, William I's governor-general Bornewasser (1983b, 232). Raepsaet derided this assembly's composition: '*on y voyait accolés à quelque peu de personnes comme il faut, des noms inconnus dans l'arrondissement, des petits commis de bureau, des gens qui ne possédaient pas un*

more favourable result for the monarch (934 pro, 796 contra[25]). William declared the constitution adopted on 24 August 1815. Yet, the Southern ecclesiastical authorities as well as the nobility rejected the constitutional system.[26] The recognition of freedom of conscience (Art. 190), in the line of Joseph II's reforms, or the insufficient checks on monarchical power, in a Montesquieuan sense, went against their interests. Most of the Belgian provinces had rejected the document, save for the districts of Hasselt, Leuven, Liège, Verviers, Luxemburg, Neufchâteau and Diekirch.[27] Louis Hymans (1829–1884), liberal member of parliament talked of the Belgian people being abducted by the Great Powers, and delivered to the greedy Dutch sovereign as a '*troupeau de moutons*'.[28]

The joint Constitutional Committee, which had met in The Hague in Spring 1815, consisted of a haphazard and divided Southern delegation and a more robust Northern bloc. Cornelis Van Maanen (minister of Justice), Frederik Roëll (future minister of the Interior, 1767–1835), Cornelis Theodorus Elout (1767–1841, future minister of Finance) and Gijsbert Karel van Hogendorp defended the outcome of the 1814 constitution. Among the Belgian delegation, the more conservative members François-Théodore de Thiennes (future president of William I's First Chamber, 1745–1822) and Raepsaet offered opposition, but were not able to prevail on issues of paramount importance. Raepsaet even left the Committee's sessions on 19 June 1815, eleven days before the end of negotiations.[29]

The final version (13 July 1815) saw the creation of a First Chamber within the Estates-General, wherein the King could appoint forty to sixty members over 40 for life, on the basis of their merit, birth or fortune (Art. 80[30]). This chamber, nicknamed '*la ménagerie du roi*',[31] only had the competence to approve or to reject texts coming out of the Second Chamber. This chamber of 110 deputies was elected

pouce de terre, des personnes mal notées, des juges, des administrateurs destitués du temps des Français pour corruption et concussion, etc.' Raepsaet (1838, 186).

[25]Colenbrander (1908, II, 615–617).

[26]Letter by Bishop de Broglie of Ghent to the clergy of his diocese, Raepsaet (1838, 358). William I added 281 abstentionists to the 527 votes in favour of the constitution, as well as 126 votes motivated on religious grounds. William I motivated this by pointing to the second of the 1814 eight articles, installing an equal treatment between the different religions in his Kingdom, Gilissen (1979, 402), Bornewasser (1983b, 232).

[27]In Ypres and Antwerp, not a single vote was cast in favour of the Constitution. In Turnhout and Namur, only one. The assemblies in Mons and Brussels rejected the text with a slight margin. Ghent, Courtrai or Tournai overwhelmingly turned it down. Etienne De Gerlache (1785–1871), a catholic nobleman, was a member of the Estates-General's Second Chamber (1824–1830). He presided over the commission in charge of the draft of the 1831 Belgian Constitution, was elected in the House of Representatives (1831–1832) and ended his career as president of the Belgian Court of Cassation (until 1867). His words are, of course, to be interpreted through the lens of Belgian 19th century patriotism. See De Gerlache (1842, I, 310).

[28]Hymans (1869).

[29]Meyer to Raepsaet, The Hague, 30 June 1815, Raepsaet (1838, 322–323).

[30]Stevens (2016).

[31]Romein (1961, III, 65).

indirectly by the provincial estates. Although the South was demographically predominant, seats were evenly split between North and South.[32] The provincial estates were divided in electoral colleges for nobility, cities, and the countryside. Provincial borders, as established first by the Treaty of Münster in 1648 (which separated parts of Flanders and Brabant) and consequently by the French annexation of 1795 (which partitioned the province of Flanders) were not altered, mainly as a consequence of the re-opening of the Scheldt. The Estates-General and government would become alternating between Brussels, the traditional administrative high point of the Habsburgs, and The Hague, ancient capital of the county of Holland.

3 International Context

> *Prenez la nouvelle Constitution de Hollande, huit articles de Londres et vingt-quatre personnes dont bien six ont de la conscience et de l'instruction. Mettez tout cela ensemble hermétiquement fermé à La Haye; secouez bien à plusieurs reprises, observant de choisir un tems bien chaud et surtout bien orageux. Laissez fermenter pendant environ deux mois et vous retrouverez les huit articles de Londres, la nouvelle Constitution de Hollande et les 24 personnes, le tout un peu froissé. Et la liqueur est faite, il faut la boire*.[33]

The constitution's preamble affirmed that William's sovereignty over the Low Countries was a purely domestic affair. The peace treaties that 'pacified Europe', negotiated in Vienna while the Committee was meeting in The Hague, were of a purely declaratory nature. Yet, the specific development of events from 1813 to 1815 cannot be understood without a clearer view of European diplomacy. When William of Orange proclaimed himself sovereign in the Belgian provinces (1 August 1814), the monarch pointed to the 'magnanimity of Europe's sovereigns' and the political system they had projected to design as the main cause of the extension of his own power.[34] Even if the creation of the United Kingdom may appear novel, it was a logical consequence of several earlier designs to employ the Southern Netherlands as a stabilizer of international relations.

From the separation of the Netherlands on (1568–1648), the Southern Netherlands had become a military contact zone between France, the Dutch Republic and the German space. Ruled at a distance from Madrid, their physical defense had become near-impossible and too expensive. Subsequent plans of partition between France and the Dutch, between Britain and the Dutch, or the creation of an "independent canton republic" did not materialize. Yet, from 1698 on, the Dutch obtained the right to occupy several fortresses. The 1715 Barrier Treaty made their presence a precondition to the transfer of sovereignty to Emperor Charles VI of Habsburg.

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[32]Bornewasser (1983b, 232). The 1814 constitution counted 55 seats for the Northern provinces of Guelders, Holland, Zeeland, Utrecht, Frise, Overrijssel, Groningen, (North-)Brabant and Drenthe. The 1815 constitution added the same number for the more populous Belgian provinces, counting 3.25 million inhabitants against just two in the North, Romein (1961, III, 65).

[33]Anonymous pamphlet against the union of North and South, 1815. Anon (1815) *Pourquoi faut-il une nouvelle constitution*? (Royal Library, Prints, II 86.908 A 1/5).

[34]Raepsaet (1838, 348–349).

William of Orange's sovereignty as prince was recognized for the North in 1813. An 'extension' was part of a deal between Britain and the Dutch. Britain was the active promotor of William's ascent to the first rank of European monarchs. William needed compensation in two regards. First, as dispossessed German ruler. This legitimized his sovereignty over Luxemburg, which had traditionally been part of the Southern Netherlands, as Grand-Duke. In this quality, William counted as a member of the German Confederation.[35] Second, as head of state of Holland, which lost the Cape colony to Britain during the Napoleonic Wars.[36] By extending William's sovereignty to the Meuse, Britain would interpose a neutral buffer between France and the spectacularly aggrandized Kingdom of Prussia.[37] The Eight Articles of London, adopted in June 1814 in a diplomatic conference with Britain, Prussia, Russia and Austria, imposed a "perfect amalgam" for the union of North and South, imposing the necessary amendments to the 1814 constitution.[38] This would prove to be rather illusory. William could not pursue his state-building adventure without this international support. Whereas his own father had been chased in 1787 and only restored with Prussian help, William of Orange obtained more 'with a single penstroke, than the big sword of his ancestors William the Silent, Maurice or Frederick Henry had ever done'.[39] Consequently, the construction, establishment and first years of the United Kingdom were also those of a 'special relationship' of tutelage under British aegis.[40] Dutch affirmations of the contrary—the Dutch people had spontaneously invited William to return-emphasized this fragility.[41]

4 The Right to Declare War (Art. 57-58)

The 1815 constitution has drawn attention from scholars for its domestic implications. The creation of a First Chamber, the role of Provinces or the recognition of many freedoms and liberties allow for a continuity or a more genealogical approach with regards to present-day positive law. Yet, one of the most essential attributions of sovereignty remains outside the perimeter of discussions: the right to wage war and conclude treaties. William's sovereignty could only be full in the arena of European sovereigns when the constitution defined the extent to which the monarch could represent the state externally.

[35]Van Sas (1981, 283).

[36]Van Sas (1981, X, 280).

[37]Prussia equally obtained the right to occupy the fortress of Luxemburg. Although William was its ruler, the Grand-Duchy served as a common buffer against France, Bornewasser (1983b, 225).

[38]And thus not its replacement by an entirely new text, Raepsaet (1838, 128). For a published version of the text, see Ibid., VI, 253–256.

[39]De Gerlache (1842, I, XV).

[40]Van Sas (1985).

[41]Van Sas (1981, 285).

Within the range of possibilities, from full royal control to full parliamentary participation, the 1815 constitution stands out as a more authoritarian restoration constitution. The preamble already indicated that the Committee had not thought it wise to limit William's foreign competence, in view of the monarch's personal wisdom and good conduct in foreign affairs. As such, this reasoning, in continuity with the 1814 Northern constitution, fails to incorporate the possibility of a less capable successor. This is even more surprising in view of the traditional distrust against the monarch in the Low Countries. Philip II of Spain was chased in the North, Joseph II was declared destitute in the South.

Art. 57 (Art. 37 of the 1814 constitution) delegated the right to declare war or make peace to the King. Only the information considered appropriate for the security of the Kingdom could be communicated to the Estates-General. Art. 58 (Art. 38 of the 1814 constitution) conferred the right to conclude and ratify all alliances and treaties onto the King. The Estates-General had a right to be informed, but nothing more. The only exception, added in 1815, constituted in the cession of territory in peacetime, which required the approbation of the nation's representatives. In wartime, decisions could be so urgent, that the monarch could not be hindered.

Raepsaet argued that this was contrary to the most distinguished authors of the law nations. Yet, Willem Queijsen (member of the Council of State, 1754–1817) opposed that the royal decision to separate a part of his territory from the rest, could not become subject of political games within the national representation. If the Estates-General could be in a position as to prevent the King from concluding a treaty, and oblige him to continue a fight against his own wishes, Queijsen added, he would not be the Head of Government any more, and be deprived of his royal dignity.[42] Van Hogendorp nuanced this position. William I would not be completely unrestrained in his foreign policy actions. War was the most costly of all state activities. Precisely the budget had been listed as one of the rare specific competences of the national representation. Extraordinary expenditures such as war did not fall within the decennial vote of the ordinary budget.[43] Moreover, tying foreign policy to parliamentary consent would have gone further than the British system. The King's negotiations and treaties fell under the Crown Privilege, as Van Hogendorp thought. David Armitage's analysis of parliamentary debates after the United States of America's Declaration of Independence seems to provide support for this thesis. The names of Pufendorf and Vattel were depicted as '*lubrications and fancies of foreign writers*'.[44]

From an external point of view, the right to wage war had been subject to theological *bellum justum*-theories up to the middle of the 17th century. The *auctoritas* or authority to wage war was confined to the supreme heads of the Christian world, in an attempt to rein in aggression. Yet, the confessional fragmentation of Europe multiplied the number of sovereign actors. Early modern law of nations-theory constructed a new set of norms, consisting essentially of a digest

[42]Queijsen, meeting of 12 May 1815, Van Maanen (1887, 40).

[43]Bornewasser (1983b, 230), Van Sas (1981, 289).

[44]Armitage (2012, 135–153).

of state practice. They did not automatically derive from theological concepts. The age of 19th century "positivism", as it is often described[45] or criticized by present-day legal theorists[46] was in the first place a product of continuity with 17th and 18th century categories. Both naturalist and realist authors were common, from Zouche and Rachel to Wolff and Pufendorf, or from Vitoria and Suárez to Moser and Martens.[47] The dichotomy between authors according priority to state practice or to the world of ideas is eternal. The Vienna Congress is attributed a milestone role in the history of international law for the installation of a collective security-system. Yet, this position is subject to criticism. The institutional innovations of 1815 were scarce.[48] The system ultimately collapsed due to the incessant waves of internal challenges, or what contemporaries called the resurgence of the French Revolutionary heritage as the 'nationality principle'. Doctrinal evolutions from Klüber (1762–1837) to Bluntschli (1808–1881) should be seen as a continuum, with the latter starting point still entrenched in Old Regime reasoning and exempla.

Whereas the 1815 constitution gives a blanco mandate to the King, most Old Regime theorists had pleaded for bottom-up limitations on royal power, through national representation. Grotius,[49] Pufendorf and Vattel[50] closely associated the social *corpus* with important external decisions. Cutting off part of the population from the others, with whom they had been associated in the same society, would be impossible for Pufendorf.[51] A moral *corpus*, such as a state, was only the result of its members' consent. Only their intention could guide the judgement of external actions. Who could argue that the founders of any society between men would have committed the folly to attribute the competence to alienate *ad libitum*? In case of occupation by a third power, the population could exercise its natural right to revolt.

Vattel offered a complementary angle. Conformably to the French theory of limits on monarchical power through the *lois fondamentales*, no 'Prince or sovereign can naturally been called the owner of his State. He is only its caretaker. The dignity of head of state does not confer the right to alienate'.[52] Vattel's affirmation of the ruler's competence as the beneficiary of a usufruct was in line with French domestic constitutional tradition in the Old Regime.[53] In 1713, the Parliament of Paris used this principle to oppose Louis XIV's wish to have his grandson abdicate his natural right of succession to the French throne. The Revolution did away with

[45]García-Salmones (2013).

[46]Koskenniemi (2001).

[47]Brown Scott (1911–1953).

[48]Jarrett (2013, 358).

[49]Haggenmacher (2013).

[50]Jouannet (1998), Chetail and Haggenmacher (2011).

[51]Pufendorf (1735).

[52]Vattel (1758, I, 226–227).

[53]See also Raepsaet's use of Grotius, *De iure belli ac Paci*s, III, XX, nr.5 as introduction to the 'Observations d'un Belge sur le sort éventuel des Pays-Bas Autrichiens' Raepsaet (1838, 220): The monarch does not hold his authority from a right of full property, but only in usufruct.

this, as the *people-roi* was now governing itself. Louis XVIII, who succeeded his brother Louis XVI in 1814, was able to lift this old theoretical limit on monarchical power. In spite of the allegation of the perpetuity of the Bourbon dynasty across political regimes, Louis XVIII was freer than his predecessors had been.[54]

Specific cases in European diplomatic history corroborated these ideas. In June 1720, George I of Britain promised the cession of Gibraltar to Philip V of Spain. The British monarch communicated a letter through his secretary of state James Stanhope. The cession would take place *du consentement de mon parlement*. In the eyes of Philip V, this constituted an enforcable international promise. Yet, George I retrenched behind the impossibility to act without the consent of Parliament, arguing that territorial cessions required the application of the "King in Parliament"-principle.[55] Likewise, after Charles XII's destructive defeat in the Great Northern War, the Swedish *Riksdag* modified the constitution in such a way as to impose the participation of the Estates in peacemaking.[56]

5 Leave Us as We Are: Jan-Jozef Raepsaet the Constitution as a *Pactum*

> C'est une maxime de sagesse et de prudence dans un Législateur, que celle qui porte: Laissez-nous tels que nous sommes.[57]

Raepsaet, the Constitution's main conservative critic, was trained *in utriusque juris* at the University of Louvain, where he obtained prizes for rhetorical excellence. It is no surprise that he considered history and literature as essential handmaidens for the exercise of the legal profession. He claimed that Flemish customs of public law went back to the seventh century.[58] His career as revolutionary and icon of protest turned around completely. He became a member, and even president of the *Conseil Général* in the Department of the Scheldt. Later on, he was even called up as a member of the *Corps Législatif* in Paris.[59] Although Raepsaet seemed to have spent his time mainly on studying in the various libraries of the capital, his enrolment in the Napoleonic system is not without significance. Pledging allegiance to the parvenu-Emperor of France, or being present at his self-coronation in the Notre Dame, where the pope was humiliated, did constitute a rupture with the Old Régime-traditions Raepsaet advocated throughout his Austrian period.

Raepsaet was a specialist of feudal law. An elaborate essay on inaugurations in the Southern Netherlands ranks among his main publications. This text was written on purpose, in order to tie William I to the Old Regime idea of contractual

[54]Mansel (2004, 210–211), Evans (2016, 30).

[55]Dhondt (2015, 238).

[56]Vattel (1758, II, 256), Mattéi (2006, 152).

[57]Raepsaet (1838, 227).

[58]Dhondt (2001, III, 21).

[59]As one of the 26 Belgian members. Devleeshouwer (1983, 200).

monarchy.[60] Raepsaet personally met William I in September 1814. During six quarters of an hour, Raepsaet recalled popular dissatisfaction, the virtues of the old constitution and government and the ideal new system.[61] A meeting between these two figures was logical. During the Revolt against Joseph II, Raepsaet had been advocating that the constitutions of the County of Flanders, a disparate hodgepodge of incidental documents and declarations, held the same rank as that of the Duchy of Brabant. Under the Austrian restoration (1790–1792), Raepsaet was charged with the draft of a new constitution for Flanders.

In Raepsaet's mind, the United Kingdom of the Netherlands was of a double nature. On the one hand, the creation of a new state corresponded to the necessity of a *titre légal* in the Public Law of Europe. The diplomatic creation of the Kingdom can thus never be seen in a solely domestic perspective. International circumstances are co-creators and are never of a purely declaratory nature. Foremost in the case of the '*théâtre naturel des guerres du continent*'.[62] If the Great Powers had consented in the transfer of the Southern Netherlands from Spain to Austria in 1713–1715, the same ought to apply a century later.[63] Loyalty did not reside in his faith in the House of Habsburg, but in his loyalty towards institutions. Raepsaet's incidental laments on the Vienna Congress, where '*on se serait permis de traiter de nous et sans nous, par un simple article* […] *sur des bases convenues avec le prince d'Orange, avant qu'il ne fut notre souverain*' should thus not be overstressed.[64]

On the other hand, Raepsaet argued that a change in international circumstances could not invalidate internal traditions. The old constitutions of the Southern Netherlands were the compass of political action.[65] They had been reaffirmed time and time again, in 1715 as well as in 1790.[66] Louis XIV had even conserved them when he conquered parts of French-speaking Flanders.[67] Raepsaet even went so far as to deny any unification intention to the Spanish and Austrian rulers of the Southern Netherlands.[68] The *Code Civil* of Napoleon had only been a vain attempt to abolish the formal authority of Roman law, ordinances and customs. Their spirit

[60]Cornelissen (1841, XXII).

[61]A proposal to sit on the monarch's Council of State was declined. After his Napoleonic responsibilities, Raepsaet preferred the calm of his local Oudenaarde.

[62]Raepsaet (1838, 127, 205).

[63]Raepsaet (1838, 225).

[64]Raepsaet (1838, 177). See as well his accusations of corruption against the British ambassador Clancarty, who would have obtained the marquisat of Heusden (near Ghent) in exchange for an unequal burden-sharing between North and South. See, on this topic: Judo (2007).

[65]See also Anon (1814).

[66]Convention relative to the Affairs of the Austrian Netherlands between Austria and Great Britain, the Netherlands and Prussia, The Hague, 10 December 1790, Parry (1969–1981, vol. 51, 71), Raepsaet (1838, 212).

[67]Raepsaet (1838, 240).

[68]Raepsaet (1838, 242).

had been explicitly acknowledged by the Code's authors as the true inspiration.[69] Uniformisation of regions as different as Frise, Hainault or Flanders would be doomed beforehand. A commercial code, for instance, had never been necessary in the heyday of Bruges, Ghent or Antwerp. Even more, the customs of the stock exchange had travelled to Amsterdam![70]

Raepsaet's plea for upholding the spirit of Old Regime diversity was perfectly congruent with the conservative perspective of the legitimacy-principle of the Vienna Congress. Customs and traditions provided internal stability, whereas treaties consecrated the external aspect of sovereignty, starting with state recognition. William's use of an assembly of appointed "notables" to endorse the constitution, seemed outright absurd. The Belgian nation had no other representatives but the three orders of the traditional estates in every province.[71] Happiness and opulence were the logical consequences of the good government of ancient constitutions.[72] Certainly in contrast with the chaotic succession of constitutions in France. Even more, its countryside nobility had always been perceived by the population as protectors, benefactors and "fathers" of the villages under their jurisdiction.[73]

Raepsaet was not a mere advocate of a return to the Old Regime. He did integrate the necessity of a new state. There was an explicit need for a '*centre de circonvallation*' to the North of France.[74] Even more, if a change in statehood would turn out to be beneficiary to the Southern Netherlands, the constitution could and ought to be modified. William's attempt to regenerate the XVII provinces was, after all, an adaptation of Charles V's Pragmatic Sanction (1549), which considered the Low Countries as a single inheritance. Yet, within this new framework, Raepsaet pleaded for a return of the societal forces that had been present since the Middle Ages. Or, in more fashionable 18th century terms, for a cooperation of elites as defended by Montesquieu.[75] The estates' cooperation in legislative power, or the administration of the treasury was as self-evident as that to wage war or conclude peace. In modern terms, we could call him an advocate of subsidiarity and multi-level governance within the composite United Kingdom of the Netherlands. A common constitution was necessary, but integration did not need to go beyond

[69] '*Suivant cet avis, le code n'est qu'une analyse de la loi romaine*; *l'on accorde force de loi à l'analyse de la loi, mais on refuse force de loi à la loi même*; *et tandis qu'on accorde force de loi à l'analyse, on reconnaît qu'elle est insuffisante sans le concours de la loi qu'on a abolie*.' The code would furthermore generate nothing but disorders: '*ces codes, qui ne laissent guère que droit romain ou la force de la raison écrite, autorisent un juge à trouver sa raison meilleure que celle de Papinien*.' Raepsaet (1838, 243).

[70] Raepsaet (1838, 250), De ruysscher (2009).

[71] Raepsaet (1838, 121).

[72] Raepsaet (1838, 227).

[73] Point made by de Thiennes and de Mérode. Raepsaet (1838, 151).

[74] Raepsaet (1838, 221).

[75] Dhondt (2001, VI, 201).

what was required to maintain '*la considération et l'influence dans la Balance de l'Europe* […] *nécessaires pour nos intérêts commerciaux et politiques*'.[76]

Raepsaet saw the new Constitution as a *Pactum* between the monarch and the representative forces in society. Consent was explicit in the inauguration ceremony. The monarch should be recalled regularly of the theoretical foundations of his powers. He relied explicitly on Grotius and Vattel to sustain this point.[77]

In sum, William's sovereignty relied on two elements: '*titre légal*' (internationally conferred) and '*anciennes lois et coutumes*.'[78] Unfortunately for him, the advantages of French-style centralized administration had conquered the minds of his interlocutors, passive Belgians and vigorous Dutchmen alike.[79] This was perceivable to the ultimate degree: the award of a near-unlimited competence in foreign affairs, designed to fit one single man, irrespective of his successors.[80]

6 Epilogue: The Eclipse of the Monarchical Principle

The Belgian Constitution of 1831 broke with the specific deficiencies of William I's constitution. The revolt of local elites and young graduates was a consequence of the unequal distribution of favours and positions within the army and administration.[81] The document approved in February 1831 by an elected National Congress explicitly turned the order of priorities upside down. William's sovereignty had preceded the constitutions of 1814 and 1815. The Belgian people, represented in Congress, established the nation's sovereignty before any ruler could personify or represent the state. Establishing this sovereignty, however, in view of the Southern Netherlands' delicate position on the European chessboard, was an external as well as an internal affair. France applauded the reduction of the buffer state designed against it in 1814–1815. Britain could support the liberal principles behind the insurrection, as far as Belgium would observe a strict neutrality.

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[76]Raepsaet (1838, 222).

[77]This is no surprise. Vattel's popularity in 19th century thought is a corollary of the political structure of the Republic of Neuchâtel. Vattel's home state was ruled at a distance from 1707 on. Consequently, Vattel advocated local sovereignty throughout his work, Dhondt (2015b). See also the use of Bynkershoek by Raepsaet on the question of wartime indemnities for the civilian population, Raepsaet (1838, 126, 222–224).

[78]Raepsaet (1838, 222), adding Montesquieu's conservative appreciation of custom as the source of a nation's felicity, and Grotius' similar point of view, confirmed by the 'authority' of Cicero.

[79]Olcina (2010, 36).

[80]Raepsaet (1838, 163): '*que le roi, par diverses considérations, et surtout dans la situation actuelle du royaume, pourrait se trouver personnellement trop faible pour résister aux instances pressantes de puissances voisines.*'

[81]This ran against article 11's promise of equal treatment between the King's subjects for appointments in public service, Witte (2016b).

The ill-reflected general delegation of powers to the monarch uncoupled the administrative Napoleonic tradition from the popular legitimacy made necessary by the French Revolution. As the constitution's preamble stated, the 'person of the monarch', had been the object and purpose of negotiations. This is striking, compared with the criticism addressed to Joseph II. We shall only quote erstwhile insurrection leader Hendrik Van der Noot (1731–1827)'s '*Si nous avons un prince c'est afin qu'il nous préserve d'avoir un maître*.'[82] The nation was not consulted in the South. Individual freedoms and liberties were numerous, but the urge to ensure 'the freedom of persons, the security of property, and all civil privileges', was not very different from the recipe used by Napoleon to urge figures as Raepsaet to participate in the French regime.

Although little discussed during the National Congress session, Art. 67 of the 1831 Belgian Constitution put brakes on monarchical power in foreign affairs. This was a consequence of the now generalized primacy of the legislative branch. Art. 67 should be seen in the context of judicial review by courts and tribunals of acts of the executive branch, or the introduction of ministerial responsibility.

This general liberal tendency can be found in Thorbecke's commentary on the 1815 constitution, which appeared in 1839. The distinction between wartime and peacetime territorial cessions was absurd and without meaning, according to the Dutch constitutionalist, who had taught in Ghent, as well as in Leiden.[83] The overarching structure of the constitution commanded to treat any alteration of territory as an outright modification of the document itself. Practically speaking, the monarch's hands would equally be tied in wartime, since the national representation had the—theoretical—possibility to oppose a modification of the constitution.

Diplomatic practice attributed a larger role to Belgium's new King, Leopold of Saxe-Cobourg. Thanks to his political and military experience, as well as his ties to both ruling houses in London and Paris, the monarch's negotiating position was without comparison to that of civil ministers or diplomats. Parliamentary control of the settlement of the nation's borders was a fiction. In his commentary on the Belgian constitution, Thonissen stated that most diplomatic information was generically unsuitable for divulgation in the public arena.[84] Jean Stengers equaled Leopold I's mental conception of foreign policy to that of an Old Regime prince.[85] Yet, the domestic legal architecture behind the exercise of his competences differed substantially from that of "monocrat" William I.[86]

[82]Dhondt (2001, V, 42).
[83]Thorbecke (1839, 69).
[84]Thonissen (1844, 202).
[85]Stengers (1996, 248).
[86]Gilissen (1979b, 131).

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Constituent Power and Constitutionalism in 19th Century Norway

Eirik Holmøyvik

Contents

Abstract The Norwegian 1814 constitution became in the middle of the nineteenth century an intellectual battleground between the constitutional ideals of the French revolution on the one hand, and the constitutional ideals of the restoration era on the other hand. According to the former understanding, the constitution was meant as an instrument of delegation from the sovereign people as pouvoir constituant to the state institutions as pouvoirs constituées. According to the latter understanding, the constitution was a contract for sharing sovereignty between the king and the people. Being an act of rebellion against the Treaty of Kiel, which stipulated that Norway would enter into a personal union with Sweden, the constitution-making process was consistently legitimized with the sovereignty of the people. The Norwegian framers' understanding of constitution was entirely conventional in American and European revolutionary constitutionalism. The constitution was considered by the

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framers as an instrument of delegation from the people to the state institutions. There was no trace of contract theory in neither the 1814 constitution's text nor the discussions at the constitutional assembly. The Norwegian 1814 constitution did not follow the path European constitutionalism was heading at the time. The post 1814 European constitutions followed the so-called monarchical principle, which rejected the sovereignty of the people and were legitimized by monarchical sovereignty and contract theory. In the early 1820s, the monarchical principle entered the Norwegian constitutional discourse with the question about a kings' absolute veto on laws and constitutional amendments. King Carl Johan attempted to reshape the constitution's system of separation of powers in accordance with the monarchical principle by a series of amendment proposals in 1821 to curb the parliament's power. These spurred an intense public debate in journals and pamphlets and were firmly rejected by the parliament in 1824. After the debates on constitutional reform in the 1820s a contractual interpretation of the constitution emerged. For the next 60 years, two contradictory interpretations of the 1814 constitution's character existed side-by-side: One based on the sovereignty of the people, the other based on contract theory and the monarchical principle. In the 1860s, the debate on the constitution's character spilled over into a related issue, namely the uniquely early Norwegian development of judicial review on the constitutionality of laws and administrative acts. Norway was the first country in Europe to develop a consistent and lasting system of judicial review. The Supreme Court's enforcement of the constitution as higher law was grounded in the notion of the constitution being an act of the sovereign people as pouvoir constituant with precedence over laws and administrative acts, being only decisions of delegated authority by pouvoirs constituées. In the 1870s the long debated issue of the royal veto was be put to the test and triggered a political crisis. The king claimed an absolute veto on constitutional amendments, after the parliament adopted an amendment allowing government ministers to attend debates in the parliament. The liberal majority in the parliament rejected the royal veto with reference to the sovereignty of the people. In 1883 the crisis reached its climax as impeachment proceedings were instituted against the government for violating the constitution. In 1884 the Court of Impeachment finally pronounced that the constitution did not allow the king to veto constitutional amendments, and that the exercise of such a veto violated the constitution. The Court's decision also settled the debate on the constitution's character as it firmly rejected the contractual interpretation and instead entrenched the 1814 constitution in the constitutional ideals of the French revolution.

1 What Is a Constitution? Delegation, Octroi or Contract?

What kind of legal instrument is a constitution? In the nineteenth century, the answer to this basic ontological question would produce conflicting replies depending on where, when and who you asked. Particularly so in Norway, where

this question underpinned the constitutional debate for most of the century and shaped Norwegian constitutionalism to be arguably the most progressive in contemporary Europe. The topic of this chapter is the competing views on the constitution's legal character in nineteenth century Norway.

In the first decade of the century, at the eve of the revolutionary era, constitutions were, formally at least, considered acts of the sovereign people delegating public authority to the various branches of government. This was, and indeed still is, a defining feature of the modern written constitution following the American and French revolutions in the late eighteenth century.[1]

The notion of the constitution as an instrument of delegation was most clearly stated in the French 1791 constitution in Title 3 Art. 2 on the public powers:

> «*La Nation, de que seule émanent tous les Pouvoirs, ne peut les exercer que par délégation*.»

The nation was the sovereign, but could only exercise its sovereign authority through delegation. The constitution then went on to delegate ("*délégué*") the legislative power to an elected and representative National Assembly, while the executive power was delegated to the king through his ministers, and lastly, the judicial power was delegated to judges elected by the people.[2]

We find the same notion of constitution in the American state constitutions of the 1770s and 1780s, though somewhat less clearly pronounced. The first modern written constitution, the celebrated constitution of Virginia from 1776, states in Section 2 of its influential Bill of Rights:

> «That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.»

Both documents refer to the fundamental distinction—famously coined for posterity by the French abbé Emmanuel-Joseph Sieyès in 1789—between the people as *pouvoir constituant* and the branches of government as *pouvoirs constitués*, deriving their authority from the former through an act of delegation and set out in a written constitution.[3]

Constitutional development is however neither linear nor is it monolithic. On the European continent the radical constitutional experiments of the 1790s were rather short-lived due to Napoleon's defeat in 1814 and the subsequent monarchical restoration and numerous constitutions following the Congress of Vienna in 1814–1815. From the second decade of the nineteenth century and for several decades to follow, the answer to the question posed above would often be that a constitution is an act of royal authority—an *octroi* in contemporary terminology. Other post-1814 constitutions could be and indeed were considered contracts between the monarch

[1]See Dippel (2005).

[2]See The French constitution of 1791 Titre 3 Art. 3-5.

[3]See the 1789 pamphlets *Qu'est-ce que le Tiers État* and *Préliminaire de la Constitution* in Sieyès (1994[1789], 161 and 198–199).

and the people or the estates for sharing sovereignty and distributing political rights and obligations between them.

The question of the constitution's legal-ontological character was effectively a question of sovereignty and who possessed it:[4] The people, the monarch, or both by virtue of what Carl Schmitt has called a "Verfassungsvertrag"?[5]

What, if any, was the practical significance of these conflicting views on the constitution's legal-ontological character? An immediate consequence concerned constitutional amendment. If the constitution was an instrument of delegation enacted by the sovereign people, then only the people through a special procedure involving the constituent power could amend the constitution and its terms of delegation. Moreover, according to the distinction between the constituent power and constituted powers, the people's representatives in parliament could not amend the constitution by an ordinary legislative act, since that was an act of a constituted power by virtue of the authority granted by the constitution. The constitution thus had precedence over legislative acts. If on the other hand the constitution was an act of royal authority, then the monarch could amend or replace it as well. The monarch would then serve in a dual capacity as both the constituent power and as the head of the executive branch. Lastly, if the constitution was a contract between the monarch and the people or the estates, then amendment to the contract would usually require the assent of both parties to the contract. Here, the distinction between the constituent and constituted powers would be blurred by the fact that both the monarch and the parliament or the estates would also act in the capacity of constituted powers.

2 The Case of Norway

Norway adopted its constitution on 17 May 1814, at a time when the source of legitimacy of European constitutions was shifting from the sovereignty of the people in the constitutions of the 1790s to the monarchical principle or contractual foundations in the post-1814 constitutions. Stuck in an ideological limbo, Norwegian lawyers debated for decades on the constitution's legal-ontological character and its relation to the post-1814 European constitutions. One issue was more contested and sharpened the positions more than any other, namely constitutional amendment. Specifically: Did constitutional amendments require the king's sanction to be valid? On this question, the constitution's text was silent, causing lawyers and politicians on both sides to resort to arguments of the constitution's character.

In the following we shall see how the debates on the royal veto on constitutional amendment divided Norwegian lawyers and politicians between two fundamentally

[4]On the juridification of national sovereignty by means of constitutions, see Müssig (2016).

[5]Schmitt (1928, 63–64).

different understandings of the 1814 constitution's legal character (Sect. 5). This division moreover unveiled an ideological divide between the Norwegian 1814 constitution and European constitutionalism following the Congress of Vienna.[6] We shall also see how the Norwegian Supreme Court's pioneering development of judicial review of the constitutionality of laws, as the first court in Europe, was framed in notion of the constitution as an instrument of delegation on behalf of the sovereign people (Sect. 5.3). First however I will provide some context by discussing the notion of constitutional amendment in the eyes of the Norwegian 1814 constitution's framers (Sect. 3), and thereafter its post-1814 European constitutional and political context (Sect. 4).

3 Background: The Constituent Power and the Norwegian 1814 Constitution

3.1 The 1814 Constitutional Assembly as the Embodiment of the Constituent Power

How did the framers of the Norwegian 1814 constitution view its legal character, and how did they understand constitutional amendment? This question may be answered with relative certainty when we take into account the constitution's background, wording and context.

If we first consider the constitution's background, we find the at the time familiar pattern of an elected constitutional assembly deliberating on and adopting the constitution. The Norwegian constitution-making process in 1814 was consistently legitimised with reference to the sovereignty of the people and its prerogative of adopting a constitution.

First of all, the constitution was an act of rebellion against the Treaty of Kiel, concluded between the king of Denmark and Norway and the king of Sweden on 14 January 1814. Denmark and Norway had formed a union under one king since 1319. The Treaty of Kiel broke the union by stipulating that Norway was to be transferred to the Swedish monarch. The Norwegians responded to the treaty by declaring independence by way of adopting a constitution. The Swedish claims that Norway's independence and constitution violated the Kiel Treaty were rejected by the Norwegians with reference to the sovereignty of the people and its right to decide its own constitution.[7] The same reasoning was applied when crown prince Christian Frederik, acting as regent in Norway and now taking on the leadership in the rebellion, intended to seize the Norwegian throne by right of inheritance. His

[6]On the distinctive character of Norwegian 19th century constitutionalism compared to Europe, see Holmøyvik (2016a).

[7]See Mestad (2014).

claims too were firmly rejected by leading Norwegian officials and academics with the same reasoning as for the Swedish claims.

Secondly, the constitutional assembly was considered at the time as the embodiment of the people's constituent power. After his failed attempt to seize the throne by virtue of inheritance, Christian Frederik issued a call for the election of a constitutional assembly on 19 February 1814. In the call he stressed that that the nation's elected representatives should decide Norway's form of government, and crucially, that his anticipated accession to the Norwegian throne would depend on the constitution eventually adopted.[8] In other words, he as former heir to the Norwegian throne and now leader of the provisional government would have no say in the constitution's adoption. That was the prerogative of the sovereign people acting through the constitutional assembly.

Turning to the 1814 constitution itself, unlike many preceding European and American constitutions, the Norwegian constitution does not contain lofty references to the sovereignty of the people or other general principles. These principles were of course well known by the framers, but the constitutional assembly deliberately left references to general principles out of the constitutional text.[9] This leaves us to search for the framers' fundamental view on constitutional amendment in the constitution's operative provisions.

Art. 112 deals with constitutional amendment.[10] The official 1814 translation into English reads:

> This Constitution, when sanctioned by the National Assembly [the constitutional assembly], becomes the fundamental law of the Kingdom.
>
> If experience should prove, that any part of it ought to be altered, a proposal concerning that affair shall be made in an ordinary session of the National Assembly [the parliament] and be published in print. But it is the business of the next National Assembly to decide, whether the alteration proposed shall take place or not. Yet such an alteration must never be inconsistent with the principles of this fundamentel [sic] law, but only concern modifications in particular cases, which do not alter the spirit of this Constitution, to which alteration the consent of two thirds of the National Assembly is required.[11]

Keeping in mind the distinction between the constituent power and constituted powers, the constitution's amendment procedure is noteworthy in two respects.

Firstly, the constitution was adopted by an elected representative assembly with the one task of writing and adopting the constitution. This fact is also stressed at the end of the document, preceding the signatures of the 112 representatives at the

[8]See Holmøyvik (2012, 417).

[9]See Aall (1859, 409).

[10]Article 110 in the constitution adopted on May 17 1814, but renumbered to article 112 in the revised constitution of November 4 1814. To avoid confusion, I refer to both as article 112.

[11]The Constitution of the Kingdom of Norway. Jacob Lehmann: Christiania 1814. In the English translation, the distinction between the constitutional assembly ("Rigsforsamlingen") in the first paragraph and the parliament ("Storthinget") in the second paragraph has been lost in translation. In the Norwegian language original, paragraphs one and two distinguish between the constitutional assembly competent to adopt the constitution, and the procedure to amend it.

constitutional assembly, where it was stated that the "Deputies of the Kingdom of Norway, hereby declare this Constitution, sanctioned by the National Assembly, to be the fundamental law of the Kingdom of Norway".[12]

Secondly, future constitutional amendments were to be adopted by the parliament with a two thirds majority, but only after a general election. This mechanism is significant in two respects: The intervening general election involves the sovereign people directly in constitutional amendment. Moreover, the king is given no role in constitutional amendment. The king's absence is significant as constitutional amendment then is left altogether to the people through the representatives in parliament and, in theory, through the direct manifestation of the popular will in a general election.

On the king's role the constitutional amendment procedure differed from the ordinary legislative procedure, where the constitution Art. 79 provided the king with a suspensive veto modelled on the French 1791 constitution. For the framers in 1814, the enactment of constitutional law and ordinary laws were to fundamentally different acts not to be confused.[13] One was an act of the constituent power acting as sovereign, the other the act of a constituted power. The distinction between the two was fundamental and clear for everyone at the time. Two examples may illustrate this conviction.

At one point during the deliberations of the constitutional assembly some representatives wanted to extend the assembly's deliberations to policy issues like foreign affairs. To this suggestion one of the assembly's leading members, Christian Magnus Falsen, successfully reminded the assembly that it was not permitted to exercise legislative or executive powers, since it operated on the specific authority on the sovereign people to write and adopt a constitution.[14]

Another example is from the constitution's revision on 4 November 1814 to accommodate a personal union with Sweden. The Norwegian rebellion against the Treaty of Kiel had failed, resulting in a short war with Sweden. The cease fire agreement with the Swedish king, the Convention of Moss of 14 August, allowed Norway to keep its with constitution with the necessary amendments to accommodate a personal union with Sweden. In the negotiations that ensued, the Swedes argued that the new union king would have to consent to the revised constitution. This was the contractual understanding of constitution. The Norwegian parliament however, sitting in an extraordinary session for the purpose of revising the constitution, made it plain that "the constitution, according to its nature, cannot be part of those laws which require a royal sanction to become law".[15] For the framers,

[12]The Constitution of the Kingdom of Norway. Jacob Lehmann: Christiania 1814.

[13]For an in-depth discussion on the framers' view on constitutional amendment, see Holmøyvik (2012, 492–517).

[14]See the records of the constitutional assembly on April 18, 1814 in *Riksforsamlingens forhandlinger*. 1914. Vol. 1. Kristiania: Grøndahl & søns boktrykkeri, 116–117.

[15]Translated from the records of the extraordinary parliament in Det overord. St. Forh. (1814, 427–428).

then, there was no inconsistency in denying the king any involvement in constitutional amendment, while granting him a suspensive veto in the enactment of laws.

3.2 International Context and Influences

Considering the wider intellectual context, until 1814 the Norwegian framers' understanding of constitution was entirely conventional in American and European constitutionalism.[16] The same distinction between constitutional amendment and legislation was found in the monarchical French 1791 and Spanish 1812 constitutions. Neither of them gave the monarch any say in constitutional amendment, yet they awarded him a suspensive veto on legislation. Republican constitutions too distinguished conceptually and institutionally between constitutional amendment and legislation. American constitutions of the 1770s and 1780s and European constitutions from the 1790s adopted different approaches to constitutional amendment. Some constitutions, like the 1780 Massachusetts constitution, made constitutional amendment a prerogative of a specifically elected constitutional assembly, others, like the Spanish 1812 constitution and the 1790 constitution of South Carolina, allowed the ordinary parliament to adopt amendments after an intervening general election. Other constitutions again, like the French 1791 constitution, combined both a constitutional assembly and the ordinary parliament. The most radical approach was to leave the adoption of constitutional amendments to the sovereign people directly by voting in the primary assemblies. In Europe the 1798 Batavian constitution is one example of this model, in America the 1792 New Hampshire constitution is another.

What all these constitutions have in common is the notion of the constitution as an instrument of delegation from the sovereign people as constituent power to the branches of government as constituted powers, as proclaimed unequivocally in the French 1791 constitution and in the 1776 Virginia Bill of Rights, both quoted above. Important protagonists for this idea, apart from the above-mentioned Sieyès, include Thomas Paine in the 1791 *The Rights of Man* and Emer de Vattel in the 1758 *Droit de Gens*.[17]

Of the more than 130 constitutions[18] written between 1776 and the adoption of the Norwegian constitution on 17 May 1814, there are in fact very few exceptions to the said scheme. Arguably the sole notable exception is the Swedish 1809 constitution, which provided the monarch with an absolute veto in both legislation and constitutional amendment. Owing largely to the uniquely Swedish evolutionary constitutional tradition at the time, this constitution did not subscribe to the ideology and form of the constitutions that followed from the American and French revolution.

[16]See Holmøyvik (2012, 241–245).

[17]See Paine (1894[1791], 428) and de Vattel (1758, 34–37).

[18]Estimate based on the list of historical constitutions at www.modern-constitutions.de.

The Norwegian constitutional assembly were well acquainted with foreign constitutions and relied heavily on them in its work. We find numerous traces of borrowing from contemporary constitutions in the final constitutional text, in particular the French 1791 constitution and the Swedish 1809 constitution, but also other French and European constitutions as well as both the American federal constitution and state constitutions.

The Norwegian framers in 1814 were however not unfamiliar with the notion of the constitution as a contractual instrument. The English constitution was commonly considered a contract between the king and the people, and as such it was conveyed as a general model to a European public by celebrated writers like Charles de Montesquieu in the 1748 *De l'esprit des lois* and Jean-Louis de Lolme in the 1771 *Constitution de l'Angleterre*.[19] Both Montesquieu and de Lolme described the English constitution as a contractual relation between the king, the nobility and the commons. For both Montesquieu and de Lolme, but most explicitly stated by the latter, the aim of the English constitution, facilitated by its separation of powers system, was to put the said three powers in perfect equilibrium. As a result, the king, the nobility and the commons in their respective assemblies, all would have to consent to the formation of laws. Among the Norwegian framers, de Lolme was held in particular esteem and he was quoted extensively in the introduction to the most important private draft to the constitution.[20] Nonetheless, the Norwegian framers deliberately rejected his principal idea of a royal veto to maintain equilibrium.

The framers were also well acquainted with the Swedish 1809 constitution, and indeed used some parts of it as a direct model for the 1814 constitution. Crucially though they did not adopt the Swedish constitution's contractual elements like the royal veto on legislation and constitutional amendments.

The fact that there is no trace of contract theory in neither the 1814 constitution's text nor the discussions at the constitutional assembly, allows us to safely conclude that the framers considered the constitution as an instrument of delegation. The practical result of this understanding was that only the people could amend the constitution. This understanding was codified in Art. 112 of the constitution.

4 Context: The Constituent Power in Post 1814 Restoration Era Europe

4.1 The Monarchical Principle and the Constituent Power

Despite its many borrowings from foreign constitutions, the Norwegian 1814 constitution did not follow the path European constitutionalism was heading at the

[19]See Montesquieu (1961[1748], 163–174, book 11 Chap. 6) and de Lolme (1771).

[20]See the draft of Johan Gunder Adler and Christian Magnus Falsen in *Riksforsamlingens forhandlinger*. 1916. Vol. 3. Kristiania: Grøndahl & søns boktrykkeri, 3–8.

time. As the Norwegian constitutional assembly laboured on its constitution in the spring of 1814, another constitution project was under way in France. This constitution, the *Charte constitutionnelle*, was granted by the newly instated king Louis XVIII on 4 June, only 18 days after the adoption of the Norwegian constitution. The *Charte* is a significant event in European constitutional history as it heralded and served as model for a new European constitutional order in an era of monarchical restoration after decades of revolutions and the Napoleonic wars.[21]

European constitutional discourse following the *Charte* was influenced by the so-called *monarchical principle*.[22] The monarchical principle was a political slogan directed against the revolutionary constitutional ideology of the previous decades. Already in 1804–1806, the German philosopher Friedrich Schlegel had called for a "monarchisches Princip" to provide the state with stability.[23] The monarchical principle did not however entail the return to the *Ancien Régime* and the rejection of the essentials of modern constitutionalism introduced by the constitutions following the American and French revolutions, like the separation of powers, representative government or the acknowledgment of certain individual rights. These principles were also implemented in the post-1814 monarchical constitutions and in the *Charte*. After the French revolution there was no going back to absolutism, and the *Charte* stated in its preamble that it recognised the progress of the Enlightenment and the major intellectual changes which it had brought forth.[24]

The *Charte* and the monarchical principle did however reject the sovereignty of the people as the source of legitimacy for a constitution. This rejection of popular sovereignty created a fundamental rupture between pre and post-1814 European constitutionalism. The *Charte* and many subsequent European constitutions in the following decades were instead octroyed, which meant that they were granted by the monarch by virtue of his sovereign authority. According to its preamble, the *Charte* was granted "par le libre exercice de notre autorité royale", making it an "OCTROI à nos sujets". For many German states, monarchical sovereignty even became an international law obligation pursuant to Art. 57 in the 1820 *Wiener Schlußakte* regulating the German Confederation established by the Congress of Vienna in 1815. The monarchical principle was moreover enforced militarily by the Great Powers, acting through treaty systems like the Holy Alliance and the Quintuple Alliance, and authorising interventions in Naples and Spain in the 1820s to suppress threats to monarchical rule.

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[21]On the model character of the *Charte Constitutionnelle 1814*, see i.e. Müssig (2012).

[22]On the monarchical principle, see Böckenförde (1991), Stolleis (2001, 61–63) and Reinhardt (2000, 426–431).

[23]Schlegel (1837, 331–332).

[24]See the preamble to the *Charte*: «Nous avons dû, à l'exemple des rois nos prédécesseurs, apprécier les effets des progrès toujours croissants des lumières, les rapports nouveaux que ces progrès ont introduits dans la société, la direction imprimée aux esprits depuis un demi-siècle, et les graves altération qui en sont résultées […].».

In addition to the octroyed constitutions, a number of the post-1814 constitutions were presented as contracts between the monarch and the people or the estates. One example is the constitution of Württemberg of 1819, which stated in its preamble:

> *Durch freie Uebereinkunft* [sic] *mit den Ständen des Landes ist das Grundgesetz des Staates zu Stande gekommen, das schönste Denkmal der Eintracht zwischen dem König und Seinem Volke*.

In German constitutional discourse, the distinction between octroyed constitutions and contractual constitutions was the subject of much debate during the first half of the eighteenth century.[25] In principle, octroyed and contractual constitutions are fundamentally different in relation to sovereignty and the authority to adopt a constitution.[26] In practice however, even octroyed constitutions becomes functional contracts if they require the consent of both the monarch and the people or the estates for constitutional amendments. In such a case, even an octroyed constitution would irrevocably limit the very sovereignty the monarch exercised when he adopted the constitution in the first place. The fact that octroyed constitutions limited the exercise of monarchical authority is an essential distinction compared to the absolute monarchies of the *Ancien Régime*.[27] Indeed, German legal scholars in the early nineteenth century also considered octroyed constitutions as contracts, as only popular consent was an essential requirement for a "*wirkliche Verfassung*".[28] The key question for defining the nineteenth century constitution's legal-ontological character is thus not how a constitution was adopted, but how it could be amended. As such, most monarchical constitutions in nineteenth century Europe were either formally or functionally contracts for sharing sovereignty.

The contractual notion of constitution appears to dominate European constitutional discourse in the first half of the nineteenth century. The 1831 Belgian constitution illustrates the pervasive influence of the monarchical principle in this respect. Unlike its contemporaries, this constitution presented itself as an instrument of delegation for the sovereign people in the same flamboyant manner as the French 1791 constitution. Not only did the Belgian constitution proclaim that all power flowed from the nation (Art. 25), it also expressly stated that the king possessed only those powers formally attributed to him by the constitution (Art. 78). In other words, the nation was presented as the constituting power delegating authority to the king and the parliament as constituted powers. The institutional system the constitution established was however a contractual one, in the sense that both the king and the parliament had to approve constitutional amendments (Art. 131) as well as ordinary legislation. The Belgian 1831 constitution may have been dressed

[25]See Stolleis (2001, 58–61).

[26]See Grimm (2001: 100–141 on 123–124).

[27]An example on the constitution binding the monarch's sovereign authority is the 1818 constitution of Baden Article 5: "Der Grossherzog vereiniget in sich alle Rechte der Staatsgewalt, und übt sie unter den in dieser Verfassungsurkunde festgesetzten Bestimmungen aus."

[28]Grimm (2001: 100–141 on 123). See also Schmitt (1928, 63–64).

in the robes of the revolutionary radicalism of the 1790s, but underneath its radical veil we find the monarchical principle naked and clear.[29]

4.2 *The Monarchical Principle and the Separation of Powers*

The monarchical principle also had consequences for the constitutions' institutional arrangement and distribution of powers. Whereas pre-1814 constitutions typically placed the legislative power undivided to the people's representatives in a representative assembly, post-1814 constitutions like the *Charte* returned to Montesquieu and de Lolme's ideal of institutional equilibrium between the monarch, the nobility and the people as the object for the separation of powers. At the core of this institutional equilibrium was the legislative veto power of both the monarch and the nobility in the legislative assembly's upper chamber.

Only days after the adoption of the Norwegian constitution, on 24 May 1814 the influential Swiss political theorist Benjamin Constant restated the theory of equilibrium for the nineteenth century constitutional monarchy in his *Réflexions sur les constitutions, la distribution des pouvoirs, et les garanties, dans une monarchie constitutionnelle*, aptly subtitled *Equisse de constitution.*[30] Constant's innovation was the institutional separation between the monarchical power ("pouvoir royal") and the executive power ("pouvoir exécutif") directed by government ministers.[31] Freed from the executive, Constant elevated the monarch to what he called a neutral power ("pouvoir neutre") in the state, which specific function was to maintain the balance between the legislative, executive and judiciary in order to provide stability to the state. In Constant's system, the monarch would check the executive by his right to appoint and dismiss ministers, while the judiciary would be controlled by appointments as well as the monarch's prerogative to pardon. To check the legislative, Constant provided the monarch with the right to appoint members of the aristocratic upper chamber, while excesses by the representative lower chamber could be checked by the monarch by his right to dissolve the parliament and by a royal veto on legislation.

Constant's institutional arrangement and distribution of powers was fundamentally different from pre-1814 monarchical constitutions like the French of 1791 or the Spanish of 1812 as well as the Norwegian of 1814. Whereas Constant's system in accordance with the monarchical principle placed the monarch above the other branches of government, the pre-1814 constitutions in accordance with

[29]See also Dippel (2005, 153–169 on 164), who refers to the Belgian constitution as a "masterpiece of constitutional camouflage".

[30]See Constant (1814).

[31]On Constant's theory of separation of powers, see Vile (1998, 224–227) and Holmøyvik (2012, 536–538).

notions of popular sovereignty typically made the representative parliament the institutional centre. In these constitutions, the monarch and the executive played second fiddle, while aristocratic upper chambers were abolished altogether. The *Charte* and other monarchical European constitutions in the subsequent decades, including later constitutions like Italy's *Statuto Albertino* of 1848 and the Danish constitution of 1849, were however largely in accordance with Constant's *Equisse de constitution*.

This brief outline shows that the Norwegian 1814 constitution was from the outset out of step with the constitutional developments Europe guided by the monarchical principle. As we shall see in the following, the Norwegians were soon to discover their constitutional solitude, and it was to become a source of contention for the next seventy years.

5 Who is the Constituent Power? Norwegian Constitutionalism Contested 1824–1884

5.1 The Monarchical Principle Introduced to Norway

In the early 1820s, the monarchical principle entered the Norwegian constitutional discourse and disrupted the constitutional unity from 1814. This shift from the sovereignty of the people to the monarchical principle is nicely illustrated by the already mentioned Christian Magnus Falsen. He is often referred to as the father of the 1814 constitution due to his leading role at the constitutional assembly and due to the highly influential draft constitution he authored with the Dane Johan Gunder Adler. Falsen's draft constitution, which became the single most important direct source to the 1814 constitution,[32] opened with 32 basic principles, two of which concerned constitutional formation and amendment:

> § 10. Since the purpose of every society is: the happiness of all; since government is instituted to secure man the enjoyment of his natural rights, then only the people as a whole, through its representatives, may constitute its government.
>
> § 11. On the same grounds, the people have the right to, according to specific intervals and rules, to review and improve on the constitution; though so that what was once considered its essence, may not be changed. The current generation cannot impose its laws upon future generations.[33]

These two articles borrowed heavily from the 1780 Massachusetts declaration of rights (Art. 7) and the 1793 French declaration of rights (Art. 28). Their message was clear: The people are the constituent power and only the people through their representatives can adopt and amend a constitution. The same was true for the

[32]See the list of direct sources to the 1814 constitution in Höjer (1882, 195).

[33]*Riksforsamlingens forhandlinger*. 1916. Vol. 3. Kristiania: Grøndahl & søns boktrykkeri, 10. My translation.

specific constitutional amendment procedure in Falsen's draft constitution. Here, all amendments were first to be proposed by an elected constitutional assembly ever 25 years, and then voted on by the people directly in the primary assemblies.[34] The king, to whom the draft constitution provided a suspensive veto on legislation, was not given any role in constitutional amendment in Falsen's draft constitution.

Ten years later, in 1824, Falsen wrote the following in a pamphlet:

> Concerning amendments to the constitution, then presumably *the king has already an absolute veto*, and there is thus nothing left to discuss concerning this part of the argument.[35]

Here Falsen presented a contractual view on the constitution, the very opposite of his position in 1814, and importantly, squarely contrary to the constitutional assembly's position that year. Why this radical turnaround?

The immediate occasion for the royal veto's comeback in Norwegian constitutional discourse was the union king Carl Johan's attempt to re-shape the constitution's system of separation of powers by a series of amendment proposals in 1821. The king argued that the 1814 constitution did not provide a "perfect equilibrium" between the branches of government, and that the scales were in fact tipped in the parliament's favour.[36] The king was moreover concerned—unfounded it later turned out—that the Holy Alliance might take notice of the radical Norwegian constitution and use military force to supress it like it did in Naples the same year.[37]

In order to restore constitutional equilibrium and to bring Norway into line with European restoration constitutionalism the king proposed in 1821 a number of amendments meant to curb the parliament's power. One of the amendment proposals would give the monarch the right to dissolve the parliament. Montesquieu had argued that the executive's right to dissolve parliament was required to maintain equilibrium.[38] The framers in 1814 had like most pre-1814 constitutions denied the executive this competency, while the *Charte* and other post-1814 monarchical constitutions had re-introduced it.

The by far most important and controversial amendment proposal concerned the introduction of an absolute royal veto on legislation. The monarch's absolute veto on legislation was the cornerstone of Montesquieu and de Lolme's separation of powers systems aimed to produce equilibrium. Rejected by the Norwegian framers in 1814, the absolute veto was an essential feature in the later European octroyed and contractual constitutions. It was also a key component in Benjamin Constant's conception of the monarch as a neutral power to guarantee stability.

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[34]See article 228 in the draft, in *Riksforsamlingens forhandlinger*. 1916. Vol. 3. Kristiania: Grøndahl & søns boktrykkeri, 56.

[35]Falsen (1824a, 20). My translation and italics.

[36]My translation of the royal proposition included in the parliamentary records of 1821, see St. Forh. (1821, vol. 7, 685).

[37]See Nielsen (1873, 108–109, 175–176, 181).

[38]See Montesquieu (1961[1748], 169, book 11 Chap. 6).

Incidentally, Constant had served as Carl Johan's adviser in 1813–1814. At that time the former French plebeian, who rose to general in Napoleon's armies and eventually to Marshal of France before in 1810 being offered to succeed Charles XIII of Sweden, had considered making an attempt on the French throne.[39] We do not know however if Constant's constitutional theory influenced Carl Johan directly in 1821, or if he simply followed the pattern set by the new monarchical constitutions in Europe. Nonetheless, Carl Johan's view on the monarch's constitutional role resembled Constant's notion of a neutral power above the three branches of government. As he set forth his constitutional amendment proposals in 1821, Carl Johan argued that such amendments, including an absolute royal veto on legislation, were required for the king to "guard the nations' rights".[40]

The king's amendment proposals spurred an intense public debate in journals and pamphlets. It was during this debate that Christian Magnus Falsen, who supported the king's reform, claimed that the constitution already granted the king an absolute veto on constitutional amendment. As late as in 1818, Falsen had published a commentary to the constitution where he made no mention of a royal veto on constitutional amendments.[41] Falsen's change of heart may have been triggered by the king's call for a constitutional reform, but his call for a stronger executive may also been due to his outspoken scepticism of the substantial representation of farmers in the Norwegian parliament. The combination of a large number of freeholders in Norway and quite liberal voting qualifications in the 1814 constitution awarded voting rights to around 45% of all male citizens above the age of 25, including a substantial part of the peasantry.[42] At the first session of the parliament in 1815, roughly one third of the representatives were from the peasantry, while in 1833 almost half of the representatives were of this class.[43] In 1821 Falsen himself unsuccessfully proposed a reform of the parliament in order to reduce the number of farmers eligible and to restrict admission to the parliament's upper chamber.

Even though an absolute veto on constitutional amendments was not on the table in the contested amendment proposals, nobody could fail to notice that the king and his supporters championed a new notion of constitutionalism compared to the constitutional assembly in 1814. This new constitutionalism emphasised monarchy and contractualism instead of the sovereignty of the people. The absolute royal veto on constitutional amendments was only a corollary to this new notion of constitution.

Falsen and the king's supporters made no secret of the source of their novel constitutional interpretation. In one of his pleas for the absolute veto, Falsen attributed his new view on the constitution to "the monarchical principle, on which

[39]On the relation between Constant and king Carl Johan, see Hasselrot (1950, 9).

[40]Quoted from the parliamentary records of 1824 where the constitutional amendment proposals of 1821 are included, see St. Forh. (1824. Vol. 2, 40). My translation.

[41]See Falsen (1818, 181–184).

[42]See Kuhnle (1972).

[43]See Mohn (1874).

so much is written these days".[44] During the debate in 1824, the king's supporters made frequent references to the monarchical principle, to its implementation in the post-1814 European constitutions and to the Holy Alliance's enforcement of restoration constitutionalism.[45]

The novelty of these constitutional arguments was recognised and criticised by the opponents of the king's amendment proposals. They accused the king transforming the constitution based upon the sovereignty of the people into a contract between the king and the people—in other words turning the 1814 constitution into a post-1814 European restoration constitution.

In the end, the king's amendment proposals, including his demand for an absolute veto on legislation, were firmly rejected by the parliament on the very symbolic date of 17 May 1824. For the Norwegian parliament, the rejection of the king's reform was also a matter of defending Norway's independence in the personal union with Sweden. The Norwegians rightly feared that a strengthened executive in the hands of the union king seated in Stockholm, could lead to Swedish influence on Norwegian affairs and institutions.

Concerning the specific grounds for a constitutional reform, a unanimous standing committee for constitutional affairs rejected the king's claims that the legislative and executive branches were imbalanced in the 1814 constitution. Yet in order not to provoke the king, the committee's report was carefully worded and devoid of any discussion of the monarchical principle. At the very end of the report, the committee even stated that the king, according to the nature of things, did enjoy an absolute veto on constitutional amendment.[46] The committee gave no reasons for the statement and it was not considered significant at the time. Since the veto on legislation and constitutional amendments had been considered interrelated in the preceding debate, the committee's statement is surprising and contradicts its conclusion on the legislative veto. Most likely, the committee's acknowledgement of a royal veto on constitutional amendment was intended to sugar the report's rejection of the constitutional reform.[47]

The preceding debate was however a taste of what was to come. The arguments made on the monarchical principle were seeds of a new understanding and reinterpretation of the constitution among conservatives and other supporters of the monarchy in the decades to come. From now on, there would be no unity among Norwegian lawyers and politicians on sovereignty and the 1814 constitution's legal-ontological character.

[44]Quoted and translated from Falsen's anonymous article with the title "On the Absolute Veto" on March 18, 1824 in the journal *Tilskueren*.

[45]On the debates in 1821–1824, see Holmøyvik (2013).

[46]See St. Forh. (1824, Vol. 2, 108–109).

[47]Most commentators have interpreted the committee's statement in the same way, see Castberg (1964, 327) and Kaartvedt (1964, 283).

5.2 *Contract or Delegation? Competing Views on the Constitution's Character*

The parliament's rejection in 1824 of the king's constitutional reform effectively blocked any major reform of the constitution's separation of powers until the end of the century. King Carl Johan persisted however in his demand for an absolute veto on legislation, and put forth constitutional amendment proposals to this effect at every session of the parliament until 1839, but to no avail. Yet even though the avenue to formal amendment was blocked, the constitution's interpretation continued to be disputed.

The most contested question was the royal veto on constitutional amendment. The king claimed to have such a right, and indeed exercised it by sanctioning constitutional amendments passed by the parliament. On six occasions between 1818 and 1863 the king refused to sanction amendments passed by parliament. In all six cases the parliament respected the royal vetoes. It is not clear however whether the parliament did so in order not to provoke conflict with the king or if it acknowledged a royal veto on constitutional amendments.[48]

Since the framers in 1814 considered constitutional amendment a prerogative of the people through their representatives in the parliament, the constitution's text did not make any reference to the king in this respect, not to speak of a royal veto. As a result of the text's silence on the matter, any argument for a royal veto on constitutional amendment would have to be based on an interpretation of the constitution's character or fundamental principles rather than the text. With the debate that followed the king's proposed constitutional reform in the early 1820s, two distinct interpretations of the 1814 constitution materialised in Norwegian constitutional doctrine.

The first commentaries to the 1814 constitution, by law professor Henrik Steenbuch in 1815 and Christian Magnus Falsen in 1818, before the latter succumbed to the monarchical principle, held that the parliament alone could amend the constitution.[49] At this time, the monarchical principle appears to have been unknown in Norway, and these early commentaries followed the constitution's text closely.

After the debates on constitutional reform in the 1820s however, a contractual interpretation of the constitution emerged. A treatise on Norwegian public law from 1830 held simply and without reasoning that the constitution was a "pact and contract between the king and the people, and which cannot be amended without the consent of both parties to the contract".[50] Consequently, the king's veto followed from the constitution's contractual character, not the constitution's wording. The author, lawyer and politician Fredrik Georg Lerche, did however add a footnote

[48]For an overview of cases, see the faculty of law's 1881 report on the royal veto in Sth. Prp. No. 20 (1881), 29.

[49]See Steenbuch (1815) and Falsen (1818, 181–184).

[50]Lerche (1830, 53). My translation.

where he made reservations to the validity of this "common assumption" if subjected to further scrutiny. Still, Lerche's treatise does indicate that a contractual interpretation of the constitution had become commonplace by 1830.

At this time, Benjamin Constant's constitutional doctrine of the king as a neutral power to balance the three branches of government influenced Norwegian constitutional doctrine. A widely read constitutional law pamphlet written by the military officer Nicolai Tidemand and published in 1829, referred to Constant and argued for a separation of the monarch from the government in order to establish the monarch as a neutral power with an absolute veto on legislation.[51] In a 1834, the philosopher Niels Treschow similarly called for a constitutional reform with reference to Constant's model, including an absolute royal veto on legislation and the establishment of a true upper chamber in the parliament.[52] However, Treschow was hesitant in recommending an absolute royal veto on legislation as long as Norway was part of a personal union with Sweden.[53] Like the parliament in 1824, he feared Swedish influence on Norwegian institutions.

From the 1830s and 1840s, these two opposing interpretations of the Norwegian constitution were grounded in more coherent theories on constitutional formation.

In 1833, the young university lecturer Frederik Stang published the first systematic treatise on Norwegian constitutional law.[54] Stang's treatise was the most comprehensive, important and influential presentation of Norwegian constitutional law until the 1870s. In his 1833 treatise, Stang specifically addressed the constitution's legal-ontological character and its relation to European post-1814 constitutionalism.

According to Stang, the Norwegian 1814 constitution was fundamentally different from most contemporary European constitution as it was neither octroyed nor a contract between the king and the people. While Stang acknowledged that the contractual notion of constitution was dominant in Europe, he explained to the reader that the Norwegian 1814 constitution subscribed to a different kind of constitutionalism as it was adopted "at a time when the people did not recognize any monarchical power, only its own sovereignty".[55] The time Stang had in mind was the revolutionary constitutionalism of the 1790s, when constitutions were held to be acts of delegation by the sovereign people. According to Stang, the Norwegian 1814 constitution was precisely such a constitution and the people alone were sovereign. As a result, the king could not have an absolute veto on constitutional amendment, although Stang allowed for a suspensive veto by analogy of

[51]See Tidemand (1829, 76–114).

[52]See Treschow (1839).

[53]In Tidemand's pamphlet, published posthumously, the publisher Jonas Anton Hielm, a former attorney general and liberal politician, added similar concerns over the absolute veto in a separate postscript to the pamphlet, see Tidemand (1829, 130–131).

[54]See Stang (1833).

[55]Stang (1833, 654 and 31).

the king's veto on legislation.[56] A suspensive royal veto was however impossible to reconcile with the text in the constitution's amendment clause. As a result, Stang's interpretation on this point gained few followers.[57]

Stang also addressed the possible constitutional consequences of the negotiations with Sweden in the autumn of 1814 for revising the constitution to accommodate a personal union with Sweden. Did the negotiations on the constitutional revision turn the constitution into a contract between the union king and the Norwegian people? Stang rejected all such claims, as he concluded that the constitutional revision was minor and that it did not in any way alter the constitution's fundamental character as an act of the people acting as the constituent power through the constitutional assembly in 1814.[58]

While Stang emphasised the historical context of the Norwegian 1814 constitution to distinguish it from subsequent octroyed and contractual European constitutions, others called instead for the constitution to be interpreted in light of and accordance with the monarchical principle and contemporary European constitutionalism. The most influential reinterpretation of the Norwegian constitution was later attorney general Bernhard Dunker's *Om den Norske Constitution* ("On the Norwegian Constitution 1814") published in 1845.[59]

Dunker's reinterpretation of the constitution was a response to a comprehensive commentary to the constitution published earlier that year and written by the liberal lawyer Peder Krabbe Gaarder. Like Stang in 1833, Gaarder rejected a contractual interpretation of the constitution and emphasised the sovereignty of the people as the constitution's basic and guiding principle contrary to most contemporary European constitutions:

> […] our entire constitution as a product of the sovereignty of the people, and [is] also founded upon this principle, which is perhaps more extensively implemented in our constitution than in any state with a monarchical form of government.[60]

As a result of this understanding of the constitution, Gaarder denied the king any veto, suspensive or absolute, on constitutional amendment. His was a classical 1790s style understanding of constitutional formation. In Gaarder's system, the king was only a constituted power, while constitutional amendment was a prerogative of the people as the constituent power.

Bernhard Dunker on the other hand, rejected such a historical interpretation of the 1814 constitution. According to Dunker, the Norwegian constitution had to be interpreted with regard to the constitutional development in Europe *after* its adoption in 1814 and thus according to the monarchical principle.[61] Dunker found a

[56]See Stang (1833, 639–642).

[57]See also Ræder (1841, 80), Hjelm (1863, 91–92) and Höjer (1882, 139–146).

[58]See Stang (1833, 33–34 and 639–642).

[59]See Dunker (1845).

[60]Gaarder (1845). My translation.

[61]See Dunker (1845, 2).

textual basis for his reinterpretation in the constitution's article 1, which stated that the "form of government is a limited and hereditary monarchy".[62]

Before Dunker, the phrase "limited … monarchy" in Art. 1 of the constitution was commonly understood in its historical context as a rejection of monarchical sovereignty and absolutism, which the 1814 constitution abolished. Between 1661 and 1814, the kingdom of Denmark-Norway had been an absolute monarchy, the only of its kind governed by a written constitution, the *Lex Regia* of 1665. The constitutional commentaries of Steenbuch in 1815, Falsen in 1818, Gaarder in 1845 and Stang's 1833 treatise, all held that Art. 1 was a reference to the separation of powers, in which monarchy was limited by democracy through an elected parliament.[63]

Dunker on the other hand, reading the constitution through the lens of the monarchical principle, interpreted the words "limited … monarchy" as an expression of monarchical sovereignty:

> The constitutional meaning of the phrase, saying that the form of government is limited monarchical, is really that *all public authority is vested in the monarch*, although he may be limited in its exercise, so that he in certain matters may not act without the consent of the parliament, this does not really deprive him of any part of it.[64]

According to Dunker, the monarch, not the people, was the source of sovereignty and thus all public authority, limited only by the constitution. Dunker's novel interpretation of the Norwegian constitution was nothing but a mirror-image of provisions in German restoration constitutions proclaiming monarchical sovereignty. The 1818 Bavarian constitution, for example, contained the following provision, that may very well have influenced Dunker:

> Der König ist das Oberhaupt des Staats, *vereiniget in sich alle Rechte der Staatsgewalt*, und übt sie unter den von Ihm gegebenen in der gegenwärtigen Verfassungs-Urkunde festgesetzten Bestimmungen aus.[65]

Having established monarchy as the source of all public authority, Dunker went on to systematically reinterpret the constitution according to the monarchical principle.

A complete reinterpretation was not possible however due to the constitution's clear wording on key issues. Art. 49 proclaimed unequivocally that the legislative power resided in the people through the parliament, while Art. 79 made it clear that the king only had a suspensive veto in legislation. These facts Dunker simply dismissed as an error made by the framers in 1814 due to their inexperience. Like

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[62]The Constitution of the Kingdom of Norway. Jacob Lehmann: Christiania 1814.

[63]See Steenbuch (1815, 11–12), Falsen (1818, 6), Stang (1833, 49–50, 64) and Gaarder (1845, 11).

[64]Dunker (1845, 4). My translation and italics.

[65]The constitution of Bavaria of 1818 Titel II art. 1. My italics. See similar provisions in the constitutions of Baden of 1818 art. 5, Württemberg of 1819 Chap. 2 art. 4, Hesse-Darmstadt of 1820 art. 4, Saxe-Coburg-Saalfeld of 1821 art. 3, Saxony of 1831 art. 4, Hesse-Cassel of 1831 art. 10, Brunswick of 1832 art. 3, Hohenzollern-Sigmaringen of 1833 art. 3 and Hanover of 1833 art. 1.

Montesquieu, de Lolme, Constant as well as king Carl Johan in 1821, Dunker argued that an absolute veto was a constitutional necessity in order to maintain the equilibrium between the branches of government.[66] Moreover he argued that the "very concept of monarchy" in Art. 1 of the constitution demanded an absolute royal veto on all decisions made by the parliament.[67] As evidence, he pointed to the fact that the absolute royal veto was found in all monarchies save for Norway.

Dunker's method was thus to reshape the Norwegian constitution in the image of European restoration constitutionalism. The same method was applied on constitutional amendment. Here, article 112 in the constitution did not expressly bar an absolute royal veto as it made no mention of the king at all. The text's silence allowed Dunker to argue that the king already possessed an absolute veto by virtue of the constitution's basic principle and fundamental contractual character.[68] Whether or not the 1814 constitution was an actual contract between the king and the people was beyond the point. For Dunker, the constitution was a functional contract in the sense that sovereignty flowed from the king to be shared by the people in the manner decided by the constitution. According to this understanding of constitution, a monarchical constitution simply could not be amended by the people alone.

5.3 *The Constituent Power as an Argument for Judicial Review*

The debate on the constitution's character concerned primarily, but not solely the royal veto on constitutional amendments. It also spilled over into a related issue, namely the uniquely early Norwegian development of judicial review on the constitutionality of laws and administrative acts.[69] This issue too concerned constitutional amendment in the sense that it placed the courts as the supreme interpreters and guardians of the constitution. In the 1860s, the people as the constituent power and the specific understanding of the constitution as an instrument of delegation became an important argument to legitimatise judicial review.

Judicial review of the constitutionality of laws was introduced by the US Supreme Court in the celebrated judgement *Marbury v. Madison* in 1803.[70] In France, Emmanuel Joseph Sieyès' had proposed the establishment of a *jury*

[66]See Dunker (1845, 95–97).

[67]See Dunker (1845, 92).

[68]See Dunker (1845, 126–127).

[69]For an English language account of the historical development of judicial review in Norway, see Kierulf (2014). For the Norwegian development in a Nordic perspective, see Helgadóttir (2006) and Rógvi (2013). In the Nordic languages, see Sunnqvist (2014), Holmøyvik and Michalsen (2015, 326–361 and Smith (1993).

[70]5 U.S. 137 (1803).

constitutionnaire already in 1795,[71] and a similar constitutional review of legislative acts was introduced in the 1799 constitution.[72] However, the French system of constitutional review was abolished in 1814 by the adoption of the *Charte constitutionnelle*. Moreover, it was not a true *ex post* judicial review by the courts, but rather an *ex ante* review by one of the legislative bodies, the *Sénat conservateur*. On this background, Norway was the first country in Europe to develop a consistent and lasting system of judicial review of legislation and administrative acts.

Despite having no provision which explicitly granted the court's competence to review the constitutionality of laws and administrative acts, the 1814 constitution was from its adoption considered as positive law to be enforced by the branches of governments, including the courts. As early as in 1822 we find the first known case before the Supreme Court concerning legislation violating the constitution. In 1818 the parliament had adopted a law regulating the sale of copper from a specific mine. As a direct consequence of the law, a number of civil servants in the area lost income stipulated in their employment contracts by imposing fees on the sale of copper. The law itself did not provide compensation for the civil servants' loss. The majority in the Supreme Court however, awarded the civil servants compensation with reference to the constitution's Art. 105 which required full compensation for expropriation as well as the prohibition of retroactive laws in Art. 97.

Even though the Supreme Court in the 1822 case shied away from explicitly declaring the law unconstitutional, the case is still an example of the constitution taking precedence over ordinary laws and thus judicial review exercised by a court. The law was considered constitutional only if the plaintiffs were awarded compensation for the violation of their constitutional rights. The Supreme Court adopted the same approach in review cases in 1841, two cases in 1844, 1854, 1855 and 1862.[73]

Until 1863, the grounds for Supreme Court judgements were not made public. Moreover, the grounds were usually terse and without any discussion of the legitimacy and scope of judicial review. In 1866 the Supreme Court decided another review case, in which a majority of four justices found that an 1857 law on conscription was unconstitutional unless the plaintiff, a naval officer, was compensated for additional workload imposed by the law. This time Peder Carl Lasson, chief justice for 18 years between 1855 and 1873, felt compelled to address the principle of judicial review. In a separate opinion, he wrote:

> How shall the Supreme Court rule, when at the same time the constitution and ordinary laws are submitted to it? As far as I know constitutional law doctrine, in such cases it is generally agreed, that since one cannot instruct the courts to rule according both laws at the same time, then they must necessarily give preference to the constitution […].[74]

[71] See Sieyès (1939).

[72] See The French constitution of 1799 art. 21.

[73] For a detailed discussion of these review cases, see Smith (1993, 78–110).

[74] The judgement is published in *Ugeblad for lovkyndighed, statistik og statsøkonomi*. Vol. 6. 1866–1867, 165–174 on 172.

Lasson's wording and reasoning is similar to that of his American colleague chief justice John Marshall in the 1803 case *Marbury v. Madison*.[75] Due to Lasson's principled and explicit stand on judicial review, the 1866 judgement has become known as Norway's *Marbury v. Madison.* According to Lasson, the constitution had precedence over ordinary laws, but his opinion did not provide any reasons other than a general consensus on the matter.

In the 1850s and 1860s, the Supreme Court's competence to exercise judicial review and its legitimacy was publically debated in Norway.[76] The majority of lawyers and legal scholars accepted that the Supreme Court had the competence to exercise judicial review, but there was less agreement on its scope. There were also critics, like the Danish law professor Johannes Nellemann, who in 1868 criticised judicial review as incompatible with "the nature of constitutional monarchy" as it involved the judicial branch in politics.[77] In 1869, chief justice Lasson published a supplement to his 1868 treatise on criminal procedure where he addressed the legitimacy of judicial review in more detail than in his opinion in the 1866 judgement.[78]

Lasson made a number of arguments for the legitimacy of judicial review.[79] His point of departure was the separation of powers, to which he considered judicial review of legislation and administrative acts as an essential component in order to protect the individuals' constitutional rights from legislative and executive intervention. He also endorsed the development of judicial review in the United States, and referred to Joseph Story's discussion of judicial review in the 1833 *Commentaries on the Constitution of the United States*.[80] The similarities between Lasson's separate opinion in the 1866 case and Marshall's opinion in *Marbury v. Madison* were thus not incidental.

In addition to these arguments, Lasson also addressed the 1814 constitution's character and the distinction on this point between the Norwegian constitution and other European constitutions.

According to Lasson, judicial review by the Supreme Court was legitimate due to the distinction between the constitutive and the constituted powers in the 1814 constitution. For him, the understanding of the 1814 constitution as an act of delegation rather than a contract was essential to the legitimacy of judicial review. Lasson argued that the constitution had to take precedence over laws since "the

[75]"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." 5 U. S. 137 (1803, 178).

[76]On the early Norwegian debates on judicial review, see Slagstad (2011, 367–392).

[77]Nellemann (1868, 113). My translation.

[78]See Lasson (1869).

[79]For an in-depth discussion of Lasson's reasoning, see Holmøyvik and Michalsen (2015, 341–346).

[80]See Story (1833, 425 pp.).

constituent power in article 112 of the constitution is superior to the legislative, the executive and the judicial power".[81] Thus judicial review and the constitution's supremacy over legislation was only a natural and necessary consequence of the distinction between constitutive and the constituted powers.

Lasson also addressed the fact that in Europe, judicial review was unique to Norway. Like Stang in 1833, Lasson made it clear that the Norwegian 1814 constitution was fundamentally different from the octroyed constitutions in other European monarchies as these were contracts involving both the king and the people in constitutional amendment.[82] His reasoning seems to be that judicial review of a contractual constitution might not be legitimate, since the courts as a third party would then interfere in the contract between the king and the parliament. If on the other hand the constitution was an act of delegation from the sovereign people as the constituent power, then judicial review was legitimate since the parliament and the king as constituted powers could always resort to

> the remedy prescribed by the constitution itself in article 112, that is to appeal to the sovereignty of the people – the highest tribunal possible in a free form of government, […].[83]

To emphasise this point, Lasson referred to the famous French political scientist and historian Alexis de Toqueville and his celebrated *De la démocratie en Amérique* from 1835.[84] In his study of the American democracy, Toqueville was both puzzled and enchanted by the American judicial system and in particular judicial review. His observation as to how judicial review was possible in the United States and not in his native France, was that

> [i]n America the Constitution rules both legislators and simple citizens. It is therefore the primary law and cannot be modified by law. Hence it is right that the courts should obey the Constitution rather than all the laws.[85]

In other words, in the United States the constitution was an act of delegation by the sovereign people as the constituent power and thus superior to the laws adopted by the constituted powers. Toqueville also pointed to the fact that unlike in France, where the *Charte constitutionnelle* of 1830 was octroyed and unamendable, the constitution of the United States could be amended by the people through a procedure designated in the constitution. This distinction between the French and the American constitutions led Tocqueville to conclude that judicial review by American courts would not put sovereignty in the hands of the judges as the people could ultimately amend the constitution. This was exactly Lasson's point too when he referred to the amendment procedure in Art. 112 in the constitution as an appeal to the sovereignty of the people.

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[81]Lasson (1869, 18). My translation.

[82]Lasson (1869, 20).

[83]Lasson (1869, 18). My translation.

[84]See Lasson (1869, 18).

[85]Toqueville (1966[1835], 123).

By referring to Toqueville, Lasson identified the Norwegian 1814 constitution with the republican 1787 constitution of the United States. At the same time he distinguished it from the octroyed and contractual monarchical constitutions in Europe.

Other lawyers too argued like Lasson for judicial review as an appeal to the sovereign people as the constituent power.[86] Yet there appears to be no causal link between the understanding of the 1814 constitution as an act of delegation and the acceptance of judicial review. Prominent defenders of the royal veto on constitutional amendments, like law professors L. M. B. Aubert and Torkel Halvorsen Aschehoug (see Sect. 5.5) also accepted the Supreme Court's development of judicial review.[87]

For the topic of this chapter however, it is sufficient to conclude that the chief justice Lasson formulated his famous separate opinion in the landmark 1866 case on the specific understanding of the constitution as an instrument of delegation from the sovereign people as the constituent power.

5.4 The Royal Veto Put to the Test

The scholarly debate on the royal veto on constitutional amendment concerned abstract notions of monarchy and sovereignty, yet this question had a very real political significance: a royal veto could block any constitutional reform initiated by the parliament. As long as the king continued to sanction constitutional amendments, or the parliament respected a royal veto, open conflict between the king and the parliament was kept at bay. Eventually, though, in the increasingly uneasy relationship between the king and the parliament, a constitutional reform was destined to be considered existential by both parties. The unresolved constitutional dispute would then turn into a political crisis in which the existence of a royal veto would be put to the test. That crisis came in the 1870s and reached its climax in 1884 with the entire government being convicted in the Court of Impeachment.

Starting in the mid-nineteenth century, the liberal fraction in the parliament pushed for constitutional reforms to strengthen the parliament and to increase popular influence in public matters. As a result of this campaign, annual sessions in the parliament were finally introduced by a constitutional amendment in 1869,[88] voting rights were expanded in 1884 and a constitutional amendment in 1862 allowed for the introduction of juries in criminal cases, which were finally introduced by the Criminal Procedure Act of 1887.

[86]See Andresen (1862). See also Slagstad (2011, 385).

[87]See Aubert (1864, 41).

[88]According to the 1814 constitution, parliament was assembled only three months every three years, though in practice the parliament remained assembled for longer periods. In 1863 the king had refused to sanction a constitutional amendment for annual parliaments.

At the same time, the liberal fraction also campaigned for an amendment of article 74 in the constitution to allow government ministers to attend debates in the parliament. The aim was to put government ministers under increased parliamentary control and scrutiny by forcing them to justify the government's policies directly before the parliament. According to Art. 12 in the 1814 constitution, the government ministers were the king's personal advisers and appointed and dismissed at his will. Even though the amendment of Art. 74 would not provide the parliament with any formal control over the government and its composition, the king and his supporters rightly feared that its adoption would be a first and decisive step towards a full-blown parliamentary system.[89] The parliamentary system was an existential threat to the king and his government, as it meant that a government would live and die on the mercy of the parliamentary majority instead of the king. This constitutional amendment was thus conceived by its opponents as an attempt to dismantle the separation of powers system in the 1814 constitution and to shift the balance of power radically in favour of the parliament.

In 1872 the parliament, where the liberal fraction enjoyed a large majority, adopted an amendment of article 74 to allow government ministers to attend debates in the parliament. Not surprisingly, the king refused to sanction and proclaim the amendment, claiming an absolute veto. In order to exhaust any argument of a two times suspensive veto by analogy of the king's legislative veto like Stang claimed in 1833, the parliament then adopted in 1874, 1877 and in 1880 identical amendments after three consecutive general elections. Again, the king refused to sanction and proclaim the amendments. In 1880 however, after the third consecutive adoption of the amendment and the king's subsequent refusal to sanction and proclaim it, the parliament responded by adopting a resolution declaring the constitutional amendment valid without royal sanction.

The parliament's rejection of the royal veto in 1880 sparked the most serious political crisis in Norway since the struggle for independence in 1814. The king and his government, led by prime minister Christian August Selmer, considered a *coup d'état* and made certain military preparations.[90] In response, supporters of the liberal majority in the parliament organised militias all over the country to defend the parliament. The extreme political tensions are vividly illustrated by the famous playwright and later Nobel laureate in literature Bjørnstjerne Bjørnson, who in a speech published in 1882 openly threatened with civil war if the king would not respect the "decision of the sovereign people".[91]

In the end, the issue would be settled in court. In the 1882 general election the liberal fraction won a landslide victory. This allowed them to win majority in the parliament's lower chamber as well as all seats in the upper chamber. Their strategy was to convict the government in the Court of Impeachment, to which the

[89]For an overview of the subsequent development of a parliamentary system with emphasis on its constitutional status, see Holmøyvik (2016b).

[90]See Hagemann (2005, 167–168).

[91]Bjørnson (1882, 12). My translation.

parliament's lower chamber could institute a prosecution. Since the Court of Impeachment was composed of nine supreme court judges and seventeen members of the parliament's upper chamber, the well organised liberal fraction could effectively dictate the outcome of the proceedings. On 18 May 1883, impeachment proceedings were instituted against the government for violating the constitution by advising the king to refuse to sanction the 1880 constitutional amendment.[92] The indictment thus presupposed that the constitution did not allow the king to veto constitutional amendments, and that the exercise of such a veto violated the constitution.

5.5 *The Impeachment Case of 1883–1884*

The impeachment proceedings were preceded by an intense public debate from the mid-1870s following the king's refusals to sanction the contested constitutional amendments on the government ministers. While the liberals enjoyed a large majority in the parliament, the country's judicial elite sided predominantly with the king and the government. At the government's request, the faculty of law at the university of Christiania (Oslo), the country's only university at the time, published a comprehensive report on the royal veto in 1881. The six law professors concluded unanimously that the constitution provided the king with an absolute veto on constitutional amendments.[93] The report became the mainstay of the campaign for the royal veto, yet it did little to deter the liberals in their pursuit of the contested constitutional amendment.

The public debate and the impeachment proceedings cultivated the arguments and positions from the preceding scholarly debate. As the constitution's text was open on the issue—it neither expressly prohibited nor allowed for a royal veto—arguments for and against the royal veto, and thus also the impeachment case, hinged upon the understanding of the constitution's basic character: If the constitution was an actual or functional contract between the king and the people, then a royal veto on constitutional amendments naturally followed from its contractual character. If on the other hand the constitution was an act of delegation from the sovereign people as constituent power, then a royal veto was logically impossible as

[92]The government was also charged on two other minor counts for not executing two parliamentary decisions. One of them concerned the financing of militias directed against the king and the government.

[93]The faculty of law's 1881 report is published in Sth. Prp. No. 20 (1881). One of the professors, Frederik Brandt, agreed on the conclusion, but dissented on the reasoning. Brandt dismissed all the report's arguments for the royal veto, in effect saying that the constitution did not provide a royal veto on constitutional amendments. Still he agreed with the report's conclusion since he considered a royal veto on constitutional amendments to be a natural consequence of a monarchical form of government.

the king was only a constituted power acting on authority delegated to him by the constitution.

After nearly 60 years of discussion, these two opposing views on the constitution were now clearly articulated and subject of a heated public debate dominating political life in Norway for more than a decade before being settled by the Court of Impeachment. What were the arguments?

The point of departure for the liberal fraction in the parliament and the prosecutor in the impeachment case was that the constitution "is not a pact between people and king, but a constituent act, by which the people can determine its constitution by virtue of its sovereignty".[94] Here we clearly see the understanding of the constitution as an instrument of delegation. This claim was supported by historical sources intended to prove that the omission of the king in the constitution's amendment procedure in Art. 112 was no mistake or oversight by the framers, but rather a deliberate move motivated by the understanding of the constitution as an act of delegation from the sovereign people. Moreover, this argument was supported by a historical-contextual interpretation of the constitution. The parliamentary majority and its supporters pointed to the framers being influenced by the constitutional doctrine and constitutions following the American and French revolution and based upon the sovereignty of the people.[95] In the impeachment proceedings, the prosecutor argued that the constitution had to be interpreted in light of preceding constitutions like the United States Constitution of 1787, the French constitution of 1791, the Batavian constitution of 1798 and the Spanish constitution of 1812.[96] The constitutional amendment procedure in all of these constitutions, though different in the details, followed the same basic model as the Norwegian constitution by involving the parliament and the people, but not the executive branch (see Sect. 3).

For the king and his supporters, the constitution was a contract in the sense that its basic principle was that "sovereignty shall be divided between the branches of government in equal measures", according to the conclusion in the faculty of law's 1881 report.[97] Yet a contractual argument for shared sovereignty was sensitive to historical criticism, as it was clear and not contested that the constitution was adopted by the constitutional assembly in 1814 by virtue of the sovereignty of the people. To get around the constitution's historical context the king and his supporters resorted to two lines of reasoning, both intended to prove that subsequent events had transformed the constitution into a contract.

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[94]The citation is from the liberal majority in the parliament's standing committee for scrutiny in 1878, quoted from the parliamentary records, see Indst. O. IV. 1878, 17.

[95]A key study is Berner (1878).

[96]See the records of the Court of Impeachment in 1883–1884 in *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 85–89.

[97]Quoted from the faculty of law's 1881 report in Sth. Prp. No. 20 (1881), 39. My translation. The same argument was made by the defender in the impeachment case, see in *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 505.

One line of reasoning challenged the liberals' historical interpretation by emphasising the constitution's revision in the autumn of 1814. The negotiations between the Norwegian parliament and the Swedish king on the constitution's revision had, the royalists argued, rendered it into an actual contract between the parliament and the king.[98] However, as seen in Sect. 3, the extraordinary parliament revising the constitution in the autumn of 1814 had explicitly rejected the idea of the revised constitution as a contract. Regardless of the constitution's origins, the king's supporters argued that a royal veto on constitutional amendments had at least been established by constitutional practice and customary law, since the king had in fact sanctioned all constitutional amendments since 1814.[99]

The other and more important line of reasoning was a systemic interpretation of the constitution's separation of powers aimed to prove that it was intended as functional contract. This argument held that while the constitution had indeed been adopted by virtue of the people's sovereignty, the people had then transferred its sovereignty by means of the constitution to the king and the parliament.[100] There was little historical evidence to support such a claim however. Instead it was based on a deduction from the very concept of separation of powers. For the royalists, separation of powers simply meant Montesquieu's doctrine of equilibrium, in which the royal veto was a key element (see Sect. 4). While there were hardly any references made to Montesquieu at the constitutional assembly in 1814, arguments for the royal veto in the 1870s and 1880s were full of references to him. For the royalists, Montesquieu's prestige was so great that at one point in the impeachment proceedings, the defender referred to him as nothing less than "Montesquieu the master".[101]

The resurgence of the Montesquieuan doctrine of equilibrium was merged with arguments according to the monarchical principle. During the impeachment proceedings, the defender repeatedly argued that an absolute royal veto on constitutional amendments was nothing more than a corollary of monarchy.[102] Europe's post-1814 monarchical constitutions were employed to prove the point, although the European constitutional landscape was more diverse now than in the 1820s. The use of European restoration constitutionalism to interpret the Norwegian constitution can be illustrated with the already mentioned Frederik Stang. In his 1833

[98]See i.e. the debate on June 14 1878 in the parliamentary records, Storthingstidende (1878), vol. 2, 507–522 and the defender in the Court of Impeachment in See examples in *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 717.

[99]See the faculty of law's 1881 report in Sth. Prp. No. 20 (1881), 17, 29 and 39 and Aubert (1880, 5–6).

[100]See the records of the Court of Impeachment in 1883–1884 in *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 505, the faculty of law's 1881 report in Sth. Prp. No. 20 (1881), 19 and Aubert (1880, 24).

[101]Quoted from the records of the Court of Impeachment in 1883–1884, see *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 525.

[102]See examples in *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 515–517, 531, 570.

constitutional law treatise, Stang the young scholar had rejected any link between the 1814 constitution and the later octroyed and contractual constitutions of post-1814 restoration Europe. Later however, like Christian Magnus Falsen in the 1820s, Stang changed his view on the royal veto. As prime minister between 1861 and 1880, Stang advised the king to veto the constitutional amendment on the government ministers in 1872, 1874 and 1877. In 1883, the ageing Stang published a pamphlet arguing for the royal veto on constitutional amendments and called for the interpretation of the Norwegian constitution in light of "later monarchical constitutions" in Europe.[103]

5.6 *The Constituent Power Decided*

The proceedings before the Court of Impeachment lasted for almost eleven months until 1 April 1884.[104] The written records from the proceedings span three volumes with a total of around 2900 pages.[105] In the end, the Court of Impeachment ruled that the constitution did not allow the king to veto constitutional amendments. Prime minster Selmer and the government ministers were all convicted and most of them dismissed from their offices.[106]

The verdict was political in the sense that the parliamentarian members of the Court of Impeachment all voted for conviction, while the Supreme Court judges all voted for acquittal. The Court was sharply divided on class lines as well. The Supreme Court judges belonged to the nation's traditional ruling class of senior civil servants, like the law professors and government ministers. Among the seventeen parliamentarians, only one was a lawyer, the rest being a motley group of farmers, school teachers and others representing the common people.

Despite the case's political context, the Court of Impeachment in 1883–1884 finally settled the 60-year-old dispute on the royal veto on constitutional amendment and the constitution's character. The sovereignty of the people had prevailed over the monarchical principle. Sovereignty was not divided between the king and the people. The people alone were the constituent power, and the constitution was not a contract for sharing sovereignty, but an instrument of delegation for the sovereign people.

The king and some royalist lawyers, like the leading constitutional law scholar and conservative politician Torkel Halvorsen Aschehoug, refused however to accept

[103]Stang (1883, 30–31). My translation.

[104]Due to procedural reasons, the prime minster and the government ministers were indicted individually, leading to separate judgements being rendered from February 27 to April 1 1884.

[105]*Rigsrets-Tidende*. 1883–1884. 3. Vols. Kristiania: Th. Steens Forlags-Expedition.

[106]The Court of Impeachment's protocol is published in Dokument nr. 1 (1930) *Voteringer i Riksrettene 1814–1884*, 109–192. See also Hallager (1915–1916, 101–128).

the judgement as an authoritative interpretation of the constitution.[107] The conservative press reacted with shock and horror, accusing the liberals for annihilating the 1814 constitution and complaining about the "flood of democracy that has now been released".[108] The king continued to sanction constitutional amendments, so that in 1913 Art. 112 in the constitution was formally amended as to explicitly ban the royal veto.[109] Yet after the 1884 judgement by the Court of Impeachment, no subsequent constitutional amendments would be contested with reference to the royal veto. The contractual understanding of constitution was no longer prevalent. Equally important, shortly after the judgement the constitutional amendment on the government minister's access to the parliament went into force. As the king and his supporters had feared, within two decades the presence of government ministers in the parliament had turned into a full-blown parliamentary system.[110]

6 Conclusion

Perhaps the Norwegian 1814 constitution was destined to be torn between different interpretations of its basic legal character. Adopted at the very eve of the revolutionary era and modelled on the constitutions following the American and French revolutions, the 1814 constitution was put into effect in a radically different ideological context due to the dominance of the monarchical principle in post-1814 Europe. As a result, two incompatible notions of constitutionalism existed side-by-side in Norway for 60 years until the great clash in 1880–1884.

In the proceedings before the Court of Impeachment in 1883–1884, both sides conjured up terrifying images of their opponent's notion of constitutionalism. For the prosecutor, the contractual understanding of constitution was equal to absolutism. With reference to Montesquieu's doctrine of equilibrium, the prosecutor remarked:

> If this system prevails, then clearly the principle of constitutionalism in our constitution is dead. Monarchy would once again and with only minor limitations have won absolute supremacy in the state.[111]

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[107] See Aschehoug (1893, 565–581) and Morgenstierne (1900, 378–386).

[108] *Morgenbladet* July 7 1884.

[109] A second paragraph with the following wording was added to article 112: "An amendment to the Constitution adopted in the manner aforesaid shall be signed by the President and the Secretary of the Storting, and shall be sent to the King for public announcement in print as an applicable provision of the Constitution of the Kingdom of Norway." Official translation retrieved from the Norwegian parliament's website: https://stortinget.no/globalassets/pdf/english/constitutionenglish.pdf [accessed 16.09.2016].

[110] For an overview, see Holmøyvik (2016b).

[111] See in *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 301. My translation.

The defender for his part referred again and again to the prosecutors arguments as "the constitutional law of the French revolution" and of Rousseau.[112] More than once the defender alluded to the notorious Robespierre's reign of terror by the guillotine as a certain outcome in Norway too if the people's representatives were left unchecked by a monarch.

Nineteenth century Norway was in many ways an intellectual battleground between the sovereignty of the people and the constitutional ideals of the French revolution on the one hand, and the monarchical principle and the constitutional ideals of the restoration era on the other hand. In Norway, unlike in Europe, the French revolution prevailed.

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[112]See in *Rigsrets-Tidende*. 1883–1884. 3. Vols. Vol. 2. Kristiania: Th. Steens Forlags-Expedition, 535. My translation.

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In Keeping with the Spirit of the Albertine Statute—Constitutionalisation of the National Unification

Giuseppe Mecca

> «Ciò che forma una costituzione è lo spirito, non la lettera» (G. Arcoleo, Diritto costituzionale. Dottrina e storia, Napoli, 1904, 216).

Contents

Abstract This chapter deals with the difficult process of constitutionalisation which characterised Italian Unification. Constitutionalisation is a long-term phenomenon which had the purpose of giving constitutional forms to the Nation. The promulgation of the Albertine Statute is more the start than the arrival of this phenomenon. The focus of this investigation is, therefore, to study the Constitution through its evolution paying particular attention to the process of legal integration

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within the structures of the Albertine Statute and to the amendment mechanisms of the constitutional text. The preamble of the Albertine Statute speaks of «perpetual and irrevocable fundamental law». The word «perpetual» meant the prohibition of revoking constitutional concession, while the word «irrevocable» was intended as a pact between the Sovereign and the Nation. Over the years, very few were the changes to the letter of the Albertine Statute. The interpretation and the practice represented the most important mechanisms of constitutional change (implicit constitutional changes). A primary role was acknowledged to non-written norms. In this perspective, it may well be said that the Italian Constitution consisted in something more than the written text and dwelt in the spirit and not in the letter of the Albertine Statute.

1 Overview

Under the Albertine Statute speaking of constitution meant referring to the «fundamental law of the State» as well as to the act by which the sovereign limits himself transforming the absolute Monarchy into a constitutional government.[1] For the purpose of defining the Constitution, references to Gian Domenico Romagnosi did not go amiss, a jurist who had explained that through the word 'Constitution' one was referring both to a written text and to the legal order of the State.[2] In the commentary by Carlo Boncompagni, to the question: *what is the constitution?*, its pactional nature (an agreement among the various parties in society) was highlighted and the idea was reinforced, through the metaphor of the human body and natural sciences, according to which the constitution was a law that defined the skeleton of the State.[3]

By way of these examples, we may approximately say that the word 'Constitution' referred to a political organisation based on consociationalism

[1]Cf. *Dizionario politico popolare*, ed. Pietro Trifone, introduction by Luca Serianni. Roma: Salerno, 1984, *ad vocem*: «oggi suona come la legge fondamentale di uno Stato; ma più comunemente equivale a costituzione, o, a meglio dire, alla carta costituzionale, ossia a quell'atto col quale un principe assoluto cangia la monarchia dispotica in monarchia temperata» (today it sounds like the fundamental law of a State, but it is more commonly equivalent to a constitution, or, to put it another way, to the constitutional charter, rather to that act with which an absolute prince changes the dispotic monarchy into a moderate monarchy).

[2]The reference is contained in the *Dizionario politico nuovamente compilato ad uso della gioventù italiana*. Torino: Pompa, 1849. Cf. Romagnosi (1937).

[3]«Nelle società che hanno origine da una convenzione la Costituzione è il patto che fissa le condizioni della loro esistenza. Le azioni de' soci sono coordinate secondo il patto sociale, onde concorrono tutte ad un effetto voluto da tutti. In quella società che è lo Stato, Costituzione è la legge secondo cui lo Stato esiste: mancando l'esistenza di quella legge lo Stato si sfascerebbe» (In societies which originate from a convention, the Constitution is the pact which fixes the conditions of their existence. The actions of the associates are coordinated according to the social pact so that they all contribute to an effect desired by all. In that society which is the State, the Constitution is the law according to which the State exists: lacking the existence of that law the State will come apart). Cf. Boncompagni (1880: UTET, 4–5).

(*pactum societatis*), but also to a normative act, to the subdivision of supreme powers within the State and to the idea of limitation/equilibrium of power, to the guarantee of liberties. These definitions recall the modern meaning of Constitution which, from mere empirical concept that described the political condition of a State, ever more took on a prescriptive meaning enriching itself with normative elements.[4] The Italian language had no word indicating the normative layout of the State until the late Eighteenth century.[5]

Having said this, it is fruitless to wish to find the normative superiority of the Constitution, as expression of a positivistic concept, within the Italian experience of the liberal period.[6] It is neither worth our while focussing attention on the normative text of the Albertine Statute to demonstrate its shortcomings and ambivalences. The perspective is rather that of verifying how the Albertine Statute was intended in the liberal era, that of the value attributed to the constitutional charter during the process of national unification, that of constitutional interpretation. It is a matter of reading the Albertine Statute through its evolution, considering contests and contrasts to keep the institutions in harmony with civil society. Specifically, the focus of this investigation is the *constitutionalisation*, understood on the one hand as the *process of legal integration within the structure of the Albertine Statute*, extended to all the pre-Unitary States following political Unification, which implies never-fully-successful attempts at developing representative institutions and parliamentarianism, at democratisation and consensus, while on the other the *mechanism of interpretation and amendability (revision) of the constitutional text* which leads to an integration without a written document as an act of a constituent power exercised by the people. In this respect literature talked about «weak constitutionalisation» as an original character and permanent feature of the Italian State, highlighting how from the very beginning the Italian constitutional development happened without breaks, without revolutions and in the name of continuity.[7]

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[4]Regarding these aspects, see Stourzh (2007, 80–99). Please, also see the essays: *The origins and Transformation of the Concept of the Constitution* (3–37); *Conditions for Emergence and Effectiveness of Modern Constitutionalism* (41–87) and *The Concept of Constitution in Historical Perspective* (89–124) published in Grimm (2016). The author distinguishes between an empirical concept of Constitution and a concept of Constitution which, over time, becomes richer of normative elements. He concludes that the concept of constitution will never come to establish itself as a mere juridical dimension. Compare the thought of Comanducci (1990). The author identifies three models: *axiological model* where the word Constitution indicates the social order of natural phenomena; *descriptive model* where the word indicates the artificial order, the State structure and the balance of powers; the *normative model* where the constitution indicates the juridical norms expressed in documents or customary law. On the meaning and role of the Constitution in different periods, please see: Fioravanti (1999, 2007). Further bibliography in § 3.1.

[5]Mannori (2016). By the same author, please see also Mannori (2011).

[6]Fioravanti (2009).

[7]Cassese (2014, 329–335). The author, while observing the way in which Italy gave itself a constitution, speaks of constitutionalisation by evolution and of missed and/or imperfect revolution. He observes that the process of national unification changed itself from a "national-popular" movement to "monarchical-governmental movement. "Original character and permanent features" were firstly mentioned by Sbriccoli (2009, 591 ff).

If it is true that in Italy constitutionalisation has been a "downward process", this can be partly explained with the culture of the liberal-moderate party concerned about avoiding excesses, favouring compromise and shunning big breaks and upheavals. It is extremely appropriate to underline how the promulgation of a written constitution constitutes only the first step of the slow and difficult process of constitutionalisation, made of progresses but also of reactions, standstills. The other phase is that of experimenting which led to an evolution of the meaning of the Statute in the light of the socio-cultural context.

In Italy, constitutionalisation of National unification is a long-term phenomenon, constituting the key feature for reading the *National Building*.[8] Specifically, the Albertine Statute is a starting point more than an arrival point.[9] From the moment when the sovereign grants the constitution, we realise that the normative act deriving from the granting is insufficient in itself, the constitutional law is simply an act which cannot be revoked, but the constitution in order to live must obtain consent and public opinion must believe in it.

2 Constitution, *Charte* and *Statuto*: Different Names for the Same Thing?

In the *Commento allo Statuto del Regno* (1909) by Francesco Racioppi and Ignazio Brunelli we read:

> Sostanzialmente, Costituzione è il complesso delle *regole*, scritte o non scritte – leggi, usi, precedenti, consuetudini – che danno la fisionomia e il modo di essere politico di uno Stato, ossia determinano in qual modo la sovranità si esercita per mezzo degli organi varii che nel loro complesso costituiscono il governo, e quali sfere di diritti sono garantiti dalla sovranità ai cittadini singoli di fronte al governo medesimo. In breve, Costituzione sostanzialmente è il complesso delle regole che determinano l'ordinamento del governo e le libertà dei cittadini. Formalmente, invece, Costituzione è l'atto o documento scritto, che contiene le regole fondamentali dell'ordinamento politico.[10]

[8] On this aspect, interesting are the remarks by Manca (2014).

[9] Cf. Lacchè (2016b).

[10] «Substantially, Constitution is the whole gamut of written and non-written rules—statute laws, customs, legal precedents, customary law—which give the appearance and the way of looking political of a State, rather they determine in which way sovereignty exercises itself by way of various bodies which as a whole constitute the government, and which spheres of rights are guaranteed by sovereignty to individual citizens against the same government. In short, Constitution is substantially the whole of rules which determines the legal order of the government and liberties of citizens. Formally instead, Constitution is the act or written document, which contains the fundamental rules of the political order». Cf. Racioppi and Brunelli (1909a, 45).

The definition allows highlighting how, for historical reasons, the conviction that the Constitution had a life beyond the written text affirmed itself quickly. It was a matter of a vision already present in the thought of the primeval Italian constitutional doctrine.[11]

The Commentary by Brunelli and Racioppi highlighted also that in the Italian experience the word 'constitution' was a synonym for Statute. It was indeed a matter of two words of Latin origin respectively deriving from the verbs *constituere* and *statuere*.[12] During the Ancien Regime with 'constitution' were generically indicated all the normative acts issued by the Sovereign.[13] The word 'statuto' was directly linkable to the late medieval experience of the Italian Communes where the word indicated the whole of rules which regulated the life of the *civitas*.

In the minutes of the *Consiglio di Conferenza* (Council of Conference) there is no sign of the reasons which led to the denomination even though the hypothesis that the *nomen juris* had been proposed by Giovanetti was put forward.[14] The choice of the denomination was not devoid of relevance if it is duly considered, as the above-mentioned commentary underlines, that the word 'statute' had its French corresponding word in the expression *charte constitutionelle*.

In the France of 1814, the question was, indeed, the subject of careful discussion. Constitution called the revolutionary period back to mind in that act which came from people. The French monarchy wanted, on the contrary, to unequivocally underline that the new normative text was a direct derivation of monarchical power. Therefore, once completed the drawing of the text within the Council of the King, the Chancellor Charles Henri Dambray proposed to use the expression *Ordonnance de reformation*, while Antoine-François-Claude Ferrand suggested the expression *Acte constitutionnel*. The position of Jacques Claude Beugnot prevailed, who shunning both proposals suggested the term *Charte* to which the adjective *constitutionnelle* was coupled according to the decision of King Louis XVIII.[15]

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[11]Opposition between written text and material constitution will have more complete theoretical formulations in the very fortunate volume by Mortati (1998). The original text dates back to 1940.

[12]For a juridical and linguistic analysis of the meaning of the words 'Constitution', 'Statute' and 'Brief' see Bambi (1991).

[13]For example, in the Kingdom of Sardinia the sovereign, Vittorio Amedeo II, gathered in 5 volumes the royal decrees in force in the State entitling Costituzioni piemontesi (Piedmont Constitutions) the work of normative rearrangement. On this collection please see: Viora (1986).

[14]Cf. Ciaurro (1996, 44–45).

[15]On the point Rosanvallon (1994), Lacchè (2002) and Alvazzi del Frate (2013). «Le mot de Constitution, dit-il, suppose le concours pour établir un nouvel ordre des choses, entre le roi et les représentants, soit du peuple, soit du peuple et des grands; et il est bien évident que rien de tel ne se rencontre ici … Puisqu'il s'agit d'une concession faite librement par un roi à ses sujets, le nom anciennement usité, celui consacré par l'histoire de plusieurs peuples et par la nôtre est celui de *Charte*» (The word Constitution, he says, supposes the cooperation—in order to establish a new order of things—between the king and the representatives both of the people and of the people and the great men; and it is very clear that nothing of this will be found here … Since it is a matter of a concession made freely by a king to his subjects, the name anciently used, that name consacred by the history of many people and by ours, is that of Charter). Cf. Beugnot (1866, t. II, 219).

If, in Italy as well, very probably the word Constitution was rejected because it was considered too 'revolutionary', the adjective 'constitutional' was instead associated with the government in order to indicate the way in which the monarchical power was shared with the people.[16] The Statute, indeed, defined the constitutional government as that form of power exercising shared between Sovereign and Parliament where a connection between those ruled and rulers was guaranteed.[17]

3 Albertine Statute as Fundamental Law

The language of the Albertine Statute was archaic and ambiguous, the text was without organic connections. The constitution of Charles Albert contained eighty-one articles and three transitory regulations. The first twenty-three articles were mainly dedicated to the person of the King and to the institution of Regency. Art. 24-32 were gathered under the title *On rights and duties of the citizen*. Art. 33-64 concerned the Parliament and were respectively dedicated to the Senate, to the Chamber of Deputies and contained shared regulations for the functioning of both branches of Parliament. Art. 65-67 concerned Ministers; Art. 68-73 referred to the judicial power; the remaining part was general regulations.

The written constitution was bare and many rules had the taste of general principles rather than directly binding juridical norms.[18] Consequently, the true game was played at the level of praxis and interpretation, of the perennial difficulty to bring the principles therein contained within the doctrinal borders of modern constitutionalism.[19] Substantially it was a matter of extrapolating the effective limitations to the monarchical power from the text of the Constitution and enucleating rules which consented a real development of the parliamentary principle guaranteeing fundamental rights and liberties.

[16]On this aspect please see the remarks of Mannori who highlights how during the post-revolutionary period in Italy literature preferred to talk about «governi liberi» (free governments) rather than «governo costituzionale» (constitutional government). Cf. Mannori (2016, 120).

[17]Ragazzoni and Urbinati (2016).

[18]The Knight Des Ambrois noted: «L'urgenza, dice, non è di formulare una Costituzione che bisognerebbe dare dopo matura deliberazione, come conviene al bel paese e alla dignità del Governo, ma è indispensabile fissare principi» (Urgency, he says, is not that of formulating a Constitution which should be granted after mature deliberation, as befits the Bel paese and the dignity of its Government, but it is indispensable to fix principles). Cf. Minutes of the Consiglio di Conferenza (Council of Conference) of 3rd February in Ciaurro. *Lo statuto albertino illustrato dai lavori preparatori* cit., 115–116.

[19]Reference is to the classical volume by McIlwain (1998).

3.1 The Albertine Statute by Means of Its Preamble

The Albertine Statute was preceded by an ample preamble. The introductive formula «per la grazia di Dio» (by the grace of God) recalled the expression *Reges Dei gratia*, *reges Catholici* probably used for the first time by the Lombard Kings, then made his own by Charlemagne and, finally, after a long evolution become an expression of royal legitimism.[20] It was inserted in the preamble nearly to mark without any doubts that the constitution was an act of sovereignty of the King. Then, the list of the feudal and honorary titles of Savoy Sovereigns followed. The same expression «con la lealtà di Re e con l'affetto di padre» (with the loyalty of King and the love of Father), which precedes the manifestation of will directed to grant representative institutions more in tune with the new times and the interests of the Nation, is typical of the paternalistic vision of the State *d'ancien regime*. It is not difficult to find a certain lexical familiarity with the 1814 *Charte Constitutionnelle* in the Preamble of the Albertine Statute.[21] The beginning of the Albertine Statute reproduces the magniloquent expressions of the French model. The formula «par la grace de Dieu» had its precedent besides in the *Charte* also in the *Déclaration de Saint-Ouen* by which the King rejected the text elaborated by the Senate (so-called senatorial constitution) and established the bases for a new Constitution with the Proclamation of 2 May 1814.

Following the Restoration, the French Monarchy had dedicated an obsessive care to the Preamble inaugurating a new form of constitutionalism.[22] The Commissioner Beugnot summarised the new constitutional philosophy with the formula «to absorb the Revolution into the Monarchy».[23] In a project of Preamble drawn up by Louis de Fontanes, a free and monarchic constitution which kept all the prerogative of the Crown was already outlined.[24] Such a layout was restated in the definitive text.[25] In other words, the *Charte* was an act by the King who decided to self-limit his own powers maintaining free and monarchic institutions together.

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[20]Cf. Maranini (1926, 128).

[21]See Müßig (2016, 66–67).

[22]On the model of the so-called granted constitutions inaugurated in Restoration Europe please see: Lacchè (2016c).

[23]«absorber la Révolution dans la Monarchie» (to absorb the Revolution within the Monarchy). Cf. *Rapport de Beugnot au roi sur la forme de promulgation de la Charte*. In Rosanvallon, La Monarchie impossible. Les Chartes de 1814 et de 1830 cit.

[24]The text «Projet de préambule de la Charte rédigé par Fontanes» in Rosanvallon, Pierre. *La Monarchie impossible*, cit. 243–245.

[25]The Preamble of the 1814 *Charte constitutionnelle*: «[…] une Charte constitutionnelle était l'expression d'un besoin réel; […] 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» (a constitutional Charter was the expression of a real need; […] At the same time that we would acknowledge that a free and monarchic constitution should fill the expectation of Enlightened Europe, we should have remembered also that our first

Almost at the end of the preamble the Albertine Statute is defined «perpetual and irrevocable fundamental law». It is highly probable that, according to the king's will, also the expression «fundamental law» evoked the theories concerning the *lois fondamentales* typical of the French absolute monarchy.[26] «Perpetual» meant the oath (political and juridical obligation) taken by the King for himself and his successors, of not revoking the constitutional granting in any way.

The word «irrevocable» was, instead, intended in the meaning of a pact between the Sovereign and the Nation.[27] The idea of pact referred, above all, to the ancient conception which saw, in the *leges fundamentales*, a contract by which the relationships between sovereigns and parliamentary assemblies were regulated guaranteeing the succession to the throne. Moreover, such an idea allowed basing the State origins not so much on popular sovereignty, rather on a pact. In such a way, the State was based upon monarchy and people without having to go through a constituent assembly. In the background there were the positions of the French doctrinarians. In this sense the position of Constant was emblematic: according to him the constitution essentially had a political supremacy expressing the great pact between Monarchy and Nation.[28] In a letter sent to Minister Ricci, Antonio Costa

duty towards our people was to keep, for their own interest, the rights and the prerogatives of our crown).

[26]On "fundamental law" in Ancien Régime please see among the abundant bibliography: Lemaire (1907), Gough (1955), Thompson (1986), Höpfl (1986), Schmale (1987), Valensise (1988), Tomás y Valiente (1995), Coronas González (1995, 2011), Saint-Bonnet (2000), Vergne (2006), Mohnhaupt and Grimm (2008), Mohnhaupt (2014), Bambi (2012, 11–28). And finally also Tavilla (2016).

[27]«Lo Statuto è un patto che lega il Principe ed il popolo sotto una determinata forma di Governo, e per conseguenza viene ad essere la legge fondamentale perpetua ed invariabile dello Stato, in modo che se il Principe tentasse di rivocarla, il popolo rimarrebbe sciolto da ogni dovere di sudditanza, e potrebbe con giusto titolo impedire l'esazione delle imposte, non che avrebbe il diritto d'insorgere contro il Governo. D'altronde il popolo non ha un dritto di immutare le basi fondamentali dello stato, né tanto meno quello di sovvertirle o distruggerlo. Coloro quindi che, con improvvido consiglio meditassero o tentassero di fondare sulle rovine di una dinastia regnante la repubblica, cospirerebbero ad un tempo e contro il popolo e contro il Re, comprometterebbero l'intera nazione per velleità di maggiori libertà, che sovente si risolvono in illusioni o sogni, seppure non menano un'anarchia e quindi al dispotismo» (The Statute is a pact which binds the Prince and the people under a determinate form of Government and consequently becomes the perpetual and invariable fundamental law of the State, so that if the Prince tried to revoke it, the people would remain free from every duty of subjection, and could, with every right, impede the collection of taxes, as well as they would have the right of rising up against the Government. However, the people have no right of changing the fundamental bases of the State, nor that of subverting or destroying them. Therefore those who, with short-sighted advice, meditated or attempted to found the republic on the ruins of a ruling dynasty, would conspire, at the same time, against the people and against the King, would compromise the whole nation because of fanciful ambitions of greater liberties, which often result in illusions or dreams, if they do not bring anarchy and therefore despotism). Cf. La Pegna (1871). Also, Vismara (1865).

[28]Constant (1815). Cf. Fioravanti. *Costituzionalismo. percorsi della storia e tendenze attuali* cit., 38. Concerning the Albertine Statute, please see Fioravanti (2006).

noted that the Preamble little complied with the principles that regulated a constitutional government highlighting:

> Uno Statuto rappresentativo, dovrebbe essere, anziché un ordinamento sovrano, il risultato di un patto tra Popolo e Re; e dovendo d'altronde servir di Legge fondamentale dello Stato; Legge che deve ammorzare ogni dissidio tra il Re ed il Popolo, parrebbe non tanto conveniente quanto importante *il consultare il Popolo sulle basi che dovrebbero adottarsi*. Epperò sarebbe assai profittevole che venisse lo Statuto pubblicato, dichiarato meramente provvisorio; provvisorio; cioè nel senso non dell'effetto, ma del disposto, *per essere poi discusso da una Nazionale Assemblea*, che assumerebbe il titolo di Costituente. Che se una Costituente riuscisse impossibile ad ottenersi, lo Statuto domanda, per i tempi in cui fu pubblicato, di essere *riformato*.[29]

The remarks of Antonio Costa neatly disputed the traditional idea which made the fundamental law of the State rest on the conventional moment of the *pactum* and therefore the idea which tied up the will of the Prince to a public contract because of mutual consent. Such was indeed the value that some important documents of the European political tradition assumed.[30] According to the Ligurian scholar, a representative constitution could not be defined a pact between People and King without having consulted the people on the fundamental rules to adopt. The same words «perpetual» and «irrevocable» were an anachronism with reference to the reason of the times in that they bound government action for a more or less long lapse of time. In such a context Costa asked to consider the Albertine statute as provisional and to convene an assembly for its reform.

In Subalpine tradition, the idea of the contract was however destined to survive in the institutional everyday life. The notion of pact which—as it has been recently underlined—did not come out of the Statute but it preceded it,[31] was destined to be reaffirmed every time it was highlighted that the representative government was the fruit of the cooperation between King and Parliament by which the most important choices for the nation were made.

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[29]«A representative Statute should be, rather than a sovereign order, the result of a pact between People and King; and after all having to serve as Fundamental Law of the State; Law that must soften every tension between the King and the People, it would seem not just convenient rather important *to consult with the People about the foundations which should be laid down*. However, it would be much more fruitful that the issued Statute was declared merely temporary; temporary, that is in the sense not of its effect, rather of its provision, *in order to be then discussed by a National Assembly*, which would assume the title of Constituent Assembly. If it would be impossible to obtain a Constituent Assembly, the Statute requires, at the time in which it was issued, to be *reformed*». The letter is included in Ghisleri (1922, 7–8).

[30]For example, among these documents beside the English *Magna Charta*, we would also include the *Joyeuse Entrée de Brabant* of 1356 considered then as one of the historical sources of the Belgian constitution of 1831; the *Pacta conventa* of 1573 with which the Polish Diet set limitations to the French king Henry of the House of Valois. For these examples please see cf. Tavilla, *Sovranità e leggi fondamentali* cit., 95–96.

[31]On the idea that the pact did not originate only from the Statute, see Ferrari Zumbini (2016, 40–47).

3.2 *Constitutional/Unconstitutional Law in Parliamentary Acts*

The expression "unconstitutional" was not unknown when the Albertine Statute was in force.[32] While examining sources it is not difficult to find how during parliamentary sessions speakers raised questions of the unconstitutionalability of statute laws and regulations without affirming a prominence of the Constitution over the other juridical norms for this reason.[33] Rather there was a certain coincidence between the meaning which the term 'unconstitutional' assumed within English public law and the expression used in Italian constitutional practice where 'unconstitutional' was generically intended «every incorrect constitutional behaviour».[34]

Generally, validity of a juridical norm should be found in its most generic conformity to the sensitivity of public opinion. Therefore, a normative act or fact was considered unconstitutional whenever it was discordant with the spirit of the Constitution.

Cavour inaugurated this form of interpretation of the Albertine Statute. This was the most important legacy of the statesman to the constitutional theory of the liberal period. From 1850 every normative act was examined in the light not only of the

[32]For an overall view of the main questions on the theme please see Miceli (1902).

[33]Many examples taken from parliamentary acts are included in Ferrari Zumbini. *Tra norma e vita. Il mosaico costituzionale a Torino 1846–1849* cit. The author notes how the Statute norms were reference parameters which changed according to cultural and social awareness. Generally, in the Italian case there had been a constitutionalisation without a hierarchicalisation of norms. With reference to the relationship between hierarchicalisation and constitutionalisation Dieter Grimm noted: «The *hierchicalization* of legal norms does not by itself produce a *constituzionalization*». Cf. Dieter Grimm, *The origins and transformation of the Concept of the Constitution*. In Constitutionalism cit., 6.

[34]In his renowned volume dedicated to English public law, Albert V. Dicey specified, referring to the concept of sovereignty of the Parliament, that in England no juridical distinction existed between Constitution and the other laws and that no power existed to nullify an Act of Parliament (86). Later the author clarified that «The expression "unconstitutional" has, as applied to a law, at least three different meanings varying according to the nature of the constitution with reference to which it is used: (1) *The expression, as applied to an English Act of Parliament, means simply that the Act in question,* as, for instance, the Irish Church Act, 1869, *is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the Act is either a breach of law or is void*. (2) The expression, as applied to a law passed by the French Parliament, means that the law, e.g. extending the length of the President's tenure of office, is opposed to the articles of the constitution. The expression does not necessarily mean that the law in question is void, for it is by no means certain that any French Court will refuse to enforce a law because it is unconstitutional. The word would probably, though not of necessity, be, when employed by a Frenchman, a term of censure. (3) The expression, as applied to an Act of Congress, means simply that the Act is one beyond the power of Congress, and is therefore void. The word does not, in this case, necessarily import any censure whatever. An American might, without any inconsistency, say that an Act of Congress was a good law, that is, a law calculated in his opinion to benefit the country, but that unfortunately it was "unconstitutional" that is to say, ultra vires and void». Cf. Dicey (1889). Appendix, Note V—The meaning of the "unconstitutional" law, 427–428. «The epithet *un-constitutional* is applied to breaches of conventions as well as of law, meaning that the public opinion condemns (or should condemn) the act». Cf. Wade and Phillips (1931, 8).

letter of the Constitution, but especially of its Spirit. This allowed keeping the legal order in constant harmony with public opinion.

One of Cavour's first interventions in this respect took place on the occasion of the discussion of the Bill concerning the immovability of judges.[35] The Parliament asked itself if the constitutional principle according to which judges are immovable should be interpreted in the sense that immovability shall be calculated from their appointment date or rather from the promulgation of the Statute. Cavour was in favour of the first interpretation because it was more in tune with the new constitutional regime.[36]

Examples can multiply. Think also of the discussion on the Bill for the tax on individuals and goods.[37] Deputy Farina accused the Cabinet of violating the most general principles proclaimed by the Statute. Cavour, minister of Finances, defended himself establishing that the new tax was perfectly in compliance with the Spirit of the Statute which imposed every citizen to contribute to the expenditure of the State proportionally to his own income.[38] The Parliament handled questions which dealt with central aspects of public finance. Thanks to the great ability of the speakers, budget questions were considered from a constitutional viewpoint so much as to become, in salient moments of national history, the place where to favour a greater political integration and to better develop constitutional rules. In such direction, can we also call an intervention in financial matters, as well, by Deputy Minghetti to mind. A Bill concerning stamp duties was accused of being contrary to the Spirit of the Constitution, also because some years before, a statute law of similar content had been rejected by the legislative assembly. During the parliamentary debate, Minghetti had the chance of clarifying the relationship among Constitution, public opinion and constitutional government: the true nature of the

[35]Cavour (1863).

[36]«Io rilevo al principio la questione chiarissima e al mio senso la prima interpretazione mi pare la più chiara, la più ovvia e la più conforme allo Spirito ed alla lettera dello Statuto» (I notice, at the beginning, a very clear matter and the first interpretation appears to me to be the most clear, the most obvious and the most consistent with the Spirit and the letter of the Statute). Cf. Cavour (1863, 150–151).

[37]Cavour (1866).

[38]«L'onorevole deputato Farina chiudeva il suo discorso quasi quasi tacciando il Ministero d'aver commesso un delitto di leso Statuto nel proporre questa legge. Io in verità non so se abbia commesso così grave delitto; ma sicuramente non ne provo nessun rimorso. Io era anzi tutto pieno di rispetto per lo Statuto quando preparava e proponeva questa legge; ed aveva, come ho, l'intima convinzione, di essere con questa legge rimasto fedele e alla lettera, e ancora di più allo spirito dello Statuto medesimo, il quale vuole che le imposte siano ripartite secondo i mezzi che ha ciascuno per pagarle» (The honourable Deputy Farina closed his speech almost accusing the Ministry of having committed a crime of lese Statute in proposing this law. I, truly, do not know if I committed such a serious crime; but surely I feel no remorse. I was, first of all, full of respect for the Statute when I prepared and proposed this law; and I had, as I have, the innermost conviction, with this law, of having been faithful to both the letter and even more to the spirit of the same statute, which wants taxes to be shared according to the means that each one has for paying them). Cf. Cavour (1866, 210).

constitutional government was that of introducing legislative novelties while keeping the Constitution connected with popular feeling.[39]

During the liberal period, was instead inexistent and/or irrelevant the category of constitutional law. The distinction between constitutional law and the others laws was formally introduced by Art. 12, Law of 9 December 1928 N° 2693, which formally sanctioned the institution of the Grand Council of Fascism. This legislative provision established the compulsory opinion of the Grand Council on every law proposal with a constitutional nature such as those dealing with the following matters: succession to the throne, attributions and prerogatives of the Crown; the composition and functioning of the Grand Council, of the Senate of the Kingdom and of the Deputies' Chamber; attribution and prerogatives of the Head of the Government, Prime Minister, Secretary of State; the faculty of the Executive power to issue juridical norms; trade union and corporative legal order; the relationship between State and Holy See; international treaties which involved variations to the territories of the State and its colonies, or rather the surrender to acquire territories.[40] This caused Italian doctrine to discuss, if this new law provision had triggered a new hierarchy among sources giving juridical prominence to the constitution and the constitutional laws over the other law sources. The difference was indeed at procedural level, in that it foresaw a heavier procedure, consisting in the advice of the Grand Council, for the approval of constitutional laws, and not really at the level of source hierarchy thanks to which an ordinary law could be declared void.[41]

4 Theories on Constitutional Revision

The Albertine Statute did not foresee a heavier procedure for constitutional revision.

The lack of an explicit legal provision generated no small measure of uncertainty, the reflections of the French jurists weighed upon the Italian debate. They

[39]«l'indole del regime costituzionale sta in ciò appunto, che le riforme non si compiono e le novità non s'introducono, se non se quando siano maturate nella pubblica opinione, e che per conseguenza una medesima proposta la quale oggi non ha trovato favore nella Camera, può trovarlo un anno o cinque anni appresso quando la pubblica opinione vi sia preparata. Questo è il senso letterale delle parole dello Statuto; questo è lo spirito vero delle istituzioni costituzionali» (the nature of the constitutional regime rests in this indeed; that reforms are not made and novelties are not introduced, if they are not matured in the public opinion, and that consequently the same proposal which today did not find any favour in the Chamber of Deputies, can find it a year or five years later when public opinion is ready. This is the literal meaning of the words of the Statute; this is the true spirit of the constitutional institutions). Cf. *Atti Parlamentari. Resoconti: Discussione del progetto di legge sulla inefficacia giuridica degli atti non registrati*. Meeting of Thursday 21st May 1874, 3830.

[40]Regarding the distinction between constitutional law and ordinary law: Saredo (1886), Ugo (1887), Id. (1888), Jona (1888), Miceli (1902), Liuzzi (1929), Ferracciu (1930, 1931), Sofia (1931), Agostino (1933). Cfr. Azzariti (1947).

[41]Cfr. Ferracciu. *Le leggi di carattere costituzionale* cit., 79 SS.

asked themselves, facing a normative gap, if the *Charte constitutionelle* could be amended and, if so, about who the competent authority would be.[42] While the 1814 Constitution was in force, the conviction that constitutional changes could come exclusively from the King affirmed itself. With the 1830 *Charte*, accepted by King Louis Philippe, the English model of parliamentary omnipotence was reinforced. Particularly, the issue was discussed with reference to the regency law (30 August 1842). On this occasion, Deputy Guizot pronounced the sentence, then become famous, according to which the distinction between constituent power and constituted power was like distinguishing between holiday power, and every day power.[43]

As far as the Italian constitutional experience is specifically concerned, three different theories which followed one another and coexisted for all the duration of Kingdom of Italy were prefigured.[44]

4.1 Immutability of the Constitution and Constituent Power

Above all, in an initial phase (two-year period 1848–49) the theory of the immutability of the Statute affirmed itself. The fear of a repealing of the constitutional grants generated an intransigent position. Such a theory was hermeneutically based on the words contained in the Preamble. According to this theoretical layout, the clause «perpetual and irrevocable law» was interpreted not only as the prohibition directed to the Sovereign of repealing the Constitution, but indicated also the absolute prohibition of amendability of the document.

This interpretation was enriched by further normative bases found in Art. 49, which required deputies and senators to take an oath of being faithful to the king

[42]Cf. Barthélemy (1909).

[43]For an accurate historical reconstruction please see: Rosanvallon (1985).

[44]For a first overview of the theme: Carbone (1898). The author, by way of a comparative analysis of the main constitutions in force in the Nineteenth Century (United States of America, Switzerland, South American States: Mexico, Columbia, Argentina, etc., France, Belgium, The Low Countries, Luxemburg, Spain, Portugal, Denmark, Iceland, Sweden, Finland, Norway, Rumania, Serbia, Bulgaria, Greece, Austro-Hungarian Empire, Constitutions of the German area: Imperial Constitution of 16th April 1873, Bavaria, Saxony, Baden, Japan), singles out three different ways of proceeding to constitutional revision: the system of parliamentary omnipotence (Italian and English cases) that is constitutional revision by the constituted powers, the system of recurring to popular sovereignty for every constitutional amendment implies directly recurring to popular sovereignty (for example see the case of Switzerland, United States of America and Latin America) and a mixed system which, although not having recourse to popular sovereignty, admits the distinction between constitutional laws and ordinary laws and foresee heavier procedures for the revision. The author is favourable to the mixed system, that is, to the introduction among the Statute articles of a revision clause. In France, the question was the subject of comparative doctoral studies: Bousquet de Florian (1891), Borgeaud (1893), Arnoult (1896). For an initial reconstruction of the Italian case are also useful: Arangio-Ruiz (1895), Minguzzi (1900), Garello (1898). Racioppi and Brunelli (1909b). Among the literature please see Contini (1971, spec. 67–106).

and of being loyal to the Statute before they started exercising their functions, and in Art. 22 which required the monarch to faithfully respect the Statute of the Kingdom.[45] By the oath of faithfulness to the *Statuto*, sovereign and representative of the people committed themselves not to amend the letter of the constitution.

Consequently, the only tool for proceeding towards a formal revision of the constitutional text was to recur to the constituent power. This solution found a reference in the words of King Charles Albert who on the occasion of the opening of the second legislature made explicit reference to a constituent assembly which had the revision of the constitutional text as a duty.[46]

The discourse of the sovereign was pronounced on 1 February 1849 in a very particular moment of the national history: the five days of Milan were just over, there had been the armistice of Salasco and the resurgence of the conflicts with Austria, while Venice resisted siege and in Rome the republic had been proclaimed. The Lombardy-Venetian people were going to hold universal-suffrage elections and they had voted for joining the Kingdom of Piedmont forcing the latter to convene a national assembly which had to proceed to revising the Statute.[47]

Giuseppe Mazzini, moved to Milan in order to give his support to the patriots, sent a note to the Lombardy provisional Government highlighting his

[45]Concerning the political oath and its constitutional value: Bonghi (1882), Luciani (1883), Semmola (1882), Bertolini (1883), Pierantoni (1883), Zanichelli (1890), Ugo (1900–1904), Di Jorio (1893), Guidi (1914), Pardo (1915), Gatta (1938).

[46]«Riguardo agli ordini interni, dovrà essere nostra cura di svolgere le istituzioni che possediamo, metterle in armonia perfetta col genio, coi bisogni del secolo, e proseguire alacremente quell'assunto che verrà compiuto dall'Assemblea Costituente del Regno dell'Alta Italia» (With regard to the internal orders, we will take care of developing the institutions that we have, of perfectly tuning them with the genius and the needs of the century, and of readily following that assumption which will be made by the Constituent Assembly of the Kingdom of Northern Italy). Cf. Monti (1938).

[47]Lombardy provisional Government of 12th May 1848 convened the plebiscite using the formula: «Noi sottoscritti, obbedendo alla suprema necessità che l'Italia intiera sia liberata dallo straniero, e all'intento principale di continuare la guerra della indipendenza colla maggiore efficacia possibile, come Longobardi in nome e per l'intercessione di queste provincie, e come Italiani per l'interesse di tutta la Nazione, votiamo fin d'ora l'immediata fusione delle provincie Lombarde cogli Stati Sardi, sempreché, sulle basi del suffragio universale, sia convocata negli anzidetti paesi e in tutti gli altri aderenti a tale fusione una comune Assemblea costituente, la quale discuta e stabilisca le basi e le forme d'una nuova Monarchia costituzionale colla dinastia di Savoia» (We, the undersigned, obeying the supreme necessity that the whole of Italy be freed from foreign occupation and with the main aim of continuing the war of independence with the utmost possible efficaciousness, as Lombards in name and for the intercession of these provinces, and as Italians for the interest of the whole Nation, we vote, from now on, the immediate merging of the Lombard provinces with the Sardinian States, on condition that, on the basis of universal suffrage, a common constituent assembly is convened in the abovesaid countries and in all others adhering to such a merging. The common constituent assembly shall debate and establish the bases and the forms of a new constitutional Monarchy with the dynasty of Savoy). Cf. *Le assemblee del Risorgimento: atti raccolti e pubblicati per deliberazione della Camera dei Deputati.* Roma: Tipografia della Camera dei Deputati. 1911. Vol. 1: Piemonte, Lombardia, Bologna, Modena, Parma, 217. Diffusely deals with these aspects Mongiano (2003, see especially 152–171)

disappointment for having called universal-suffrage elections which offered the choice of unifying with the monarchy of Charles Albert or of keeping a separate government.[48] Popular consultation was carried on anyway and the Lombardy people voted for the relative joining together which was approved by the Chamber of Deputies on 28 June 1848.[49]

[48]«il vostro decreto del 12 (…) sanziona quei provvedimenti fatali, e chiama i cittadini non preparati a decidere in un subito le sorti del paese con un metodo illegale, illiberale, indecoroso, architettato al trionfo esclusivo di un'opinione sull'altre. Il metodo dei registri è illegale. Perché viola, per autorità vostra, il programma ch'era condizione della vostra politica in faccia al paese; perché invola la più vitale, la più decisiva fra le questioni all'*Assemblea Costituente*. Illiberale, perché sopprime la discussione, base indispensabile al voto, cancella un diritto inalienabile del cittadino; e sostituisce all'espressione pubblica e motivata della coscienza del paese il mutismo e la servilità dell'Impero. Indecoroso, perché affrettato; perché tende a trasmutare ciò che potrebb'esser prova d'affetto sentito e di maturato convincimento in dedizione di codardi impauriti; (…) Architettato al trionfo esclusivo d'un'opinione sull'altra, perché coglie a imporsi il momento in cui quell'opinione ha preparato in tutti i modi e con tutti gli artificii il terreno; e perché voi non vi limitate neppure a chiedere al popolo se intenda o no procedere immediatamente a una decisione, ma escludete dai vostri registri una soluzione al problema, e ne sopprimete qualunque espressione» (your decree of 12th (…) sanctions those fatal provisions and calls citizens not prepared to promptly decide the fate of the country with an illegal, illiberal, indecorous method designed for the exclusive triumph of one opinion over the others. The method of the registers is illegal. Because it violates, in agreement with your authority, the programme which was the condition of your politics before the country; because it steals the most vital, the most decisive matters among those of the constituent assembly. Illiberal, because it suppresses discussion, indispensable basis to the vote, it cancels an inalienable right of the citizen; and replaces the public and motivated expression of the conscience of the country with dumbness and servility to the Empire. Indecorous, because rushed; because it tends to transform that which could be evidence of heart-felt affection and matured conviction into devotion of frightened cowards; (…) Planned for the exclusive triumph of one opinion over the other, because it seizes, in order to impose itself, the moment in which that opinion prepared the ground in every way and with all its stratagems; and because you do not limit yourselves not even to ask the people if they want or not to immediately proceed to a decision, but you exclude a solution to the issue from your registers, and suppress any expression of it). Cf. Mazzini (2011). On Mazzini`s ideas about the constituent assembly please see Falco (1952). Also, see Recchia and Urbinati (2009).

[49]On 15th June 1848 in Parliament a Bill presented by the Government was discussed concerning the Unification of Lombardy with the Venetian Provinces of Padua, Vicenza, Treviso and Rovigo. During the discussion the Government presented an amendment which affirmed: «L'assemblea costituente non ha altro mandato che quello di discutere le basi e la forma della monarchia. Ogni altro suo atto legislativo è nullo di pien diritto. La sede del potere esecutivo non può quindi essere variata che per legge del Parlamento» (The constituent assembly has no other mandate than that of debating the bases and the form of monarchy. Every other legislative act of it is nil by full right. The seat of the executive power therefore can be changed only by parliamentary law). Cf. *Le assemblee del Risorgimento: atti raccolti e pubblicati per deliberazione della Camera dei Deputati* cit., 219. During the discussion the reporting Deputy Rattazzi made the audience note how the formulation by the Government transformed the constituent assembly into a consultative assembly («Orbene, si dichiara che l'Assemblea Costituente non ha altro mandato tranne che quello di *discutere*. Così, mentre il voto dei Lombardi e dei Veneti, e quello che noi pure abbiamo espresso, portava che l'Assemblea costituente dovesse *stabilire;* il Ministro, il quale aveva e l'uno e l'altro sott'occhio, dopo di avere maturamente esaminato ogni cosa, vorrebbe che l'Assemblea costituente venisse circoscritta a discutere, ed assumere così il carattere di una semplice assemblea

The idea of a constituent power spread from the territories of Lombardy-Venetia to all the Italian peninsula. The debate which initially was directed at organising those freed territories forced the most important characters to measure themselves with the ideologies at the base of the constituent power. Distinctions between moderates and democrats were outlined in a clearer way.[50] The group of moderates sustained the monarchical-representative form and a unification under the aegis of a Monarch, at most reaching an idea of confederal assembly. Within this group there was, for example, Vincenzo Gioberti who ever since his *Primato civile e morale degli italiani* (1843) proposed a monarchical federalism of a neo-Guelph orientation, that is a confederation of States with the Pope as its head, and in September 1848 in Turin took part in the constitution of the *Società per la confederazione italiana* (Society for the Italian confederation) which had the programme of favouring a federal pact in Italy.[51] The Society deemed the summons of a constituent assembly which established the forms and norms of the Confederation of the Italian States opportune and for this purpose nominated a commission for the drawing up of a Bill on the electoral law and of a model of federal act. These Bills were read, modified and approved during the public meeting which was held at the national theatre on 27 October 1848 under the presidency of Mamiani and they were sent together with an *Indirizzo ai Principi e ai Parlamenti italiani*. Another supporter of a confederation was Antonio Rosmini who intervened on the merging of Piedmont with the provinces of Lombardy-Venetia by way of a series of articles published in *Il Risorgimento* and afterwards, collected under the title of *La Costituente del Regno dell'Alta Italia*.[52]

The group of the democrats considered, instead, the Lombard war from a national viewpoint to be solved by recurring to a constituent assembly elected by universal suffrage which would have drawn up the pact among all individuals of the

consultiva» (Well, the constituent assembly is declared to have the sole mandate of discussing. So, while the vote of the inhabitants of Lombardy and Venetia, and that which we as well expressed, established that the Constituent Assembly should decide; the Minister, who had both in front of him, after having maturely examined everything, would like the constituent assembly to confine itself to discussion, assuming in such a way the character of a simple consultative assembly)). Cf. *Le assemblee del Risorgimento* cit. 222. Therefore the Assembly reputed the introduction of further limitations to the constituent Assembly besides those already indicated in the formula of the Lombardy vote. The Chamber approved the law of unification which accepted the convening of a constituent assembly in «conformità del voto emesso dal popolo lombardo» (in compliance with the vote issued by the people of Lombardy). Mongiano (2003) and Ferrari Zumbini (2016, 321–333).

[50]Cf. Prestandrea (1881, 131). Moreover, the author distinguished between Constitution granted by the Monarch and popular constitution and noted that the revision procedure should necessarily be different because of the different nature of the document. Please add: Del Balzo (1904).

[51]Coppi (1860, 440–446), Zama (1946), Oddo (1979).

[52]Articles appeared respectively in *Il Risorgimento* of 1st July 1848; *Il Risorgimento* of 2nd July 1848; *Il Risorgimento* of 6th July 1848; *Il Risorgimento* of 8th July 1848; *Il Risorgimento* of 11th July 1848; *Il Risorgimento* of 13th July 1848; *Il Risorgimento* of 17th July 1848; *Il Risorgimento* of 20th July 1848; *Il Risorgimento* of 27 July1848; *Il Risorgimento* of 27th July 1848; *Il Risorgimento* of 1st August 1848; *Il Risorgimento* of 5th August 1848.

dawning nation.[53] Also Giulio Pisani, in a small volume dedicated to Giuseppe Montanelli, favoured the idea of a constituent power as the only tool for Italian independence.[54] Mazzini's press contributed to spread the ideas of a constituent assembly with a popular base.[55] An important educative mission was attributed to journalism: to form a public opinion alert and informed.

The binomial "revision of the constitution" and "constituent power" heightened the tones of the political debate. On the one hand, the limits of constitutionalism by means of monarchical granting were highlighted, while on the other, the necessity of a sovereign power for a full legitimisation was underlined.[56] The end of the war with the Austrian victory made the idea of a constituent assembly which was able to modify the Albertine Statute doze off again.

4.2 Omnipotence of Parliament

It was the legal doctrine which better corresponded to the feeling of the time.[57] Parliamentary omnipotence, otherwise called Parliamentary sovereignty, acknowledged, to the legislative body, the power of modifying the letter of the constitution, of abrogating its principles, of waiving them or interpreting them by way of the ordinary legislative activity; rather, by way of the constitutional practice. This theory, borrowed with appropriate adjustments from the English juridical doctrine, had the advantage of sterilising the issue concerning the constituent power as *summa potestatis* attributed to the people, and at the same time guaranteed the possibility of adapting the constitutional text to the changing and inevitable necessities of the real life, without reducing the Constitution to the written document. Consequently, it was impossible to distinguish between constituent powers

[53]«una rivoluzione nazionale può iniziare da chicchessia; ma non può compiersi che da un'Assemblea nazionale. E quest'assemblea non può uscire legittima ed efficace che dall'elezione popolare: eletta da governi o da Stati, non potrebbe rappresentare che il vecchio principio, più o meno modificato, di smembramento, contro il quale il paese s'agita e s'agiterà … L'assemblea costituzionale non può dunque essere che costituente» (a National revolution can start from anybody; but it can be completed only by a National Assembly. And this assembly may come out as legitimate and effective only by popular election: elected by governments or States, it could only represent the old principle, more or less modified, of dismembering, against which the country protests and will protest … The constitutional assembly therefore can only be constituent). Mazzini (2011, 623).

[54]Pisani (1849).

[55]Particularly see *L'Italia del popolo* which appeared for the first time in Milan from 20th May to 3rd August 1848. The title remained the same, coming out in various critical moments of Italian national life, like in Rome during the Roman Republic and then in Lausanne, Lugano and Genoa. Mazzini's press see: Ravenna (1967), Scirocco (2004, 353–394). Bruni (2007). Della Peruta (1847), Pau (2015).

[56]Cf. Bianchi-Giovini (1849).

[57]Cf. Racioppi and Brunialti (1909).

and constituted powers, between ordinary sovereignty and extraordinary sovereignty; rather, a sole and unique sovereignty existed.[58]

Such a layout was inaugurated by the well-renowned article by Camillo Cavour published in *Il Risorgimento* where voice was raised against those who criticised the expression 'irrevocable' as if in such a way a system of absolute immutability was established. He clarified that such a layout ran contrary to common sense, society's needs and also to the most common constitutional theories, affirming that «the word 'irrevocable', as used in the Preamble of the Statute, is only literally applicable to the new and great principles proclaimed by it, and to the important fact of a pact destined to indissolubly link the people and the King. However, this does not mean that the particular conditions of the pact were not susceptible to progressive improvements operated with the common agreement of the two contracting parties: the King, with the help of the nation, in the future will always be able to introduce, within them, all the changes which will be indicated by experience and reason of the time period».[59]

Little knowing the English parliamentary system, it was deemed convenient to imitate it. From here, according to the model of the *King in Parliament*, the body competent for the constitutional revision was considered to be the Parliament, to be understood indeed as the Monarch together with the Senate and the Chamber of Deputies. The normative base was found in Art. 3 of the Albertine Statute according to which the King and the two Chambers collectively exercised the legislative power.

The revision procedure was that briefly required for the promulgation of ordinary statute laws. The legislative initiative jointly belonged to the Sovereign and the Chambers (Art. 10). The bills should be firstly examined, then discussed and approved. Over time three different modalities for the examination of a bill developed: *Offices system*, *three-readings system* and *committees system*. Discussions were public and were carried on article by article (Art. 55). In the case that a bill was rejected, it could not be proposed again in the same parliamentary

[58]On these aspects, I refer to my contribution: Mecca (2016a, 159–214).

[59]«La parola irrevocabile, come è impiegata nel preambolo dello Statuto, è solo applicabile letteralmente ai nuovi e grandi principi proclamati da esso, ed al gran fatto di un patto destinato a stringere in modo indissolubile il popolo ed il Re. Ma ciò non vuol dire che le condizioni particolari del patto non siano suscettibili di progressivi miglioramenti operati di comune accordo tra le parti contraenti: il Re, col concorso della nazione, potrà sempre nell'avvenire introdurre in esse tutti i cambiamenti, che saranno indicati dall'esperienza e dalla ragione dei tempi» (The word 'irrevocable', as it is used in the preamble of the Statute, is only literally applicable to the new and great principles proclamed by it, and to the great fact of a pact destined to indissolubly bind the people and the King. However, this does not mean that the particular conditions of the pact are not susceptible of progressive improvements operated by mutual consent of the contracting parties: the King, with the nation's aid, will always be able in the future to introduce all the changes in them, which will be indicated by experience and the reason of the times). *Il Risorgimento. Giornale quotidiano*, A. I, 10th March 1848.

session (Art. 56). The procedure concluded with the royal approval and promulgation (Art. 7).[60]

The above mentioned theory was not just useful to neutralise the constituent power in the hands of the people, but it was also functional to legitimise the representative government.[61] Supporters of parliamentary omnipotence were aware of the novelties introduced by the Albertine Statute and were also alert to the immaturity of the new institutions which needed consent and legitimisation. In the initial imprinting the cohabitation between monarchical principle and representative principle was affirmed in that they were considered genetic elements: the nation was jointly represented by the Monarch and the Parliament. Practice was entrusted with the duty of better defining the relationships between the two constitutional bodies.

4.3 Intermediate Theory

After almost forty years from the entering into force of the Albertine Statute, the Italian juridical doctrine, the constant changes made in the constitutional text having been acknowledged—on the matter please see infra § 6—made the effort of singling out some corrections for the theory of parliamentary omnipotence.

Among the jurists the strengthened conviction that more things should be done in order that the distinction between Constitution and ordinary statute law be more clear cut.[62] At the same time the theory according to which the Omnipotence of Parliament should necessarily meet some juridical limits for the purpose of avoiding the risk of a despotic government of the majority made inroads as well.

Along this direction, the difference between the English constitutional system and the Italian one was above all noted. Indeed, Italy based the form of its government on a written constitution which was missing in Britain. Moreover, as in England the law established that Parliamentary activity will find its limitations in the general law, fruit of constitutional centuries-old experience, in the same way in Italy the legislative function was limited by the juridical principles proclaimed by the Statute and, however, by the triadic nature of the legislative power subdivided between the King and the two branches of Parliament.[63]

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[60]On procedural aspects, please see: Broglio (1865), Mancini and Galeotti (1887), Donati (1914). Cf. Dickmann (2007).

[61]Please refer once more to my contribution: Mecca (2016a).

[62]Cf. Carbone (1898, 117).

[63]Marchi (1921). The author noted: «Che del resto, in genere, la funzione legislativa esser stretta da limiti risulta da quel complesso di principii che si affermano, qui come altrove, coll'affermarsi dello Stato libero moderno: il movimento storico che portò alla proclamazione delle Carte Costituzionali, alla attuazione dei principi dei poteri, alla distribuzione delle competenze fra i diversi organi costituzionali, l'enumerazione in tali Carte dei diritti fondamentali di libertà ebbero, tutte, per scopo di porre, in definitiva, dei limiti all'arbitrio degli organi dello Stato nell'esercizio delle diverse funzioni, quella legislativa compresa. Fu una tendenza codesta che, rispondendo ad

On these aspects, Santi Romano, jurist with great talents and a pronounced sensitivity, entered into the merits of the question singling out the legal, not just moral, limits to Parliamentary sovereignty with more precision.[64] First of all, the author warned that the boundaries of the legislative power were constituted by internal limits deriving from the same layout of powers and that it was impossible to single out external limits to the legislative power, like for example a syndicate on the legitimacy of the statute law to be attributed to the judges, both in the case of it being shaped as a control of constitutionality spread among all judges, and in the case of it being shaped as a control of constitutionality concentrated in the hands of special judges designated to perform this duty.[65]

Santi Romano singled out *absolute limits* to Parliamentary sovereignty, like for example the prohibition of usurping the prerogatives of the other powers or the prohibition of derogating from international commitments by way of legislatives acts, and *relative limits* which allowed the Parliament to modify the constitutional norms only on particular conditions. Such conditions were: the necessity understood as living law, thanks to which at legislative level a dichotomy between law and life was cancelled; the derogation from Statute for the purpose of acknowledging a *constitutional custom* that already modified the constitutional letter in fact; *integrative statute law*, phenomenon which was halfway between the mechanism of text amendability and constitutional interpretation, which broadened the cases of implementation of the Albertine Statute. The author noted that the written constitution has its base in a non-written law, which directly emanates from social forces.[66] From this assumption came the fact that customs played a primary role in public law.

Generally, the attempt of the legal doctrine between the Nineteenth and the Twentieth centuries was that of distinguishing within the Statute between essential and/or fundamental norms and contingent or accessory norms, in such a way narrowing the absolute prohibition of constitutional revision to the sole first group of norms. This layout, however, only moved the question from the possibility of

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un bisogno della coscienza giuridica popolare, doveva portare a non dovere più riconoscere in nessun organo costituzionale una sovranità della stessa natura di quella dei Re assoluti, una *legibus absoluta potestas*» (However, generally, the fact that the legislative function is bound by limitations comes out by that whole of principles which are affirmed, here as everywhere else with the affirmation of the modern free State: the historical movement which led to the proclamation of the Constitutional Charters, to the implementation of the principles of the powers, to the distribution of competences among the different constitutional bodies, the enumeration in such Charters of the fundamental rights of liberties had, them all, the purpose of definitely setting limitations to the discretional power of the State bodies while exercising their different functions, the legislative one included. This was a trend which answering a need of the popular juridical conscience should lead to no more having to recognise a sovereignty of that same nature as the absolute Kings, a *legibus absoluta potestas*, in any constitutional body) (17–18).

[64]Romano (1950a, 179–200). The article is published for the first time in *Archivio di diritto pubblico* 1902.

[65]Romano (1950a, 188).

[66]Romano (1950a, 198).

modifying the text to the often ephemeral attempt of classifying norms into primary and secondary. Doctrinal positions in the late Nineteenth century were many.[67] A common feature of these theories can be found in the intangibility of the representative government upon which the whole constitutional structure inaugurated by the Albertine Statute rested. In this sense the position expressed by Livio Minguzzi is exemplifying. He declared that the limit of parliamentary omnipotence lies within the same nature of the institution. Indeed, the Parliament being a body of the State, if the power of modifying the form of the State were attributed to it, it would mean acknowledging, to a sole body, the power to change the whole organism to which it belongs.[68] Minguzzi remarked once again how also in England Parliamentary omnipotence met a limit in the Crown. Indeed, the Parliament could never have acted against the royal prerogatives, in that monarchy had the power of approving the statute laws.

5 Flexibility and Elasticity of the Constitution in the Legal Debate

In this context, the Italian constitutional doctrine speaks of 'flexibility' and/or 'elasticity' of the Albertine Statute.

As is known, according to James Bryce's theory the Constitutions could be classified as rigid or flexible. Bryce denied any usefulness to the distinction between written and unwritten constitutions because «in all written Constitutions there is and must be, as we shall presently see, an element of unwritten usage, while in the so-called unwritten ones the tendency to treat the written record of custom or precedent as practically binding is strong, and makes that record almost equivalent

[67]Cf. Borsi (2009).

[68]Minguzzi (1899). «Conseguentemente quella dell'onnipotenza parlamentare è un'espressione erronea e pericolosa; la quale viene usata, perché esprime energicamente, anzi iperbolicamente, il potere del Parlamento, ma che dovrebbe essere bandita dalla scienza. Maggiormente viziata intrinsecamente è quella che il Parlamento sia una costituente perpetua» (Consequently that of parliamentary omnipotence is an erroneous and dangerous expression; which is used, because it, energetically rather hyperbolically, expresses the power of the Parliament, but which should be banished by science. That which the Parliament is a perpetual constituent is more intrinsically flawed) (103–104). The author reached the conclusion that «nei governi costituzionali l'attività del Parlamento nella sua più ampia estensione ha per suo limite la forma politica dello Stato» (in constitutional governments the activity of Parliament, in its widest extension, has the political form of the State as its limitation) (105); «Il Parlamento italiano, per servirci di un esempio, può riformare liberamente come crede la costituzione del regno, ma che sempre costituzione del regno rimanga» (The Italian Parliament, in order to use an example, can freely reform, as it wishes, the constitution of the kingdom, but on condition that it forever remains the constitution of the kingdom) (106).

to a formally enacted law, not to add the Unwritten Constitutions».[69] Specifically, the English jurist explained that «The Statutory Constitutions become developed by interpretation and fringed with decisions and enlarged or warped by custom, so that after a time the letter of their text no longer conveys their full effect».[70] Also, Bryce noted that «Excluding despotically governed countries, such as Russia, Turkey and Montenegro, there are now only these in Europe, those of the United Kingdom, of Hungary—an ancient and very interesting Constitution, presenting remarkable analogies to that of England—and of Italy, whose Constitution, though originally set forth in one document, has been so changed by legislation as to seem now properly referable to the flexible type. Elsewhere in Europe, all Constitutions would appear to be rigid».[71] Definitely, the distinction between flexible and rigid Constitutions was in a formal method (or special revision procedure) of amending the constitution.

The Italian legal doctrine accepted Bryce's classification only at the beginning of the twentieth century, as a result of the constitutional changes introduced by the Fascist regime.

In particular, Teodosio Marchi analysed the flexibility of the Albertine Statute in two important essays: *Lo Statuto albertino ed il suo sviluppo storico* (1926) and *Sul carattere rigido o flessibile della Costituzione italiana* (1938).

In the first work, the author recognised two different merits of the Albertine Statute: the first, being a 'written constitution' and the second being a 'flexible constitution'. According to Marchi, the Albertine Statute could adapt continuously without violent tremors because it is similar to a centuries-old tree which keeps its trunk and changes leaves each new spring («può continuamente adattarsi, senza scosse violente, al graduale, perenne mutarsi della coscienza giuridica, quasi albero secolare, che, mantenendo saldo il suo tronco, si spoglia, via via, di rami inutili e secchi per rinverdirsi al soffio di ogni nuova primavera»).[72]

In his second essay (*Sul carattere rigido o flessibiule della Costituzione italiana*), Teodosio Marchi reaffirmed that in the Subalpine experience there was no distinction between ordinary law and constitutional law, but the constitutional changes occur by means of the ordinary law.[73] Furthermore, he affirmed that even in flexible constitutions there was a principle unmodifiable and that was the form of Government.[74]

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[69]Bryce (1905, 6). In the preface to the Italian edition, Alessandro Pace noted how in Bryce's thought the prominence of the constitution and the constitutional rigidity were two faces of the same coin. He then specified that the prominence of constitution is a relational concept: it exists when the Constitution imposes respect of its provisions to the legislator. Cf. Pace (1998, XXVI).

[70]Bryce (1905).

[71]Bryce (1905, 11–12).

[72]Marchi (1926, spec. 188).

[73]Marchi (1938).

[74]Marchi (1938, 327): «in tutte le Costituzioni, monarchiche o repubblicane, per quanto flessibili esse siano, un principio esiste che, se non proclamato in modo esplicito, vi è sempre implicitamente contenuto, il quale riconosce la rigidità, la intangibilità, di ciò che costituisce l'essenza

Without knowing Bryce's theory well, Luigi Rossi preferred, however, to talk of *L'elasticità dello Statuto Albertino* (1939), meaning the ability of the Albertine Statute to adapt to the circumstances, because its formulas, summarising characteristics and generic, leave an enormous margin for development and their integration through special constitutional laws, various customs and interpretations («alle variabili necessità dei tempi e delle circostanze, perchè le sue formule, sintetiche e generiche, lasciano largo margine al loro sviluppo e alla loro integrazione mediante leggi costituzionali particolari, consuetudini e interpretazioni varie»).[75] Elasticity of the Statute also meant reconciling two opposites: the stability of the basic principles with the ability of transformation and change in special provisions. The author recognised that the issue of elasticity had something to do with flexibility, but they could not be equated.[76] The elasticity of the Constitution consisted not in the competence of Parliament to amend the constitution, but in the wide field reserved for the customary law to be understood in a broad sense, also, including *usus fori*, the *consuetudo parlamenti* and all sources not covered by the law. In flexible types of Constitutions, indeed, there was a variety of sources, there was not a primary source, a precise and reliable law; but there was a set of several different rules, which were intersected, made up, or deleted, according to the circumstances. Staying with Rossi, the characteristics of elasticity is useful in overcoming the distinction between flexible constitution and rigid constitution and surmounting the difficulties of this classification.

From these essays, the Albertine Statute was universally considered a flexible and an elastic Constitution meaning that the text could be innovated by ordinary law or the text could be changed without formal amendments. This debate was so pervasive that it even continued under the Italian Republican Constitution (1948). For example, by discussing the nature of the Albertine Statute, Alessandro Pace denied the logical assumption that only rigid constitutions do provide a special proceeding to amend the Constitutional text. Finally, in the evaluation of a Constitutional character the constitutional interpretation plays an important role.[77]

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stessa della forma speciale di Governo» (in every Constitution, monarchic or republican, no matter how flexible they are, a principle exists that, if it is not proclamed explicitly, it is always implicitly contained in them, which recognises the rigidity, the intangibility of that which constitutes the same essence of the special form of Government).

[75]Rossi (1940, spec. 27–28).

[76]Rossi (1940, 35).

[77]It is difficult to summarise the Italian debate on the matter. For an overview please see Pace (1996). The author demonstrates the reasons for the historical mistake directed at identifying the causes of rigidity of the constitution in having foreseen, in the same constitution, a special procedure of constitutional revision. Pace's reflection had among its merits that of clarifying the concept of constitutional prominence and the essential characteristics of a fundamental law. Among those studies that move along that path, please see: Varela Suanzes (1994), Blanco Valdés (1997), Bignami (1997), Soddu (2003), Lanchester (2011). Finally, Ferrari Zumbini (2011) and Id., *Tra norma e vita* cit. The author speaks of mobility of the Statute due to three requisites: elasticity, flexibility and ductility.

6 Interpreting the Constitution: Letter of Statute, Customs and Practice

The category "flexible constitution" was acknowledged late, even though it had extraordinary fortune and circulation.[78] Early on, jurists talked generically about interpretation in compliance with the spirit of the Constitution, changes, waivers or abrogation of the Statute.

Changes of the letter of the Albertine Statute were very few.[79] Among these, there was the article dedicated to the flag: the Constitution established the azure colour among the characteristics of the ensign, however after the Lombardy-Venetian war the Parliament approves a statute law which acknowledge the tricolour with the coat of arms of the Savoy family as a flag. A further example can be statute law N° 665 of 1912 with which Art. 50 of the Statute which prescribed no retribution or allowance for exercising the role of parliamentarian.[80]

For the purpose of better understanding the Italian experience, attention must, however, not be paid not the changes of the letter, rather to the so-called tacit changes, that is to those changes of the meaning of the constitution without changing the written text for this reason. In other words, the interpretation and the practice represented the most important mechanism of constitutional change.[81] In this context a primary role was acknowledge to non-written norms.[82]

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[78]About "flexibility" Miceli (1898) talked for the first time. Cfr. Colombo (2003, 131).

[79]For a thorough examination of the (implicit and explicit) changes of the letter of the Statute please see Arangio-Ruiz (1913, 466–467). For a comparison between letter of the Statute and text integrated with customs and practices, it is very useful the *Attachment* A to the volume by Ferrari Zumbini. *Tra norma e vita* cit.

[80]For an overview of the matter without any pretension of exhaustiveness, please see: Montalcini (1935, 371), Chimienti (1915), Arcoleo (1913), De Dominicis (1913), Brunelli and Racioppi (1909), Malvezzi (1905), Trespioli (1900), Piscel (1897), Zanichelli (1887), Brunialti (1882), De Mauro 1882), Linati (1882), Castagna (1865), Casanova (1859), Peverelli (1849). Cf. Musso (2000), Mola (1988).

[81]Arangio-Ruiz explicitly spoke of tacit (implicit) changes. Cfr. Arangio-Ruiz, *Istituzioni di diritto costituzionale italiano* cit. For a theoretical framework see Voigt (1999).

[82]Cfr. Longo (1892). Custom is legal norm when it occurs two assumptions: *diutunitnas* and *opinio juris ac necessitatis*. Ranelletti clarified the importance of customs in the Italian legal order: «il sistema legislativo del nostro diritto pubblico, per la sua formazione recente e senza tradizioni nazionali e imitato da altri popoli con un procedimento precipitoso, anzi abborracciato, è incompleto e difforme dalle tendenze dello spirito nazionale; e d'altronde non tutto in esso si può regolare con leggi, poiché molte materie mal si prestano ad essere contenute nella rigidità della formula legislativa; (…) supplisce bene la consuetudine, che ha maggiore flessibilità per adattarsi alla varietà delle condizioni di fatto e tenere il dovuto conto dell'interesse pubblico» (the legislative system of our public law, for its formation which is recent and without national tradition and inspired by the law of other people with an overly hasty rather patchy procedure, is incomplete and dissimilar to the trends of the national spirit; and therefore not everything in it can be regulated with laws, since many matters are badly suited to being contained within the rigidity of the legislative formula; (…) customary law which has greater flexibility in adapting itself to the variety of the factual conditions and to rightly consider public interest compensates well). Cfr. Ranelletti (1913).

Italian writers justified this importance adopting the following reasons: the lack of a century-old tradition of doctrinal and legislative elaborations, the laconicism of the constitutional text, and finally the greater adaptability of customary law to the changeable practical needs. Scholars considered customary law as an autonomous, spontaneous and unintentional juridical source. The foundation of unwritten juridical norms was to be found in real and fundamental needs of constitutional life.[83] That which characterised customary law compared to other constitutional norms was the predominance of the political element, since certain relationships between State bodies, because of their complexity and changeability, are better suited to be regulated by the flexibility of customary law rather than the rigour and stability of written norms. Moreover, starting from Santi Romano's reflection, doctrine associated constitutional customary law with the so-called «correttezza costituzionale» (constitutional fairness), which only partially coincided with the English conventions of constitution.[84] The rules of «correttezza costituzionale» (constitutional fairness) were rules relating mainly to custom and political morality from which constitutional bodies should draw inspiration. These rules could not be classified among juridical norms and could not be confused with customary law, affirming themselves immediately and without expiry of time.[85] They often represented the first step toward a juridification of the same rules.[86]

All the unwritten rules greatly contributed to the evolution of the Constitution. In particular, the «tacit changes» intervened on the document at least in a twofold way: they implemented/developed the written document and corrected eventual mistakes.

This is the case in which, through constitutional practice and interpretation, principles and rules, not explicitly considered by the constitution were set. These rules essentially derived from the long and uninterrupted practice and were based

Another author in relation to the Italian public law distinguished three types of customs: interpretative, rescinding and innovative. Cfr. Ferracciu (1913), Id. (1919), Id. (1921). Si veda, inoltre, Girola (1934). In 1909, for the first time in Italy, Romano debated the issue of constitutional conventions. Next to the customs, Romano identified a complex of flexible and folding rules regulating the very delicate relationship between the powers and the political conduct. Cfr. Romano (1950c). The author debated, also, the relationship between law and morality. Cfr. Romano (1947). It is noted, in fact, that «le norme di correttezza bene spesso si applicano a rapporti, che, per la posizione eminente degli organi costituzionali cui si riferiscono, per gli alti interessi di natura pubblica che sono destinati a tutelare, per l'indole eminentemente politica della materia che essi concernono, risultano assolutamente inidonei a venir regolati dal diritto, sia pure per mezzo di norme consuetudinarie» (appropriateness rules often apply to relationships, which, for the prominent position of the constitutional bodies to which they refer, for the high interests of public nature which they are destined to protect, for the eminently political nature of the matter which they are concerned with, result absolutely unsuitable for being regulated by law, even if by way of customary laws) (96). Cfr. Biscaretti di Ruffia (1939). Please see also Caristia (1953). Finally, for a wider reflection please see Avril (1997).

[83]Ferracciu (1919, 28).

[84]Romano (1950c).

[85]Ferracciu (1919, 34–35).

[86]Biscaretti di Ruffia (1939, 96).

on the tacit agreement of constitutional bodies. A disavowal of these norms constituted, in fact, a systematic violation of the spirit of the constitution.

The main example is that of a primordial development of representative government in the form of parliamentary government. The Albertine Statute established the role of Deputies in only three articles: Art. 65—The King appoints and dismisses (removes) his Deputies; Art. 66—Deputies have no right to vote in Parliament; Art. 67—Deputies are responsible.

The letter of the Statute granted the King the absolute right of appointing the Cabinet; customary practice, instead, had established that the Prime Minister won the double confidence of the King and the Chamber of Deputies.[87] Italian scholars found the foundation of the rules concerning the representative government in customary law.[88]

More often non-written rules, interpretations and practices intervened in the letter of the Statute in order to soften its rigour, favouring in such a way a better functioning of the constitutional system.

The most evident example was constituted by Art. 53 of the Albertine Statute which required an absolute majority of members for parliamentary meetings and decisions. The difficulty in reaching the legal number produced the development of the practice according to which senators and deputies who were absent for a just cause, bishops and public officials who were busy in the exercise of their own functions, were not counted for purpose of the decision.[89] Moreover, it was the same Cavour who, intervening against Deputy Moia, who deprecated certain parliamentary practices, recollected the distinction between decisions and discussions and highlighted how the practice was not contrary neither to the letter nor to the Spirit of the Statute.

7 National Unification by Constitutionalisation

The historical and legislative events which led to national Unification are well known.[90] The statute law of 25 April 1859 conferred, to the Sardinian Government for the duration of the war, all legislative and executive powers and the faculty of doing, under ministerial responsibility by way of simple royal decrees, all the acts necessary for the defence of the homeland.[91] On the basis of such law, extraordinary magistratures were instituted in almost all the Italian Provinces and States

[87]About the origins of the confidence vote procedure see Rossi (2001).

[88]For an analysis of the different theories on the matter please see: Raggi (1914).

[89]Please allow me to refer to Mecca (2016b).

[90]Among the many works, please see Martucci (1999), Ghisalberti (2002, 87–122 (chapter III. *L'Unificazione politica e la costruzione dell'apparato Statale*)), Pene Vidari (2010a), Genta Ternavasio (2012, especially chapter III. *L'unificazione politica: dal regno di Sardegna al regno d'Italia*).

[91]Latini (2005, spec. 210–226) and Pene Vidari (2010b).

which aspired to a union with the Sardinian State.[92] A Lieutenant Decree of 11 June 1859 instituted a General Directorate at the Ministry of Foreign Affairs to which all the matters concerning the annexed Italian Provinces were conferred. With the exclusion of Lombardy for which the consent expressed through the 1848 popular consultation (infra § 4.1.) was deemed sufficient, in other Italian provinces between March and November 1860 plebiscites with voting rights granted to 21 year-old male citizens were carried out.[93] After the law of 3rd December 1860 the Government accepted the annexation of those Provinces of central and Southern Italy. The royal Decree of 17 December 1860 declared the annexation of the provinces of Naples into the Subalpine Constitutional Monarchy; the Royal Decree of 16 December the annexation of Sicily, the Royal Decrees of 17 December the annexation of the provinces of Marche and Umbria, by way of similar plebiscites the Royal Decree of 22 March annexed the provinces of Tuscany and the Royal Decree of 18 March the province of Emilia.

Historiography dedicated important pages to single moments or juridical institutions which consented political-institutional integration. Alongside studies on the customary institution of lieutenancies and on the activity of provisional governments, on plebiscites and on the law concerning full powers, scholars discussed, as well, if the Italian State was the prosecution of the Sardinian Kingdom or if it was a new State, the fruit of the reunion of the ancient kingdoms.[94] Here, however, we would like to observe the national Unification through a constitutional perspective. In other words, I will try to underline in which way constitutional forms were given to the dawning Kingdom of Italy. The constitutionalisation was realised by the recourse to three tools: the formula contained in the plebiscites, the granting of the Albertine Statute to all conquered territories and the parliamentarisation of the national cause.

The formula of the plebiscites was more or less the same: accession to the constitutional monarchy of King Victor Emmanuel II was required.[95] According to

[92]Santangelo Spoto (1902–1905); Marchi (1918, 1920, 1925).

[93]Cf. Mongiano (2003), Fruci (2007, 2011), Lacchè (2016d) and Pene Vidari (2016).

[94]Anzillotti (1912), Romano (1950b), Marchi (1924), Orlando (1940).

[95]*Formula of Tuscany plebiscite* (11th and 12th March 1860): «Unione alla Monarchia costituzionale del Re Vittorio Emanuele II, *ovvero* Regno separato» (Union to the constitutional Monarchy of the King Victor Emmanuel II, *rather* separated Kingdom); *Formula of Emilia plebiscite* (11th and 12th March 1860*)*: «Annessione alla Monarchia costituzionale del Re Vittorio Emanuele II, ovvero: Regno separato» (Annexation to the constitutional Monarchy of the King Victor Emmanuel II, or: a separate Kingdom); *Formula of Neapolitan Provinces plebiscite* (21st October 1860): «Il popolo vuole l'Italia una e indivisibile con Vittorio Emanuele Re costituzionale e suoi legittimi discendenti?» (Do the people want one and indivisible Italy with Victor Emmanuel constitutional King and his legittimate descendants?); *Formula of Sicily plebiscite* (21st October 1860): «Il popolo Siciliano vuole l'Italia una e indivisibile con Vittorio Emanuele Re costituzionale e suoi legittimi discendenti?» (Do the Sicilian people want one and indivisible Italy with Victor Emmanuel constitutional King and his legittimate descendants?); *Formula of Marche plebiscite* (4th and 5th November 1860): «Volete far parte della Monarchia costituzionale del Re Vittorio Emanuele II?» (Do you wish to become part of the constitutional Monarchy of the King

Alberto Mario Banti the consensus by the Plebiscites was not a "founding act" but an "confirming act" of the will of the Nation.[96] Plebiscites were a political act more than a juridical act: they were made in order to please certain trends and necessities which manifested themselves in the public conscience and for reasons of international politics. In them there was a generic reference to the constitutional monarchy which meant gathering the main forces of the nation around the Sovereign. The constitutional monarchy should represent Unity and should stop those substantial discourses which prevented working at a common project.[97] In opposition to those who saw the constitutional monarchy only as an initial step that anticipated the Republic or at least the convening of a constituent assembly, Carlo Boncompagni said:

> Per l'Italia, il Re non è solamente colui che regge le sue sorti, e che la guida alla sua liberazione; egli simboleggia una grande istituzione destinata a proteggere i suoi destini futuri. Che se lo stare in fede della monarchia fu necessario finora, questa necessità divenne più stretta dappoiché l'unità nazionale fu posta in cima del nostro programma. La monarchia fu la unificatrice di tutte le grandi nazioni d'Europa: la unificazione fallì là dove mancò quel simbolo del diritto nazionale che è il Re.[98]

National unification was realised without a constituent assembly in that the Albertine Statute was deemed sufficient. In the two-year period 1859–60 the Constitution of Charles Albert was published/promulgated in every province for mere needs of legitimisation of the ongoing historical process of unification.

Victor Emmanuel II?); *Formula of Umbria plebiscite* (4th and 5th November 1860): «Volete far parte della Monarchia costituzionale del Re Vittorio Emanuele II?» (Do you wish to become part of the constitutional Monarchy of the King Victor Emmanuel II?); *Formula of the plebiscite of the provinces of Venetia and Mantua* (22nd October 1865): «Dichiariamo la nostra unione al Regno d'Italia sotto il governo monarchico costituzionale del Re Vittorio Emanuele II e dei suoi successori» (We declare our union to the Kingdom of Italy under the constitutional monarchic government of the King Victor Emmanuel II and his descendants). Cf. Mongiano (2003, 216).

[96]Banti (2011).

[97]Luigi Lacchè noted that on the European Continent the constitutional monarchy is a general formula, a complex political order, a conceptual space which took on a variety of characteristics. Cf. Lacchè (2016a, *History & Constitution* cit., 252).

[98]«For Italy, the King is not only he who holds its fate, and who guides it to its liberation; he symbolises a great institution destined to protect its future destiny. If to trust the monarchy has been necessary till now, this necessity became more urgent ever since the national unity was placed at the top of our programme. The monarchy was the unifier of all the great nations of Europe: unification failed there where that symbol of national law that is the King was lacking». Boncompagni (1861, 34). Lampertico as well noted that: «L'idea di monarchia costituzionale richiama non solo l'idea di monarchia limitata ed è in contrapposto quindi a monarchia assoluta, ma inoltre di monarchia rappresentativa ed in cui i poteri sovrani si esercitano dal Principe e dai rappresentanti della nazione» (The idea of constitutional monarchy brings to mind not only the idea of limited monarchy and therefore is in contrast with absolute monarchy, but moreover it recalls the idea of representative monarchy where the sovereign powers are exercised by the Prince and by the representatives of the nation). Cfr. Lampertico (1886, 56).

The Statute was again elevated to the role of political symbol (not legal) of the new State and devaluation of the letter of Constitution continued.[99] Fedele Lampertico (1833–1906) noted that:

> La Costituzione dello Stato Sardo ha bastato, perché mediante il concorso del Re, del Senato e della Camera dei deputati, ossia senz'uopo di costituente venisse proclamato il Regno d' Italia, e ne divenissero parte integrante i paesi d'Italia o soggetti già allo straniero o smembrati negli antichi Stati. Qui però l'atto costitutivo si è trovato immedesimato coll'atto stesso di unione, d'aggregazione, d'incorporazione nazionale. Il quale atto di unione ritrae origine e valore dai plebisciti, per cui venne a costituirsi l'unità d' Italia.[100]

According to Lampertico the Statute was the fundamental and irrevocable law because by way of the nation consent permitted to share the sovereignty between the King and the Parliament. In a key passage the author noted that the Constitution was not only the written text but Constitution was inside the public sentiment, the practice, the customs, the legislation and in the history of Risorgimento.[101] In the same years, public opinion constantly asked to restore constitutional order within the framework of the Albertine Statute. *La Gazzetta del popolo* of 13 January 1860, with the explicative title of *Give us back the Statute! (Restituiteci lo Statuto!)*, noted

> In fatto di costituzione non si può e non si deve far credito, essenchè il semplice fatto di un credito costituiscono un debito verso la Costituzione, quindi un atto incostituzionale. Soggiungiamo che a noi non importa gran fatto che il Ministero si chiami Pietro o Paolo o che sia costituzionale in teoria, ciò che chiediamo che siano costituzionale in pratica.[102]

Moreover, *La Gazzetta del popolo* of 12 August 1860 noted:

> Lo Statuto nostro è buono, e possiamo dirlo anche migliore di quasi tutte le contemporanee costituzioni scritte. (…) Lo Statuto italiano (…) ha eziando agevolato il futuro ordinamento delle altre provincie d'Italia che aspettano la liberazione.[103]

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[99]Manca (2015, 89–134).

[100]«The Constitution of the Sardinian State was enough, because by way of the involvement of the King, the Senate and the Chamber of Deputies, or without the need of a constituent assembly the Kingdom of Italy was proclaimed, and the countries of Italy, which were either subject to foreign occupation or dismembered into the old States, became integral part of it. Here however, was the constitutive act identified with the same act of national union, aggregation, incorporation. Such act of union derives its origin and value from the plebiscites, by which the unification of Italy was constituted». Lampertico (1886. *Lo statuto e il senato* cit., 50).

[101]Lampertico (1886, 99).

[102]«On the matter of constitution, credit cannot and must not be given, since the simple fact of a credit constitutes a debt towards the Constitution, therefore an unconstitutional act. We add that we do not care a lot for the fact the Ministry is called Peter or Paul or that it is constitutional in theory, that which we ask is that it is constitutional in practice».

[103]«Our Statute is good, and we can also define it better than almost all the other written contemporary constitutions. (…) The Italian Statute (…) has also facilitated the future legal order of the other Italian provinces which wait for liberation».

The newspaper *L'Opinione pubblica* focused on specific constitutional issues like for example the legitimacy of the law concerning full powers and on provisional governments.[104] Alongside the restoration of constitutional rules by way of a return to the Statute, a part of the public law doctrine hoped for the immediate summoning of the Parliament.[105] According to Mazzini and the Mazzinians the Parliament did not have any title for facing the issue of national integration.[106] Cavour, however, decided to face the situation at parliamentary level. On 2 October 1860 the Prime Minister presented a Bill with only one article to the Chamber in which he asked for the authorisation of the Government to proceed onto the annexations of new provinces through royal decrees.[107] Cavour admitted in front of the Parliament that during the annexation process of Tuscany and Emilia many unconstitutional acts had been carried out:

> Il nuovo Ministero si affrettò di dar opera all'annessione; ma, siccome questa incontrava gravi ostacoli nella diplomazia, parve opera savia e prudente l'associare il Parlamento al suo compimento; ed egli è per ciò che quando i dittatori dell'Emilia e della Toscana promossero il plebiscito, il Governo del Re li invitò a promuovere immediatamente l'elezione dei deputati di quelle provincie, chiamandoli tutti insieme a sedere in quest'aula. Ma così facendo, o signori, io lo dichiaro altamente, noi ci siamo scostati dalla stretta legalità, noi abbiamo commesso un atto incostituzionale; noi non avevamo, a termini di rigoroso diritto, facoltà di invitare i deputati dell'Emilia e della Toscana a sedere in Parlamento per deliberare assieme ai rappresentanti delle antiche provincie (e tra queste annovero anche la Lombardia) intorno all'annessione delle nuove provincie.[108]

In this speech, the Count underlined that under international pressure the annexation procedure was not properly carried out according to a legitimate procedure, since the act was authorised through an enlarged Parliament with

[104] *L'Opinione pubblica*, 29th September 1859, N° 271; *L'Opinione pubblica*, 6th October 1859, N° 278; *L'Opinione pubblica*, 14th October 1859, N° 286; *L'Opinione*, 24th November 1859, N° 327.

[105] La nazione provvega alla nazione. *Il diritto*. 28th April 1860, N° 118 and L'appoggio del parlamento. *L'opinione*, 6th May 1860, N° 126. Articles are also reprinted in the Appendix of the volume by Caracciolo (1960).

[106] Mazzini, Giuseppe. Assemblea e plebisciti. *Il Popolo d'Italia*. 19th October 1860.

[107] For a detailed analysis on the statute law and on the content of the Relation by Cavour to the bill, please see Santoncini (2008, 217–232).

[108] «The new Ministry hastened to realise the annexation; but, since this met serious obstacles in diplomacy, a wise and prudent operation appeared to be associating the Parliament to its realisation; and it is for this reason that when the dictators of Emilia and Tuscany promoted the plebiscite, the Government of the King invited them to immediately promote the election of the deputies of those provinces, summoning them all together to sit in this Chamber. However, in doing so, Milords, I declare it loudly, we diverged from the strict legality, we have committed an unconstitutional act; we did not have, according to rigorous law, the faculty of inviting the deputies of Emilia and Tuscany to sit in Parliament in order to decree together with the representatives of the old provinces (and among them I include Lombardy as well) on the annexation of the new provinces». Cf. Artom and Blanc (1868, 606).

representatives of new provinces. To the South of Italy the statesman, therefore, proposed an alternative solution. In the same report, he asked for a motion of confidence. Cavour noted that it was «more consistent with the spirit of our institutions» to legally proceed, that is making the electoral committees vote the annexations first and then summoning the Parliament.[109]

After a long discussion, the Chambers approved the annexations. The opposition was limited to more advanced criticism of different procedure than in the past. The statute law was approved on 16 October 1860, but it was promulgated only on 3 December 1860 after that the plebiscites of the Southern provinces, of the Marche and Umbria were carried out. Then, the Parliament was dissolved on 28 December 1860. The results of the elections of 27 January substantially rewarded the Cavour politics. On 18 February 1861 the new parliamentary session was inaugurated with a solemn meeting where for the first time the new representatives of the new State filed in together. Some days later a Bill was presented by way of which Victor Emmanuel II assumed the title of King of Italy for himself and his descendants.

8 Epilogue

Constitutionalisation was not a moment, it was rather a continuous process which characterised Italian Unification. It was a question of a phenomenon which had the purpose of giving constitutional forms to the Nation. The parabola of this process remains an open question with non-defined features for many aspects: it had its origins in Piedmont-Savoy when the small State connected its own politics and institutional transformations to the national cause; it proceeded during the making up of the Kingdom of Italy and continued also after the Unification. This phenomenon consisted in making a "common" constitutional patrimony based on the idea that statute laws and institutions must agree with the Spirit of the Albertine Statute come to the surface, and in making sure that this spirit spread within all the social body. A good part of the results are not easily valuable if we do not want to get to the heart of the matter with judgements on its value which often position themselves around the incompleteness of the constitutional forms and the limits of the institutional results which characterise the Italian State.

The constitutionalisation of the Italian Unification had a written constitution at its core. The Albertine Statute was considered the main bond for the political-social dimension, a political necessity, but it did not rise to the role of a law higher than the other norms of public law (hierarchicalisation of norms) and a control of constitutionality was lacking.[110] No judge had the faculty of pronouncing on the

[109]Artom and Blanc (1868, cit., 607).

[110]Among those who fought for a control of constitutionality there was for example, Racioppi (1905). The author admitted a judicial control all the times that procedural norms included in the Constitution were not respected. Moreover, the judiciary could verify if the Parliamentary consent was validly formed. Racioppi tried to single out norms included in the Albertine Statute which

legitimacy of a statute law. The Court of Cassation, in a decision of 26th January 1871, was firm in holding that searching for the opposition of a norm to the Statute and to the rights of the citizens was a duty exclusively reserved to the Parliament and the Sovereign.[111] Such a reconstruction was corroborated by the theory of separation of powers, according to which it was not acceptable that the judicial power syndicated the act of another power. The guardian of the Constitution was solely and only the legislative power (so-called parliamentary syndicate).

Within this framework the term-concept Constitution referred both to the idea of a *pactum* which gave shape to the Nation and to the written document. De facto, the same normative dimension of the Constitution rested on the idea of a "perpetual constituent assembly". Common features could be found in all the experiences that belong to the model of the so-called granted constitutions. That which makes the Italian experience a unique case as regards the *Charte costitutionelle* (1814 and 1830) or the *Landständische Verfassung* was the longevity of the constitution of Charles Albert. The Albertine Statute survived political and institutional changes without there being a formal change of juridical norms. Institutional mechanisms and dynamics generated constitutional forms which were diverse according to contingencies and spontaneous requests. In this context, jurists could affirm that the essence of the Constitution was the Spirit, not its letter and that the Constitution was something more than the written text.

allowed a syndicate by the judge. Instead, Gaetano Silvestri both acknowledged a normative prominence to the Albertine Statute, and invoked a jurisdictional syndicate: «La "legge costituzionale", dunque, si distingue dalla massa delle "leggi ordinarie" per un rapporto di priorità storica, che la costituisce come presupposto di tutti gli atti del potere legislativo. Ma si distingue pure per un rapporto materiale di priorità logica e giuridica. Difatti, lo Statuto, oltre a fissare i caratteri formali obbligatorii di ogni legge, ha per contenuto un particolare corpo di norme aventi per oggetto la tutela dei diritti fondamentali (*Grundrechte*) dei cittadini: diritti, i quali costituiscono il *minimum* indispensabile per l'esistenza e per la struttura dello "Stato giuridico". La "carta costituzionale", invero, non stabilisce dei precetti vaghi e indefiniti, i quali non siano suscettibili di applicazione pratica, ma chiude e tutela diritti determinati in precise disposizioni positive, dotate di una adeguata garanzia di stabilità» (The "constitutional law", therefore, distinguishes itself from the mass of "ordinary laws" for a relationship of historical priority, which constitutes it as presupposition of all the acts of the legislative power. However, it distinguishes itself also for a material relationship of logical and juridical priority. Indeed, the Statute, besides fixing the compulsory formal characteristics of every statute law, contains a particular body of norms whose object is the protection of fundamental rights (*Grundrechte*) of the citizens: rights which constitute the indispensable *minimum* for existence and for the structure of the "juridical State". The "constitutional charter", indeed does not establish vague and indefinite precepts, which are not susceptible to practical application, rather it encloses and protects determinate rights in precise positive provisions endowed with an adequate guarantee of stability). Cf. Graziano (1914, 39). On these aspects please see Meccarelli (2002) and Stronati (2015).

[111]The decision is quoted by Miceli (1902. *Incostituzionalità*, cit., 775).

9 Summary (Italian)

Il focus di questa indagine è la costituzionalizzazione intesa come *processo di integrazione legale*, entro la struttura dello Statuto Albertino, e *meccanismo d'interpretazione e d'emendabilità (revisione) del testo costituzionale*, che porterà ad un'unificazione nazionale senza un documento scritto quale atto di un potere costituente esercitato dal popolo. Si tratta di leggere lo Statuto Albertino attraverso la sua evoluzione, tenendo conto delle competizioni e delle contrapposizioni per mantenere in armonia le istituzioni con la società civile.

La promulgazione dello Statuto Albertino costituiva la prima tappa del lento e difficile processo di costituzionalizzazione fatto di progressi, ma anche di reazioni, battute di arresto. L'altra fase è quella della sperimentazione che portava ad un'evoluzione della lettera dello Statuto alla luce del contesto storico-sociale. La costituzionalizzazione dell'Unificazione nazionale è, pertanto, un fenomeno di lungo periodo, costituendo la cifra per leggere il *National Building*. Specificamente, lo Statuto Albertino era un punto di partenza più che un punto di arrivo. Dal momento in cui il sovrano concedeva la costituzione, ci si rendeva conto che l'atto normativo era di per sé insufficiente, lo Statuto Albertino era un atto che non poteva essere revocato, ma la costituzione per vivere doveva riposare sul consenso e l'opinione pubblica doveva credere in essa.

Nel preambolo lo Statuto Albertino è definito «legge fondamentale perpetua ed irrevocabile». È assai probabile che, nell'intenzione del sovrano l'espressione «legge fondamentale» evocasse le teorie sulle *lois fondamentales* proprio della monarchia assoluta francese. «Perpetua» stava a significare il giuramento (obbligo politico e giuridico) assunto dal Re, per sé e per i suoi successori, di non revocare in alcun modo la concessione costituzionale.

La parola «irrevocabile» era, invece, intensa nel significato di un patto tra Sovrano e Nazione. L'idea del patto rinviava anzitutto all'antica concezione che vedeva nelle *leges fundamentales* un contratto attraverso cui si regolavano i rapporti tra sovrani e assemblee parlamentari garantendo la successione al trono. Tale idea consentiva di fondare le origini dello Stato non sulla sovranità popolare ma sulla parità giuridica delle due parti contraenti.

Sebbene l'esperienza italiana non conoscesse il principio di supremazia della Costituzione, l'espressione "incostituzionale" non era sconosciuta sotto lo Statuto Albertino. Ad un esame delle fonti non è difficile rinvenire che durante le sessioni parlamentari gli oratori sollevavano questioni di incostituzionalità di leggi e regolamenti. Vi era una certa coincidenza tra il significato che assumeva il termine incostituzionale in seno al diritto pubblico inglese e l'espressione impiegata nella prassi costituzionale italiana, ove incostituzionale era genericamente inteso «ogni comportamento costituzionale scorretto».

In generale, la validità di una norma giuridica doveva rinvenirsi nella più generica conformità al sentire dell'opinione pubblica. Pertanto si faceva risultare incostituzionale ogni atto o fatto normativo discorde o contrario allo spirito della Costituzione. Fu Cavour che inaugurò questa forma di interpretazione dello Statuto

Albertino. Ciò fu il più importante lascito dello statista alla teoria costituzionale del periodo liberale. A partire dal 1850 ogni atto normativo veniva vagliato alla luce della lettera ma soprattutto dello Spirito della Costituzione che consentiva di mantenere in costante armonia l'ordine legale con la pubblica opinione.

È cosa nota che la costituzione scritta era scarna e molte norme avevano il sapore di principi generali piuttosto che di norme giuridiche direttamente vincolanti. Di conseguenza, la vera partita si giocava sul piano della prassi e dell'interpretazione, sulla perenne difficoltà a ricondurre i principi in esso contenuti entro i confini del costituzionalismo moderno. Si trattava, in sostanza, di estrapolare dal testo della Costituzione limiti effettivi al potere monarchico ed enucleare regole che consentissero un reale sviluppo del principio parlamentare garantendo diritti e libertà fondamentali.

I giuristi parlavano in modo generico di interpretazione secondo lo spirito della Costituzione, modifiche, deroghe o abrogazione dello Statuto. Le modifiche alla lettera furono pochissime. L'attenzione deve però essere concentrata sulle c.d. «modifiche tacite», cioè sui cambiamenti al significato della costituzione senza che per questo si cambi il documento scritto. Le modifiche tacite intervenivano sul documento implementando, sviluppando la lettera dello Statuto e correggendo gli eventuali errori. L'interpretazione e la prassi costituivano i più importanti meccanismi di cambiamento costituzionale. In questo contesto si riconosceva un ruolo di primo piano alle norme non scritte.

In conclusione, la costituzionalizzazione avvenne attraverso il ricorso a tre strumenti: la formula contenuta nei plebisciti, l'estensione dello Statuto Albertino a tutti i territori conquistati e la parlamentarizzazione della causa nazionale. Essa non fu un momento ma un processo continuo che caratterizzò l'Unificazione italiana. Si è in presenza di un fenomeno che aveva per scopo dare forme costituzionali alla Nazione. La parabola di questo processo resta una questione aperta, per molti aspetti dai tratti non definiti: aveva origine nel Piemonte-Savoia quando il piccolo Stato legava la propria politica e le trasformazioni istituzionali alla causa nazionale, proseguiva durante la formazione del Regno d'Italia e perdurava anche dopo l'Unità. Questo fenomeno consisteva nel far emergere un patrimonio costituzionale "comune" fondato sull'idea che le leggi e le istituzioni debbano essere concordi con lo Spirito dello Statuto Albertino, fare in modo che questo spirito si diffondesse per tutto il corpo sociale. Buona parte dei risultati non sono facilmente valutabili se non si vuole entrare nel merito con giudizi di valore che spesso si attestano attorno all'incompiutezza delle forme costituzionali e sui limiti degli esiti istituzionali che caratterizzarono lo Stato italiano.

La costituzionalizzazione dell'Unificazione italiana aveva a fondamento lo Statuto Albertino che era considerato il principale collante della dimensione politico-sociale, una necessità politica, ma non assurgeva al ruolo di legge più alta rispetto alle altre norme di diritto pubblico. Mancava, inoltre, un controllo di costituzionalità. Nessun giudice aveva la facoltà di pronunciarsi sulla legittimità di una legge. In questo orizzonte è difficile poter dire quando il termine-concetto Costituzione rinviava alla tradizione delle *leges fundamentales*, all'idea di un ordine precostituito frutto di un *pactum unionis* e alla tradizione, e quando si rinviava al

documento scritto. Per certi versi i due momenti tendono a coincidere e rendono l'esperienza italiana originale in quanto conciliava un costituzionalismo a base scritta con un costituzionalismo a base consuetudinaria. Restava di fatto che la stessa dimensione normativa della Costituzione poggiava sull'idea di una "costituente perpetua". Lo Statuto Albertino era sopravvissuto a cambiamenti politici ed istituzionali senza che ci fosse un formale cambiamento delle norme giuridiche. Meccanismi e dinamiche istituzionali generavano forme costituzionali diverse a seconda delle contingenze e delle domande spontanee. In questo contesto, i giuristi potevano affermare che l'essenza della Costituzione fosse lo Spirito non la lettera e che la Costituzione fosse qualcosa di più del testo scritto.

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Legal Hierarchies in the Works of Hans Kelsen and Adolf Julius Merkl

Thomas Olechowski

Contents

Abstract At Austrian universities, the problem of 'Precedence of Constitution' is usually taught within the framework of the 'theory of the hierarchical structure of the legal order', an essential part of the so-called 'Pure Theory of Law.' Whilst the famous jurist Hans Kelsen (1881–1973) was the founder of the Pure Theory, the 'theory of the hierarchical structure' has been introduced by Kelsen's disciple Adolf J. Merkl (1890–1970) in 1918 and is accepted also by those who do not follow Kelsen's Pure Theory. According to the Pure Theory, the basis of the validity of a norm can only be another norm, which can be seen as the 'higher' norm. The legal order can be seen as a structure of 'higher' and 'lower' norms, and within the legal order of a certain state, its constitution is the highest norm of all—the 'paramount law', as has been said by US Supreme Court in its famous case *Marbury v. Madison*, in 1803. The 'theory of the hierarchical structure' also gives the justification for constitutional justice: the constitutional court reviews whether the legislator has remained within the framework of the constitution.

'Precedence of Constitution' or, in German, *Verfassungsvorrang*, the phrase which is in the centre of this conference, is hardly ever used in the Austrian legal language, even almost unknown. The problem discussed here, which is the question of the relationship of the constitution to other norms, in particular to statutes, is usually taught at Austrian universities within the framework of the 'theory of the hierarchical structure of the legal order'—in German: *Lehre vom Stufenbau der Rechtsordnung*.

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This theory is recognised as so fundamental that it is already taught to students in their first semester, albeit in very simplified manner, which does not really reflect the revolutionary character that the theory had in the days when it was first developed.[1] At any rate this theory is common sense in the Austrian scientific community. This is true not only for the followers of Hans Kelsen's 'Pure Theory of Law', which continues to be quite popular in Austria, but also for its critics. Just a short while ago it was argued that the 'hierarchical structure of the legal order [was] the most important achievement of the Vienna School of Legal Theory, and indeed its only element that was not built on sand but stands on solid ground.'[2] Hardly ever do people remember that the theory of the hierarchical structure was not developed by Hans Kelsen, and that, in fact, Kelsen had originally intended to banish as non-juristic from his theory of law the central problem which is resolved by the theory of the hierarchical structure, which is the question of the formation and annulment of legal norms.[3] It was his disciple Adolf Julius Merkl, who from 1918 onward developed the first ideas in this regard,[4] and thereby made such an important contribution to Kelsen's Pure Theory of Law that Merkl was even 'crowned' co-founder of the Pure Theory by his academic teacher.[5] However, it remained Kelsen's task to connect the theory of the hierarchical structure with the other propositions of the Pure Theory of Law and to integrate it into his theorem in such a skilful way that it would hardly occur to latter-day readers that it had not been part of this theory from the beginning.[6]

From what has been said so far, one can infer that the theory of the hierarchical structure, even if it is nowadays often taught independently of more detailed theoretical considerations, can only be fully understood if it is elaborated against the backdrop of Kelsen's Pure Theory of Law. This will be briefly addressed in the following.

The vantage point of the Pure Theory of Law is the difference between 'is' and 'ought': With the sentence 'A certain state of affairs exists', we express something completely different than with the sentence 'A certain state of affairs ought to exist.' The first sentence is a statement about the actual state of affairs; the latter sentence is a normative order, a norm.[7] Admittedly, it is often the case that the content of a norm corresponds to an actual state of affairs, so that what ought to be does actually

[1] See f.e. Kneihs et al. (2014, p. 21f.) and Thaler (2016, p. 29).

[2] Koller (2005, p. 106).

[3] Kelsen (1911, pp. 543–547).

[4] Merkl (1918). The „classical" version of the theory is given in Merkl (1931).

[5] Kelsen (1960, p. 313). The historical development oft he idea of the „Stufenbau" is described by Borowski (2005, pp. 124–131).

[6] See esp. the sum of Kelsen's theory in Kelsen (1967), and the chapter on „The dynamic aspect of law", pp. 193–278.

[7] Kelsen (1967, pp. 5–6).

happen. But this would be a 'material-historical-psychological approach'. From the point of view of logic, there is no bridge that would lead from the one to the other.[8]

Therefore, it is in particular impossible to deduce from factual power relationships the validity of a norm. If a gangster says to me: "Give me your money!", and, because I am refusing to comply, uses force, he is perhaps only in gradual terms different from the income-tax official, who also wants my money and is prepared to use force, if necessary, to recover it. Nevertheless, the official's order, quite different to that of the gangster, will be interpreted as a norm. Behind his subjective volition there is an objective 'ought'.[9] How can this be explained? What is the basis of the validity of this norm?

According to the Pure Theory of Law, the basis of the validity of this norm can only be another norm, which in our case authorises the officer to create norms.[10] In our concrete case this would be a court order to direct a civil execution against someone's property. This only diverts the question for the basis of the validity, though. Now it sounds like this: What is the basis of the validity of the court order? If the court with which we are dealing here is situated in a continental European *Rechtsstaat*, a state under the rule of law, it will have applied a statute. And the norm which in turn provides for the validity of the statute is the constitution as the highest norm of the state.[11] The word 'highest' does suggest a certain idea of spatiality, for whose characterisation the phrase 'hierarchical structure' is ideal; the entire legal order of the state appears as a hierarchy, with the constitution forming its highest level.

Obviously we cannot stop here, because the constitution must derive its validity from another norm, for example from a previous constitution, but this only works if this previous constitution included norms regulating how changes to the constitution should be made, and if these norms were actually applied.[12] If the new constitution, however, has come about in a revolutionary act, then we have arrived at a provisional end point, at least as far as national law is concerned. I only want to hint here at the fact that another of Kelsen's disciples, Alfred Verdross, quite vehemently argued that national law has some norms of the international law as the basis of its validity.[13] One could say that he extended the hierarchical structure from including only national law to comprising international law as well. Kelsen himself at least regarded this as one of several ways to solve the problem[14]; I myself share Verdross' opinion. But for us here it is not necessary to delve further into this discussion. In the present context we are only concerned with national law, and there, the constitution does indeed form the highest level of positive law. One level further down are the statutes, another level under them the ordinances or

[8]Kelsen (1911, p. 87).
[9]Kelsen (1967, p. 8).
[10]Kelsen (1967, p. 193).
[11]Merkl (1931, p. 282).
[12]Kelsen (1967, p. 200).
[13]Verdross (1923, p. 134).
[14]Kelsen (1967, p. 336).

administrative regulations, then the court decisions and individual administrative acts, and so on.[15]

The hierarchical structure which I have just described is a typical one, but not the only possible one. The actual sequence of the individual levels does not follow a principle of legal theory, but the positive law instead.[16] This is why I said before, 'if the court with which we are dealing here is situated in a continental European *Rechtsstaat*, a state under the rule of law.' A court in a common law jurisdiction might not base its decision on a statute but on a precedent. A court in a fascist dictatorship might perhaps base its decision not on a statute but on the will of the dictator, which may have been issued only orally. The possibilities are endless.

It is crucial here to recognise that it is a characteristic of the law that it regulates its own creation.[17] A highly developed legal order contains not just detailed rules which directly affect the coexistence of people but also equally detailed rules which authorise certain organs to create rules themselves. How detailed these rules are, how many levels there are in this hierarchical structure, entirely depends on the respective legal order. Always there has to be a highest level, which at least needs to state who is authorised to create law. But even if one imagines this norm in the simplest possible terms—for instance, *regis voluntas suprema lex* (the king's will is the supreme law)[18]—there needs to be at least one lower-level norm which contains some more specific expressions of the norm-issuer's will. Whether these are statutes, court decisions or administrative acts, whether a corresponding statute is needed to issue an administrative act, whether a difference is even made between a court decision and an administrative act—all these are questions of positive law, which may differ from one country to another.[19] At any rate there needs to be a lowest level: the practical execution of a norm, which is the act in which the bailiff takes, for example, the laptop computer into his hands and carries it out of the apartment of the person against whom the execution is directed. This lowest level is not a norm; it is a legally relevant fact.[20]

Between the highest level, the constitution, and the lowest level, the factual execution of a norm, there are other norms whose creation is determined by a higher norm but which also serve as a precondition for the creation of lower-lever norms. While the highest level is a level of absolute law creation, and while the lowest level is a level of absolute law application, the levels in between have—to quote Merkl's famous dictum—'two faces': they are law application (from the point of

[15]Merkl (1931, p. 259).

[16]Merkl (1931, p. 273).

[17]Kelsen (1929, p. 2), Merkl (1931, p. 281), Kelsen (1967, p. 221) and Vašek (2013, p. 10).

[18]Merkl (1931, p. 252).

[19]Kelsen (1929, p. 2).

[20]Merkl (1923, p. 2010), Merkl (1931, p. 260), Koller (2005, p. 109). See also Borowski (2005, p. 137f), who is on the opinion that it is not possible to construct a two-step legal order, so there has alway to be at least one level between the highest and the lowest one.

view of the higher level) as well as law creation (from the point of view of the lower level).[21]

Law-creation from one level to the next was characterised by Merkl as a gradual individualisation and concretion[22]: Very general norms develop gradually into more specialised ones; at first, they apply to an infinite number of material facts, then to a large number of them, then only to a few and eventually only to one. For example, the constitution only stipulates that the federal parliament is competent to create private law; private law stipulates that in the case of a divorce the child should stay with the parent who is best suited to bring him or her up; the judge finally needs to make a decision whether little Peter should be brought up by his father or by his mother. In this process, the creation of a new level is in part an act of thought, in part an act of will.[23] In an act of thought, the legislator needs to understand the content of the constitution, the judge the content of the statute. One could say that these higher-level norms demarcate the outer frame of what is actually possible in terms of the law. Usually, this framework will allow for a number of alternatives. The legislator who is competent to create private law could also have said that divorce is illegal or that whenever a divorce occurs the child has to stay with his or her mother. But the legislator has found another solution, namely that the judge must decide which parent should bring up the child—this is the legislator's act of will. This means, however, that the judge is only dealing with a framework, he may decide in favour of the father as well as in favour of the mother, depending on what he thinks will be best for the welfare of the child.

At this point I should make a comment on the theory of interpretation that comes with the Pure Theory of Law[24]: The highest principle of the Pure Theory of Law, as you know, is that it wants to 'purify' the study of the law of all non-juristic elements. It stipulates that only the 'act of thinking' just described, that is, the definition of the frame provided by the higher-level law, constitutes legal scholarship. This is true for the academic lawyer (for instance at a university) as well as for the practising law professional. The filling of this frame on the other hand, that is, the act of will in which a concrete decision is made, does not constitute scholarship but is an act of judgment which needs to follow extra-legal criteria.[25] In the language of the Pure Theory of Law, this is a 'political' act, but 'political' not in terms of party politics. At any rate, scholarship stops, as it were, one step before the goal; unlike the judge, it accepts that for an academic question there is often not one but there are several equally valid answers.

But let us now return to the hierarchical structure: The question on which level of the hierarchical structure a norm is situated is not determined based on its content but on its form: Constitutional provision—simple statute—ordinance—court

[21]Merkl (1918, p. 10).

[22]Merkl (1931, p. 283); see also Kelsen (1929, p. 3).

[23]Merkl (1923, p. 219).

[24]Kelsen (1967, pp. 348–356).

[25]Kelsen (1967, p. 351).

decision or individual administrative act (formal administrative decision). It should be stressed at this point that court decisions and individual administrative acts are situated at the same level, that is, below the statute. In this respect, the theory of the hierarchical structure constitutes a counterpoint to the traditional theory of the separation of powers, which regards legislature, executive, and judiciary as standing next to each other and does not structure them hierarchically, whereas the theory of the hierarchical structure quite easily accounts for a precedence of the statute.[26] This has led us to the core of our subject: the precedence of the constitution, which like the precedence of the statute can be understood in terms of the theory of the hierarchical structure.

The constitution is thus the level of the law which contains the preconditions according to which simple statutes can be created.[27] One can distinguish two types of such preconditions: there are preconditions in regard to the legislative process on the one hand, and preconditions in regard to the content of the statutes on the other.[28] The constitution may contain provisions on who may initiate the legislative process, how many members of parliament need to be present during the poll, who needs the sign the bill once it has been passed, and so forth. It may also contain substantive provisions, however, in regard to a certain content that must not become law. One example is the distribution of competences in the federal state, which may prevent the federal parliament or the parliaments of the member states, respectively, from enacting laws on certain subjects. In particular, however, this concerns the fundamental rights and liberties, precisely because they are not written down in simple statutes but form part of the constitution, that is, rules which primarily address the legislator. They forbid him to overly restrict the freedom of speech, to discriminate against women, to impose the death penalty, etc.

This example, in particular, makes clear that we are referring to constitutional law in a formal sense, not to constitutional law in a substantial sense.[29] If parliament enacted only a simple statute that says: 'Everyone is entitled to enjoy freedom of speech', and immediately afterwards another statute which imposes censorship on newspapers and other media, then the first statute could not block the second one. Only if the freedom of speech is constitutionally guaranteed, if in the hierarchical structure of the legal order it is one level above the statute, can it block the statute. However, this also means: if the statute that introduced censorship was itself enacted in the form of a constitutional provision, a constitutional guarantee against censorship will not have the desired effect, because the enabling and prohibiting norms are situated at the same level.[30]

Here again it should be noted that all of the examples provided depend on the respective national legal order. The example which I have chosen here is at any rate

[26]Merkl (1931, p. 285).
[27]Kelsen (1929, p. 7).
[28]Kelsen (1929, p. 8).
[29]Kelsen (1929, p. 7) and Kelsen (1967, p. 222).
[30]Kelsen (1929, 8, 35).

in accordance with the Austrian legal order. In Germany, the freedom of speech is guaranteed by Art. 5 of the Basic Law. This article is, at least to a certain extent, protected by the 'eternity clause' of Art. 79 of the Basic Law, which stipulates that the 'fundamental principles' of Art. 1–20 can never be changed.[31] In the present context we need not delve into the question of what precisely these 'fundamental principles' are or which limitations to the freedom of speech might be introduced even in the Federal Republic of Germany by means of a constitutional amendment. We can however note that there seem to be in Germany two types of constitutional law: Constitutional law which is affected by the eternity clause, on the one hand, and all the other constitutional law, on the other. This necessarily implies that even within constitutional law, separate levels may exist, and that Art. 79 constitutes as it were the highest level of national law. The Austrian counterpart would be the 'structural principles' of the Austrian Federal Constitution. This idea was developed by legal theorists on the basis of Art. 44 of the Federal Constitutional Act; it stipulates that a fundamental change to the democratic, republican, federal, or other basic principle of the constitution requires a two-thirds majority in parliament as well as a referendum. The point is that by means of this complicated procedure a total change of the constitution would at least theoretically be possible, which is not the case in Germany.[32]

But what are the implications then if a statute was passed in a procedure that deviated from the procedure laid down in the constitution, or if it has some content that is ruled out by the constitution? Given that the constitution sets the preconditions under which statutes can come into existence, the answer must primarily be that any deviation from these preconditions, as small as it may be, must have as its consequence that the statute has not accrued the force of law, that is, that it is null and void.[33] The argument was also a similar one in the US Supreme Court case *Marbury v. Madison*, where the court came to the conclusion that the Act in question was null and void.[34]

This state of affairs will only be different if the constitution contains a provision which expressly prohibits the courts to exercise judicial reviews of statutes or at least contains a prohibition of reviewing statutes in terms of their content. Such prohibitions could be found in many constitutions of the nineteenth and twentieth centuries and seemingly had the effect that the judges had to apply statutes even if they were clearly unconstitutional.[35] But was that indeed the case?

Let us remind ourselves of the significance of the hierarchical structure of the legal order. This stepped pyramid traces all legal acts in the state back to higher-level legal acts and these are traced back to the constitution. The constitution

[31]See Dreier (1994, p. 265ff.), with further references; Vašek (2013, p. 30).

[32]See now the sharp-witted analysis by Vašek (2013).

[33]Kelsen (1929, p. 15) and Merkl (1923, p. 292).

[34]Urofsky and Finkelman (2002), Documents No. 46.

[35]See for example article 7 of the Austrian Staatsgrundgesetz über die richterliche Gewalt, 21st December 1867, Reichsgesetzblatt No. 144.

is the origin of all national law, it provides for the unity of the legal order, figuratively speaking: it expresses the will of the state. An unconstitutional statute is characterised by the facts that it cannot be incorporated into the hierarchical structure; that it cannot base its validity on the constitution; that it does not reflect the will of the state.

But if the constitution says: 'I want you to apply this law, and whether its content is compatible with the provisions which I have made elsewhere does not need to concern you', then it is the will of the constitution that this apparently unconstitutional statute should be valid. But in this case the statute is not unconstitutional at all, it is indeed constitutional.

Here an example as well: If the constitution says that freedom of speech is guaranteed and a statute introduces censorship, then this statute is unconstitutional and therefor null and void. If the constitution however also says that the judges must not review the censorship statute, then this statute is constitutional and valid. The question that remains to be asked then is: To what extent is the guaranteed freedom of speech still significant? The answer is rather frustrating: This constitutionally guaranteed right has no significance vis-a-vis the simple legislator, it cannot bind him. In other words, in the hierarchical structure of the legal order it is not above but at the same level as the censorship statute. By means of the simple sentence: 'Judges are not competent to carry out judicial review', the differentiation between constitutional law and simple statutes loses its significance, and even more: it does not exist.

And this is exactly the point where Hans Kelsen's concept of constitutional courts sets in. As soon as there is a court which is competent to review the constitutionality of statutes, this introduces also a special level of formal constitutional law in the hierarchical structure of the legal order.[36] This constitutional court simply checks whether the preconditions for the creation of statutes as stipulated in the constitution have been met. If the constitution offers the simple legislator several alternatives and if the legislator has chosen one of these legitimate alternatives, then the constitutional court must not criticise this choice; it is not the legislator's choice which is under review, but only whether he has remained within the framework of the constitution. Its role is not different to that of a court of higher instance, which reviews the decision of the court of first instance but may only decide whether the decision was legally correct, but not whether it was lenient or harsh, fair or unfair.[37]

The particularity of the Austrian model of judicial review by a constitutional court, by which it differs from the American model, is its centralisation in a single court: All the other courts cannot undertake the judicial review themselves; they may only request that the constitutional court, which has a monopoly in this respect, checks a statute for its constitutionality.[38] If it comes to the conclusion that a statute is unconstitutional, it annuls this statute. This means that its decisions have a

[36]Kelsen (1929, p. 48).

[37]Kelsen (1931, p. 71).

[38]Olechowski (2014, p. 87).

constitutive effect; the statute is not invalidated until it is declared null and void. Until then it is only annullable, or in other words, not an absolute but a relative nullity.[39]

How can this provision be understood in terms of the hierarchical structure? Annulment is only an option for something which has previously existed. This means that until they are annulled, unconstitutional statutes are valid. And this also corresponds to the prohibition directed at other courts to undertake the judicial review themselves. So the constitution does, as just explained, indeed contain a general sanction according to which statutes, as long as they have the outward appearance of a statute, have at least provisional validity, even if they are otherwise flawed. For this phenomenon, Merkl coined the term *Fehlerkalkül*, which means that the constitution takes the possible faultiness of statutes into account and merely provides for the possibility of their annulment by a special court.[40]

With this I am arriving at the last aspect: I have made use of the hierarchical structure in two different ways[41]: On the one hand, it shows how the entire legal order consists of norms which are in a relation of super- and sub-ordination; one norm owes its validity to the validity of another norm. On the other hand, however, the hierarchical structure provides also the theoretical basis for the annulment of statutes; higher-level law destroys lower-level law. It must be clear that the hierarchical structure understood in terms of legal conditionality does not have to be completely identical with the hierarchical structure understood in terms of derogatory power.[42] A constitutional provision can form the basis for the annulment of a simple statute even if it was created after the statute and thus cannot have been a precondition for the creation of this statute in the first place. A converse example would be the parliamentary rules of procedure, which will usually either be at a lower level or at most at the same level as a simple statute, but which are also a precondition for the creation of simple statutes and even constitutional provisions. It is thus justified to join Merkl in distinguishing between two 'hierarchical constructions': the hierarchical structure understood in terms of legal conditionality and the hierarchical structure understood in terms of derogatory power. In both of them, however, the constitution will claim the highest level.

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[39]Kelsen (1929, p. 15).

[40]Merkl (1923, p. 293), Merkl (1931, p. 293) and Borowski (2005, p. 151).

[41]Merkl (1931, p. 278).

[42]Merkl (1931, p. 278); this is criticized by Koller (2005, p. 112).

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Appendix A
Emmanuel Joseph Sieyès, Du Jury Constitutionnaire (an III)

Presented on 18 Thermidor III (5 August 1795)

French Original[1]

ARTICLE PREMIER

Il y a un dépositaire conservateur de L'ACTE CONSTITUTIONNEL, sous le nom de **jury constitutionnaire**.

II

II est composé de cent huit membres, qui se renouvelleront annuellement par tiers, et aux mêmes époques que le corps législatif.

III

L'élection du tiers ou des trente-six entrants se fait par le jury constitutionnaire lui-même, sur les deux cent cinquante membres qui doivent, à la même époque annuelle, sortir de l'un et l'autre conseil du corps législatif.

IV[2]

La première formation du jury constitutionnaire se fera au scrutin secret par la Convention, de manière qu'un tiers des membres soient choisis parmi ceux de l'assemblée nationale, dite Constituante, un autre tiers parmi ceux de l'assemblée législative, et un autre parmi les membres de la Convention.

V

Les séances du jury constitutionnaire ne seront point publiques.

VI

Le jury constitutionnaire prononcera sur les violations ou atteintes faites à la constitution, qui lui seraient dénoncées contre les actes,

[1] Archives Nationales 284 AP 4 doss. 8.
[2] C'est un article à décréter à part.

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Soit du conseil des Anciens,

Soit du conseil des Cinq-Cents,

Soit des assemblées électorales,

Soit des assemblées primaires,

Soit du tribunal de cassation,

Lorsque ces dénonciations lui seront portées,

Soit par le conseil des Anciens,

Soit par le conseil des Cinq-Cents,

Soit par des citoyens en nom individuel.

II prononcera sur semblable dénonciation qui lui serait portée par la minorité contre la majorité de l'un ou l'autre des susdits corps constitués.

VII

Les décisions du jury constitutionnaire porteront le nom d*'arrêt.*

VIII

Les actes déclarés inconstitutionnels par arrêt du jury constitutionnaire, sont nuls et comme non avenus.

IX

Si les actes dénoncés comme inconstitutionnels, sont des actes responsables ou mêlés d'actes responsables, le jury constitutionnaire pourra, avant ou après avoir juge le point d'inconstitution, adresser la dénonciation aux tribunaux compétents, avec ordre de poursuivre.

X

Le jury constitutionnaire s'occupera habituellement des vues qui lui paraitront propres à perfectionner l'acte constitutionnel et la déclaration des droits de l'homme.

L'opinion de la majorité, quand elle sera formée, sera inscrite dans un registre particulier.

XI

Dans le courant de chaque dixième année, à commencer de l'an 1800, huitième de la république, douzième de la révolution, le jury constitutionnaire examinera de nouveau ses *avis* consignés dans son registre.

Il composera son *cahier de propositions* pour améliorer l'acte constitutionnel,

Et il en donnera officiellement communication au conseil des Anciens et à celui des Cinq-Cents, afin qu'il reçoive la plus grande publicité.

Cette communication se fera trois mois au moins avant la tenue annuelle des assemblées primaires.

XII

Les assemblées primaires, après lecture faite du *cahier de propositions,* déclareront *oui* ou *non,* si elles entendent donner au conseil des Anciens le pouvoir d'y statuer.

Si la majorité des assemblées primaires a dit *non,* le *cahier* sera regardé comme non avenu, et ses propositions ne pourront être reproduites avant la dixième année suivante.

Si la majorité des assemblées primaires a dit *oui,* le pouvoir constituant est délégué, par ce seul fait, au conseil des Anciens, pour statuer sur les propositions faites, sans qu'il puisse ni les amender ni en substituer d'autres.

XIII

Les séances où le conseil des Anciens exercera le pouvoir constituant y seront exclusivement affectées.

Elles ne pourront excéder le nombre de douze en tout, ni celui de deux par décade.

II y aura, pour les séances du pouvoir constituant, un procès-verbal séparé, sur un registre particulier, qui sera, à la fin, solennellement déposé aux archives du jury constitutionnaire.

XIV

Chaque année, le dixième au moins des membres du jury constitutionnaire, pris au sort, se formera en *jury d'équité naturelle.*

Cette section sera, en sus des deux attributions précédentes, exclusivement chargée de prononcer sur les demandes officielles qui lui seraient portées par les divers tribunaux, à l'effet d'avoir un arrêt d'équité naturelle sur les cas qu'ils déclareraient n'avoir pu juger, faute de loi positive qui pût s'y appliquer, ou ne pouvoir juger que contre leur conscience, d'après le texte seul de la loi.

XV

Les *arrêts d'équité naturelle* seront exécutés par le tribunal qui aura formé la demande officielle, ou par toute autre, au choix du jury constitutionnaire.

XVI

Les arrêtés d'équité naturelle seront officiellement communiqués, dans le mois, au conseil des Cinq-Cents.

XVII

Le jury constitutionnaire ne peut rendre aucun arrêt du propre mouvement.

À Paris, de l'Imprimerie nationale.

Thermidor, L'an III.

Appendix B
Emmanuel Joseph Sieyès, Du Jury Constitutionnaire (an III)

Presented on 18 Thermidor III (5 August 1795)

English Translation by Ulrike Müßig

FIRST ARTICLE

There is a depository keeper of the CONSTITUTIONAL ACT, under the name of the *constitutional jury.*

II

It consists of 108 members, a third of whom are annually replaced, and at the same time as the legislative body.

III

The election of a third or of the thirty-six entrants is executed by the constitutional jury themselves, among the 250 members who have to, at the same time of the year, leave one or another council of the legislative body.

IV[3]

The first formation of the constitutional jury will be made secretly by the convention, in such a manner that one third of the members are selected among that of the national assembly, i.e. the constituent assembly, another third among that of the legislative assembly and still another by the members of the Convention.

V

The sessions of the constitutional jury will not be open to the public.

VI

The constitutional jury will comment on the violations or the impairments of the constitution, which will be denounced to them, against the acts,

[3]This is an article to be decreed separately.

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either of the Council of Ancients,

or of the Council of Five Hundred,

or of the electoral assemblies,

or of the primary assemblies,

or of the tribunal of cassation,

when these denunciations will be addressed to them,

either by the Council of Ancients,

or by the Council of Five Hundred,

or individually by the citizens.

They adjudicate on a similar denunciation addressed to them by the minority against the majority of one or another of the constitutional bodies mentioned above.

VII

The decisions of the constitutional jury will bear the name 'decision.'[4]

VIII

The acts declared as unconstitutional by the decision of the constitutional jury are null and void.

IX

If the acts denounced unconstitutional are responsible acts or involve responsible acts, the constitutional jury can, before or after having judged the point of unconstitutionality, address the denounciation to competent tribunals with the order to pursue.

X

The constitutional jury will habitually take care of the views which for them seem to be suitable to improve the constitutional act and the declaration of the human rights.

The opinion of the majority, when they are formed, will be particularly registered.

[4]The original French—arrêt—most accurately translates to the English 'judgement.' However, in modern terminology, 'judgement' refers to the first instance jurisdiction. The modern usage of the term 'decision' is closer to Sieyès' intention.

XI

In the course of each tenth year, starting from year 1800, eighth of the Republic, twelfth of the Revolution, the constitutional jury will examine again their opinions registered.

They will create their notebook of propositions in order to improve the constitutional act,

and they will officially communicate with the Council of Ancients and that of Five Hundred, in order to receive the greater publicity.

This communication will be made three months at least before the primary assemblies are annually held.

XII

The primary assemblies will, after having read the notebook of propositions, declare yes or no, if they understand giving the council of Ancients the power to lay them down as rules.

If the majority of the primary assemblies said no, the notebook will be seen as void and its propositions cannot be reproduced before the following tenth year.

If the majority of the primary assemblies said yes, the constituent power is delegated, by this fact only, to the Council of Ancients, to lay the propositions made down as rules without being able to either amend them or to substitute them with others.

XIII

The sessions at which the Council of Ancients will exercise the constituent power will be exclusively affected.

Altogether, they cannot exceed the number of twelve nor that of two per decade.

There will be, for the sessions of the constituent power, a separated written report, about a particular register, which will be, in the end, solemnly placed in the archives of the constitutional jury.

XIV

Every year, the tenth of at least the members of the constitutional jury, which will be randomly taken, will build a jury of natural equity.

This section will be, in addition to the two preceding attributions, exclusively assigned to adjudicate on the official requests submitted to them by the different courts, for having a decision of natural equity in the case that they declare not having been able to judge, due to the absence of a positive law which can apply to that, or to being forced to judge only against their conscience, according to the text only of the law.

XV

The decisions of natural equity will be executed by the tribunal who will make the official demand or by any other on the choice of the constitutional jury.

XVI

The decisions of natural equity will by officially communicated, within one month, to the Council of Five Hundred.

XVII

The constitutional jury cannot make any decision of the proper movement.

In Paris, National Printing House.

Thermidor, Year III.

Appendix C
Projet de Constitution pour le Royaume de Pologne, 1812

Collection of the National Museum Cracow (Muzeum Narodowe w Krakowie), The Princes Czartoryski Library (Biblioteka Książąt Czartoryskich)

Ref. Ms. 13078, provenance: Archiwum Druckich-Lubeckich no 5.

Transciption with (tracked=[ ]) alterations of grammar, syntax and spelling errors as necessary for the French comprehensibility. The correction of the Cyrillic additives for the nobility's charte, the cities' constitution, the governing council and the districts takes into account the terminology in use since Catherine's II administrative and judicial reforms. For readability's sake tracking has been suspended in the latter case as well as in regard to the French separation rule.[5]

[5]Deviating titles, varying in the table of contents and in the body of text (headings), are kept as in the original source.

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Titre Huitième. Des Etrangers.

Titre Neuvième. De l'Administration centrale.

I. Du Conseil Dirigeant[.]

II. Du Conseil d'[É]t[a]t.

Titre Dixi[è]me. De l'administration exécutive et de [la] Police dans les Provinces.

I. Dans les Chefs lieux[.]

II. Dans les Districts et Communes.

III. Dans les Villes.

Titre Onzième. De l'Administration Judiciaire.

I. Des Tribunaux de première Instance.

II. Des Tribunaux d'Appel.

III. Du Tribunal Supr[ê]me.

Constitution du Royaume de Pologne.

Titre Premier.

Lois fondamentales.

I.

Le Royaume de Pologne est joint et confédéré indissolublement avec l'Empire de Russie, il conservera à jamais toute son intégrité politique et celle des Droits qui lui sont assurés par la présente constitution.

II.

La Couronne est héréditaire dans la Famille de Sa Majesté l'Empereur et Roi ALEXANDRE I^{er}.

III.

Dans le cas d'extinction de la Famille Impériale actuellement régnante, celle qui alors occupera le t[rô]ne Impérial succ[è]dera aussi à celui de la Pologne.

IV.

Chaque Empereur de Russie se fera couronner comme Roi de Pologne à Wilna et indiquera le jour de son couronnement lors de son av[è]nement au T[rô]ne.

V.

L'Empereur et Roi régnera selon la présente Constitution par laquelle toute autre loi ou acte constitutionel antérieur, est aboli.

VI.

La Religion catholique apostolique et Romaine est, et restera à jamais la Religion nationale dans le Royaume.

VII.

La Religion Catholique apostolique grecque professée dans les différentes provinces, continuera de jouir des mêmes avantages dont elle a joui jusqu'à présent.

VIII.

Le Gouvernement assure en même tem[p]s à toutes les Religions ou cultes, leur libre exercice, en abolissant les lois qui porter[ai]ent atteinte à ce principe.

IX.

Les droits et fondations accordés à l'Universit[é] de Wilna et aux autres Institutions de l'Instruction publique seront conservés.

X.

Dans le cas de minorité du Roi, un Conseil du Régence composé de la Reine Douairière et de trois membres du Sénat (désignés par le Roi ou s'il ne l'eut pas fait par les [É]tats) remplira les fonctions du Roi.

XI.

Les Lois Civiles et Pénales, actuellement en vigueur, continueront de l'être jusqu'à ce que les [É]tats aient décidé sur le nouveau Projet du Code ALEXANDRE, qui leur sera présenté par une Commission que le Gouvernement nommera.

XII.

Le Roi, L'Ordre Equestre, les villes libres et les communes des Cultivateurs, constituent la Nation.

XIII.

Leur ré[u]nion en Diète du Royaume (en assemblée des [É]tats) constitue le Pouvoir législatif.

XIV.

Le Gouvernement et Pouvoir exécutif, réside dans le Roi seul, aid[é] d'un Conseil dirigeant composé des Ministres ou Chefs, et d'un Conseil d'[É]tat.

XV.

L'Empereur de Russie, comme Roi de Pologne, ainsi que chacun de ses Successeurs, nommera un Lieutenant (ou Vice-Roi) soit parmi les Princes de Sa Maison, soit tel autre individu qu'il Lui plaira de nommer, et à qui il déléguera telles attributions de Son autorité qu'il trouvera convenable.

XVI.

Le Pouvoir judiciaire est distinct des deux précédents, il est confié à des juges élus aux diètines et à la diète, et confirmés par le Roi.

XVII.

Il y aura trois ordres de tribunaux, ceux de première, de seconde et en dernière instance.

XVIII.

La présente Constitution, sera revue par la Diète tous les vingt cinq ans.

[Le deuxième titre et les premières dispositions du troisième titre sont manquants].[6]

21. La Chambre des Nonces se renouvellera par moitié tous les deux ans.
22. Dans chaque Province, la corporation de l'Ordre Equestre en nomme un, et celle des villes, l'autre. Un Règlement spécial déterminera les arrondissements, dont les propriétaires constitue ront une diètine.
23. La Chambre des Nonces est présidée, pendant la diète, par un Maréchal choisi dans l'ordre de la Noblesse, à la majorité des voix, et confirmé par le Roi.

[6]Le Réf. Manuscrit 13078 ne contient pas les dispositions numérotées XIX et XX. Avec le n° 21 suivant, la numérotation change pour être en chiffres arabes. Cette lacune fait l'objet de controverses dans la littérature polonaise (Smolka Stanisław, *Polityka Lubeckiego przed powstaniem listopadowym, vol. II*. Kraków (1907), 506; Izdebski Hubert, Litewskie projekty konstytucyjne z lat 1811–1812 i ich wpływ na Konstytucję Królestwa Polskiego. *Czasopismo Prawno-Historyczne* (XXIV) (1972), 105). La position de Smolka, selon laquelle le "deuxième titre et les premières dispositions du troisième titre manquent," semble préférable, car il n´y a aucune raison de cautionner la supposition d´Izdebski, selon laquelle les dispositions manquantes couvrent jusqu´à 20 articles. Ce dernier ne prend pas en considération que chaque titre comprend plusieurs articles (par exemple, le titre X: 16 articles, le titre XI: 36 articles, le titre VIII: quatre articles).

24. La Diète s'assemblera tous les deux ans, à moins que le Roi ne juge à propos d'ordonner une Assemblée extraordinaire.

25. Elle ne peut être convoquée que par des lettres Circulaires, signées par le Roi.

26. Sa durée ordinaire, est de six semaines. Le Roi peut la proroger, et prolonger ses séances.

II.

Attributions.

27. La Chambre des Nonces donnera en premier lieu, son avis sur les propositions faites par le Roi, son Conseil d'[É]tat entendu, relativement à l'augmentation ou la distribution des impôts, ou sur tout autre objet que le Roi trouve à propos de leur faire communiquer.

28. Elle décidera aussi des propositions faites par chaque Nonce, relativement à la situation et aux besoins de sa classe dans l'arrondissement.

29. Ces Propositions doivent préalablement être communiquées au Gouvernement, qui ne pourra suspendre la discussion sur cet objet, que lorsqu'elle ser[a]it contraire à la Constitution, ou si les faits n'ét[ai]ent pas justifiés.

30. L'emploi des sommes destinées pour les dépenses locales de chaque corporation, sera contr[ô]lé par un Comité, nommé par la Chambre, après qu'il l'aura été par la Diètine.

31. Chaque Projet de Loi générale (civile et pénale) sera discuté par la Chambre des Nonces.

32. Des Commissaires (ou Orateurs) nommés par le Gouvernement, exposeront les motifs des lois ou des propositions faites par le Gouvernement.

33. Après que la Chambre des Nonces aura manifesté son opinion à la majorité des voix, le Commissaire (ou Orateur) du Gouvernement, un des Nonces et le Maréchal, se pr[é]senteront à la barre du Sénat, pour soumettre le Projet de la Loi à sa décision.

34. On fera une seconde lecture des mêmes pièces, et le Sénat a le droit d'accepter ou de reje[t]er simplement la proposition et l'avis de la Chambre des Nonces.

35. Le Sénat manifestera son acceptation ou son rejet par la pluralité des voix et au scrutin secr[e]t. Si le Sénat rejette la proposition ou la Loi proposée par la Chambre des Nonces, elle ne peut être présentée une seconde fois dans la même Diète.

36. Lorsque la majorité des deux Chambres sont d'accord sur l'acceptation d'une proposition, elle n'obtient force de la loi que par la sanction du Roi ou de son délégué.

37. Le Roi a une double voix pour résoudre la parité, quand elle aura lieu.

38. Le Roi peut reje[t]er la proposition, quand même elle aur[a]it pass[é] à la totalité des voix dans les deux Chambres.

39. Dans le cas de l'article [38] l'Ordre, ou la corporation, dont la proposition a été reje[t]ée, peut s'adresser au Roi par un Député et lui exposer sa prière, pour obtenir qu'elle devienne l'objet d'une nouvelle proposition à la Diète.

40. On nommera trois Comités (ou Députations) composées de Membres des deux Chambres pour préparer les objets qui seront portés à l'Assemblée. Ces comités seront:

    1. Celui des finances.

    2. – des Lois.

    3. – de la Police.

Titre IV.

Des Diètines.

I.

Formation.

41. Les Diètines sont composées par les députés choisis par l'Ordre Equestre, les Villes et les Communes.

42. Elles seront précédées des réunions ou Assemblées électorales de District, composées de députés de chaque classe.

43. Le Mode de ces reunions sera fixé par un Règlement particulier qui déterminera conformément aux localités, le nombre des députés de chaque district.

44. Les Diètines s'assembleront dans les Chef lieux des Provinces (ou villes de Gouvernement.)

45. Les Diètines ordinaires auront lieu tous les deux ans et précéderont la Diète des [Éta]ts.

46. Le Gouvernement en fixera le tem[p]s.

47. Les Membres seront élus pour 6 ans.

48. Le tiers sera renouvél[é] tous les deux ans.

49. L'assemblée élira un Président ou Maréchal de la Classe de l'Ordre Equestre et un Secrétaire pour la rédaction des Procès- Verbaux et des propositions à faire à la Diète.

50. La durée de chaque diètine ne peut excéder trois semaines.

II.

Attributions.

51. Les objets dont les Diètines s'occuperont sont; 1., d'émettre leur opinion sur la distribution impartiale des impôts et le mode de perception le plus convenable [dans les] localit[é]s et [par] rappor[t] [aux] habitan[t]s. 2., sur l'état et les besoins des différentes classes dans leur arrondissement, pour éclairer le Gouvernement sur la meilleure voie de faciliter et améliorer l'administration publique.

52. Ils feront parvenir directement leurs observations et représentations, à cet égard, au Conseil dirigeant, par les Ministres respectifs, et ces mêmes objets seront le contenu des instructions des Nonces et Députés choisis pour la Di[è]te des [É]t[a]ts.

53. Ils seront obligés d'examiner les comptes sur l'Emploi des sommes destinées aux besoins locaux de chaque district et arrondissement.

Titre V.

De L'ordre Equestre.

54. Les Nobles terriens constituent le premier Ordre de la Nation.

55. L'ét[a]t noble de Pologne est égal en dignité à celui de tous les autres Pays.

56. Il jouira de tous les Privilèges accordés à la Noblesse Russe par la Charte de la Noblesse (Дворянская Грамота).

57. Dans leur sein, seront choisis exclusivement les grands Dignitaires et tous les autres fonctionnaires du Royaume, à l'exception de ceux auxquels les députés des villes et communes concourront, en vertu de la constitution.

58. Tous les Membres de ce corps sont égaux, non-seulement quant aux droits de posséder dans le Royaume, toutes espèces de charges, et de remplir les fonctions, mais aussi quant aux autres immunités et prérogatives qui sont attribuées à l'ordre [É]questre par cette Constitution.

59. Les Membres de l'ordre [É]questre sont les premiers défenseurs de la liberté du Royaume et de la nation.

60. L'ordre [É]questre participe à la législation par la réunion de ses Députés aux diètines, comme Propri[é]taires, pour concourir à une distribution impartiale des impôts.

61. Il participe à la législation par l'[é]lection de Nonces à la Diète (vu l'Assemblée des [É]t[a]ts)[.]

62. Il participe encore au pouvoir judiciaire en choisissant les juges et étant choisi comme Candidats, pour la plus grande partie des places judiciaires.

Titre VI.

Des Villes libres et Bourgeois.

63. Les villes libres comme corporations des bourgeois, constituent le second ordre de l'[É]t[a]t.

64. Ils jouiront de tous les Privilèges et Droits accordés aux Villes de l'Empire Russe par la Charte des Villes (Городовое положение)[.]

65. Ils participeront à la législation, en s'assemblant par leur Députés aux diètines pour concourir à la distribution des Impôts.

66. Ils participeront à la législation par l'élection des Députés à la Di[è]te (ou l'Assemblée des [É]t[a]ts)[.]

67. La Diète s'occupera d'un Projet de loi sur la Constitution à donner aux autres villes.

Titre VII.

Des Colons et cultivateurs.

68. La Constitution assure à la Classe des Cultivateurs un ét[a]t légal.

69. Les travaux et redevances auxquelles les cultivateurs, comme usufruitiers des terres (appartenant aux propri[é]ta[ir]es des biens-fonds) sont assujettis, ne seront pas arbitraires, mais détermin[é]s, par des Lois et Règlements particuliers, ou par des Contrats.

70. Le principe sur lequel les redevances dues aux Propriétaires seront fixées, est celui, que l'usufruitier jouisse d'un bénéfice proportionné à son travail et au produit de la terre.

71. Une Commission spéciale s'occupera à cet effet, d'un Projet de loi sur l'arpentage et l'estimation des terres et sur la confection d'un cadastre.

72. Pour ce même effet, les Paysans ou cultivateurs établis sur les terres d'une certaine étendue, formeront des communes qui seront solidairement responsables [envers] l'[É]tat et [les] Propriétaires des Droits et Impôts auxquels ils seront obligés.

73. Ces Communes jouiront, sous le rapport des droits civils, des droits des Corporations.

74. Plusieurs communes formeront un Canton.

75. Chaque Commune choisira ses anciens pour le maintien de l'ordre dans l'intérieur, et pour juger les différends de peu d'importance.

76. Ils seront surveillés par les Juges de Paix ou Commissions du bon ordre.

77. Dans le contentieux, les cultivateurs ne participeront à la judicature [i.e. le corps judiciaire] que comme juges du fait. L'application de la Loi appartiendra aux Juges ordinaires choisis par les diètines.

78. Il sera libre aux Propriétaires, de conclure avec leurs colons des contrats par lesquels les redevances et travaux seront fixés d'un accord commun.

79. De telles conventions, conclues avec la communauté entière, ou séparement avec chaque habitant de village, deviendront, pour les parties contractantes, une obligation commune et r[é]ciproque, et cela, suivant l'énonciation expresse et la teneur du contrat garant de cet accord, sous la protection du Gouvernement.

Titre VIII.

Des Étrangers.

80. Tout individu à qui l'entrée dans le Royaume n'est pas défendu par les Lois, y jouira de la libert[é] de faire valoir son industrie de la manière et dans tel endroit que bon lui semblera, de se choisir un ét[a]t et de quitter le pays à son gré, en se conformant aux lois de Police établies à ce sujet.

81. Tout étranger qui se sera établi dans le Royaume et qui y a vécu paisiblement un certain tem[p]s pourra être naturalisé en remplissant les conditions prescrites par les Lois à cet égard.

82. L'indigenat ne peut être accordé à un [É]tranger d'extraction noble que du Consentement de la Diète.

83. La r[é]ception d'un [É]tranger bourgeois ou Cultivateur dans les Corporations des villes et Communes des habitan[t]s de village, dépendra du consentement des autorit[é]s locales y établies, toutefois en observant ce qui est prescrit par les Lois de Police.

Titre IX.

De l'administration centrale.

84. Le Pouvoir exécutif de l'administration est confié.

    1., Au Conseil Dirigeant. (Правительствующий Совет)

    2. [,] Au Conseil d'[É]tat.

85. Les Membres de ces Conseils sont nommés et revoqués par le Roi.

I.

Du Conseil Dirigeant.

86. Le Lieutenant du Roi, les Chefs des Départemen[t]s et un Secrétaire d'[É]tat forment le Conseil Dirigeant (ou le Ministère) qui est présidé par le Roi, et dans son absence par Son Lieutenant.

87. Le Lieutenant du Roi exerce en son nom celles des attributions Royales que Sa Majesté lui aura spécialement dél[é]gués.

88. Il surveillera en même tem[p]s la Police du Royaume.

89. Les Ministres ou Chefs qui siègent au Conseil Dirigeant sont:

    1. Le Primat, comme Chef du Clergé et Président de la Commission d'[É]ducation.

    2. Le Ministre des affaires étrangères.

    3. La Ministre de la Guerre (ou Hetman) [.]

    4. Le Ministre de l'Intérieur.

    5. Le Ministre ou Chancelier de la Justice et Garde du Sceau.

    6. Le Trésorier et Contr[ôl]eur du Royaume.

90. Le Conseil dirigeant se trouve dans la Capitale du Royaume de Pologne qui est Wilna.

91. Chaque Chef aura un Département et dirigera sa partie dans toute l'étendue du Royaume.

92. L'organisation des Autorités établies. dans les différentes Provinces (Gouvernements Palatinats) ainsi que dans les Districts (Уезды) et communes, répondra aux attributions du Conseil Dirigeant. Des Règlemen[t]s particuliers contiendront le développement des détails.

93. Lorsque le Roi appelle chez lui un Chef de Département (un Ministre) il sera remplacé ad interim par le Vice Chef ou le Membre le plus ancien du même Département.

94. Dans l'assemblée des Chefs de Départemen[t]s, l'opinion du Lieutenant du Roi est décisive.

95. Le Ministre qui enfreint ses devoirs, devient responsable.

96. Ayant quitté sa place, il peut être accusé devant le Tribunal suprême, après que le Conseil d'Etât aura trouvé qu'il y a lieu à l'accusation.

97. En outre, chaque fonctionnaire Public qui a lésé les droits d'un Citoyen, en abusant de son pouvoir, peut être pris à partie par la voie civile, pour la réparation due à l'individu lésé.

II.

Du Conseil d'[É]tat.

98. Le Conseil d'[É]tat réside auprès de Sa Majesté l'Empereur et Roi qui y préside.

99. Le Conseil d'[É]t[a]t est composé

    1., d'un Président qui a la préséance dans l'absence du Roi, et qui dirige la marche des affaires.

    2., de quelques membres référendaires et d'un Secrétaire d'[É]tat.

    3., de Membres extraordinaires qui assistent aux Séances lorsqu'ils y sont appellés.

100. Les Ministres et Sénateurs sont par leur place Membres extraordinaires du Conseil d'[É]t[a]t.

101. Le Président est le Rapporteur général de toutes les affaires, et l'organe des ordres du Roi.

102. Le Conseil d'[É]tat s'assemble ordinairement une fois par mois.

103. En outre, le Président convoque le Conseil d'[É]t[a]t, chaque fois que le Roi l'ordonne.

104. Hors des Séances, le Président, les Référendaires et le Secrétaire d'[É]t[a]t travaillent en Comité.

105. L'objet de l'activité du Président et des Conseillers-Référendaires, est de rendre compte au Roi de la marche et de l'[é]t[a]t des affaires, suivant les rapports qui sont entrés du Conseil Dirig[e]ant, afin de réunir toutes les données qui peuvent servir à constater des faits et éclairer la Religion du Roi.

Titre X.

De l'administration exécutive dans les Provinces.

106. Le Royaume est divisé, sous le rapport de l'administration, en Provinces (Gouvernements Palatinats) Districts et Communes.

107. Sous le rapport militaire, la division sera fixée par un règlement particulier.

I.

Dans les Chefs-Lieux.

108. Dans chaque Province[,] il y aura un Président (Palatin) (Gouverneur Civil) et quelques Membres, qui formeront un Département administratif central, dont les attributions répondent à celles du Conseil dirigeant auquel il est subordonné.

109. Le Président et les Membres seront nommés par le Roi.

110. Ils surveilleront l'activité des Autorités de District ainsi que des Juges de Paix et des Commissions du bon Ordre.

111. Les autorités judiciaires ne sont point sous la direction du Département administratif.

112. Dans les affaires administratives, la voix du Chef est décisive.

113. Le Chef assistera aux discussions des Diètines sur la distribution des Impôts, la comptabilité et les autres objets que le Gouvernement leur fait communiquer.

II.

Dans les Districts.

114. Dans chaque District, il y aura

    1. Un Chef de District (Castellan, Wo[j]ewoda[7]) avec un ou plusieurs adjoints (selon que les localités l'exigent) exerçant des attributions qui répondent à celles du Département administratif sans les Chefs-lieux.

    2. Une Commission du bon [O]rdre composée d'un Juge de Paix et de quelques Membres (ou Commissaires).

115. Ces fonctionnaires seront élus par les Diètines, tous les quatre ans, et renouve[l]és par moitié tous les deux ans.

116. La Commission du bon Ordre est chargée de la Police judiciaire dans le District.

117. Le Juge de Paix et les Commissaires sont chargés de la Conciliation. Un R[é]glement particulier r[é]glera cet objet.

118. Dans les Provinces ou les localités l'exigeront on pourra établir plusieurs Commissions du bon Ordre dans un District.

119. Leur Jur[i]diction s'étendra sur toutes les classes.

120. Les autorités locales des Communes (art …[114]) seront surveillées par les Commissions du bon Ordre.

121. Personne ne pourra [ê]tre Chef ou Membre du D[é]partement administratif de la Province, du Tribunal d'appel, de la Cour supr[ê]me, Nonce, ou S[é]nateur [s'il] n'a pas occupé pendant 2 ans au moins une Place dans les Commissions du bon ordre ou dans l'administration du District.

[7]L'orthographe originale est Woewod, ce qui renvoie en polonais au terme "Wojewoda" (voïvode = gouverneur), qui administre la voïvodie (territoire administratif).

III.

Dans les Villes libres.

122. L'administration des Villes libres sera organisée sur le même Principe comme il sera developpé par un R[é]glement particulier.

Titre XI.

De l'administration judicaire.

123. Il y aura trois ordres de Tribunaux.

    1. Cour de première instance dans les Districts (уезды) et dans les villes.
    2. Cour de seconde instance dans les Chefs lieux des Provinces (Gouvernements Palatinats).
    3. Un Tribunal en dernier ressort pour tout le Royaume.

I.

Des Tribunaux de première Instance.

124. Les tribunaux de premi[è]re Instance seront compos[é]s d'un Président et de quelques membres.

125. Ils seront élus par Les Diètines tous les quatre ans et renouve[l]és par moitié tous les deux ans.

126. Les tribunaux de première instance conn[aî]tront des affaires civiles, de police correctionelle et criminelles.

127. Dans les Districts ou la Population est plus consid[é]rable le Tribunal de première instance sera divisé en deux Chambres.

128. Dans les cas (civils et de Police correctionelle) ou les Juges de Paix et les Commissions du bon Ordre ainsi que les autorités des Communes, n'auront pas [de] juge en dernier ressort, les parties peuvent exercer les recours [devant] Tribunaux de première instance.

129. Les Tribunaux de première Instance conn[aî]tront de certains objets en dernier ressort.

130. L'instruction et le jugement du fait ser[ont] separé[s] de la question du droit; le premi[è]re appartiendra à des Jurés choisis dans la classe des parties litigeantes; l'application de la loi sera reservée aux Juges.

131. Le Code Judiciaire qui sera presenté à la Diète, developpera ces Dispositions et en les appliquant selon les localités tant aux habitans des campagnes que des villes, r[é]glera les autres objets relatifs à l'organisation definitive des tribunaux et des formes de Proc[é]dure à suivre.

II.

Des Tribunaux d'appel.

132. Les Tribunaux d'appel siègeront dans les Chefs-lieux des Provinces.

133. Leur Jur[i]diction s'[é]tendra sur toutes les classes.

134. Ils seront divisés en deux Chambres, l'une pour les affaires civiles, l'autre pour les affaires criminelles.

135. Chacune sera composée d'un Président et de plusieurs Conseillers.

136. Les Président et Membres seront élus par les diètines et confirmés par le Roi.

137. Ils seront élus pour quatre ans et renouve[l]és par moitié tous les deux ans.

138. Personne ne peut [ê]tre nommé Membre d'un Tribunal d'appel [s'il] n'a pas rempli pendant un certain temps les fonctions de jug[e] dans les tribunaux de première instance ou celles de Juge de Paix.

139. En cas de parité de voix celle du Président départage.

140. Ils surveilleront les tribunaux de premi[è]re instance.

141. Ils jugeront en dernier ressort des objets d'une certaine importance.

142. Leurs Jugemen[t]s seront exécutoires; dans certains cas, ils ne le seront que contre des s[û]retés.

143. Les Jugemen[t]s criminels seront toujours portés à la r[é]vision de la Cour suprême.

144. Les deux Chambres se r[é]uniront sous la Présidence du plus ancien des Presiden[t]s pour juger du contentieux de l'administration, entant qu'il est du ressort des tribunaux civils.

145. Le tem[p]s et la durée des séances et les autres objets accessoires, seront regl[é]s comme il est dit à l'article 131.

III.

Du Tribunal Suprême.

146. Il y aura pour tout le Royaume un Tribunal de Justice Suprême[.]

147. Il sera composé d'un Premier President de trois Présidents et de Membres, tous nommés par le Roi, sur un nombre double des Candidats présentés par la Diète.

148. Les Nonces qui composent le Comit[é] (ou la Députation) des lois à la Diète, font partie des Membres de la haute Cour dans la cas désignés à l'article 152.

149. Le Tribunal supr[ê]me surveillera l'administration de la Justice dans toute l'etendue du Royaume.

150. Le Tribunal sera divisé en trois Sections; la première, pour les affaires civiles; la seconde, pour les affaires criminelles et la troisième, pour les affaires contentieuses avec la Couronne (le contentieux de l'administration).

151. Les Sections se réuniront en Assemblée générale: 1., lorsqu'il n'y a pas deux Jugemen[t]s conformes et que les voix auront été partagées, 2. lorsque le Roi l'ordonnera, 3. pour les objets généraux qui se rapportent au service et à la Police du Tribunal.

152. Les Nonces (art: 148.) se joindront à l'assemblée générale : 1., lorsqu'un Membre de l'administration centrale devra [être] jugé. 2., dans les cas où il se manifeste une lacune dans la loi et que les Tribunaux inf[é]rieurs demandent une disposition régulative à ce sujet.

153. Si le Tribunal suprême trouve que l'objet est suffisamment déterminé par les lois existantes, il le renvoi[e] au Tribunal d'appel, pourqu'il [en] conn[a]isse en vertu de la Loi.

154. S'il trouve qu'en effet il existe une lacune, il présentera l'objet au Conseil Dirigeant, qui soumettra au Roi son opinion relativement à une disposition préalable, jusqu'à ce que la Diète prochaine y [ait] pourv[u].

155. Tous ces cas seront toujours portés à la discussion de la Diète, qui en d[é]cidera sous le rapport législatif.

156. Dans le cas de l'article 148 et 152. le Roi nommera celui qui pr[é]sidera le Tribunal suprême.

157. Les Jugemen[t]s du Tribunal Suprême, ne sont pas sujets à l'appel et seront toujours exécutoires.

158. Les Jugemen[t]s criminels qui emportent la perte des droits civils et politiques, ne pourront être exécutés sans la confirmation du Roi ou de Son Lieutenant.

159. Une Loi particulière d[é]terminera les fonctions des Procureu[r]s (ou Commissaires) Royaux, celles, des Chancelleries, Secrétaires, de même que la Surveillance que le Ministre ou Chancelier de la Justice exercera sur les autorités judiciaires.

Appendix D
Projet de Constitution pour le Royaume de Pologne, 1812

Draft of the Constitution of the Kingdom of Poland 1812

English Translation by Ulrike Müßig

Collection of the National Museum Cracow (Muzeum Narodowe w Krakowie), The Princes Czartoryski Library (Biblioteka Książąt Czartoryskich)

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II. Of Courts of Appeal

III. Of the Supreme Court

CONSTITUTION OF THE KINGDOM OF POLAND

FIRST TITLE

Fundamental Laws

I

The Kingdom of Poland is united to and connected indissolubly with the Russian Empire and will protect forever its political integrity and the integrity of rights assured to it by the present constitution.

II

The crown is hereditary, vested in the family of His Majesty the Emperor and King ALEXANDER I.

III

In the case of extinction of the currently-ruling Imperial Family, the family occupying the Imperial throne will also succeed the Polish throne.

IV

Every Emperor of Russia will be crowned as King of Poland in Vilnius, and the day of His coronation will indicate consequently His accession to the throne.

V

The Emperor and King will rule according to the present constitution by which every law or previous constitutional act is abolished.

VI

The Roman Catholic and Apostolic Church is, and will remain, the national religion of the Kingdom.

VII

The Greek Catholic and Apostolic Church in the different Provinces will continue to enjoy the same advantages as it has enjoyed hitherto.

VIII

The Government guarantees at the same time freedom of worship to all religions or cults, abolishing every law that limits this principle.

IX

The rights and foundations granted to the University of Vilnius and other institutions of the public educational system will be secured.

X

In the case of the King's minority, a Council of Regency formed by the Queen Dowager and three members of the Senate (nominated by the King or, if he has not done so, by the estates) will fulfil the functions of the King.

XI

The civil and criminal laws currently in effect will continue to be in force until the estates have decided on the new draft of a Code Alexander, which will be presented by a Commission appointed by the Government.

XII

The King, the Equestrian Order, the Free Towns, and the communities of peasants constitute the nation.

XIII

Their association in the Diet of the Kingdom (in the Assembly of the Estates) constitutes the legislative power.

XIV

The Government and executive power reside in the hands of the King, with the assistance of a Governing Council composed of Ministers or Heads [of government departments], and a Council of State.[8]

XV

The Emperor of Russia, as King of Poland, as well as each of His successors, will nominate a Lieutenant (or Viceroy), either from amongst the princes of His House, or another individual He may choose to nominate, and to whom He will delegate such authority that He considers appropriate.[9]

XVI

Judicial power is divided into two orders, the one entrusted to Judges who are elected by the Diet, and the other at the Dietine, both confirmed by the King.[10]

XVII

There will be three ranks of tribunals, those of first, second, and last instance.

XVIII

The present constitution will be revised by the Diet every twenty years.

[*The Second Title and the first provisions of the Third Title are missing*][11]

[8]The French term *chef* translates directly to 'chiefs'; in this context, however, the 'chiefs' being referred to are the equivalent of departmental heads within government, which is therefore a more accurate translation of the intended term.

[9]The term 'Lieutenant' appears both in the original French, and in the English translation of the later constitution of 1815. Here it is used as a synonym of 'Governor.' *Constitutional Charter of the Kingdom of Poland in the Year 1815* (London: James Ridgway, 1831), 13.

[10]The French term *diètine*, in its anglicised form (without the accent grave), is used to describe what in sixteenth-century Poland was termed a 'Provincial Assembly.' In the 1791 Constitution, 'Dietine' and 'Primary Assembly' are used interchangeably. Daniel Stone, *The Polish-Lithuanian State, 1386–1795* (Seattle: University of Washington Press, 2001), 64; *New Constitution of the Government of Poland, Established by the Revolution, the Third of May 1791* (London: J. Debrett, 1791), 59ff.

[11]The Ref. Ms. 13078 does not contain provisions numbered XIX and XX. With the following No. 21 the numbering changes to arabic counting. This gap is the subject of controversy within the Polish literature (Smolka (1907), 506; Izdebski (1972), 105). The position of Smolka that the 'Second Title and the first provisions of the Third Title are missing' seems preferable, as there are no indications to support Izdebski's assumption that the missing provisions cover up to 20 articles. The latter does not take into account that every title comprises several articles (e.g. Title X: 16 articles, Title XI: 36 articles, Title VIII: four articles).

21. Half of the Representatives of the Chamber of Envoys will be renewed every two years.[12]
22. In every Province, the corporation of the Equestrian Order nominates one Chamber, and the corporation of the Towns the other Chamber. A special regulation will determine the Districts, whose landowners will constitute a Dietine.
23. During the session of the Diet the Chamber of Envoys is presided over by a Marshal, chosen from the noble estate with the majority of votes and confirmed by the King.
24. The Diet will assemble every two years, unless the King decides to convene an extraordinary assembly.
25. It can only be convened by circular letters, signed by the King.
26. Its ordinary duration amounts to six weeks. The King has the power to extend the duration, and to prolong its sessions.

II.

Attributions

27. The Chamber of Envoys will give, in the first place, its opinions about proposals made by the King, after His Council of State had been heard, in relation to the increase or distribution of taxes, or any other object the King sees fit to communicate with the Envoys.
28. It will also decide about proposals of every Envoy concerning the situation and needs of his estate in the District.
29. These proposals must be previously communicated to the Government, which cannot suspend the discussion about this object unless it is contrary to the constitution, or the facts have not yet been justified.
30. The use of the determined sums for local expenditure of every corporation will be controlled by a Committee, nominated by the Chamber, after being appointed by the Dietine.

[12]The original French term, *la Chambre des Nonces*, can be translated variously as 'Chamber of Deputies', 'Chamber of Envoys', or 'Chamber of Nuncios', although the latter term is customarily used to denote functionaries of the Holy See of Rome. The English translation of the preceding Polish Constitution of 1791 uses 'Chamber of Envoys' and 'House of Deputies' interchangeably, and 'Chamber of Envoys' appears commonly in the secondary literature concerning Poland (and occasionally France) in the nineteenth century. Today, the Lower House of the modern Polish *Sejm* is officially referred to in English as the Chamber of Envoys. Georges Lefebvre, *Napoleon* (London and New York: Routledge, 2010), 446; *New Constitution of the Government of Poland 1791*, 13.

31. Every bill concerning general law (civil and criminal) will be discussed by the Chamber of Envoys.

32. Commissioners (or Speakers) nominated by the Government will set out the motives of laws or proposals made by the Government.

33. After the Chamber of Envoys has given its opinion with the majority of votes, the Commissioner (or Speaker) of the Government, one of the Envoys, and the Marshal will present the draft before the Senate for its decision.

34. There will be a second reading of the same objects, and the Senate has the right to accept or simply reject the proposal and the opinion of the Chamber of Envoys.

35. The Senate will declare its acceptance or rejection through a plurality of votes and via secret ballot. If the Senate rejects the proposition or the law put forward by the Chamber of Envoys, there will be no possibility to present it a second time during the same term of the Diet.

36. When the majority of the two Chambers agree with the acceptance of a proposal, it will be enacted only by the King's consent, or that of his delegates.

37. The King has a double vote to solve the parity of votes, when this takes place.

38. The King has the right to reject a proposal, even after it has been passed with unanimous approval by the two Chambers.

39. In the case of this article [Art. 38], the order or the corporation whose proposition has been rejected may address the King through a Deputy and forward the request to him that it becomes the object of a new proposal before the Diet.

40. Three Commissions (or Delegations) will be nominated, composed of members of the two Chambers, in order to prepare the objects to be presented in front of the Assembly.[13] These Commissions will be:

    1. Commission of Finance;

    2. – of Law;

    3. – of Police.

[13]The term 'Commission' is used in the English translation of the 1815 Constitution.

TITLE IV

Of Dietines

I.

Formation

41. The Dietines are constituted by the Deputies chosen from the Equestrian Order, the Towns, and the Communes.

42. They will be introduced by meetings or District electoral assemblies, composed of Deputies of every estate.

43. The mode of these meetings will be fixed through a particular regulation that will determine the number of Deputies in every District, in accordance with the localities.

44. The Dietines will meet in the capital centres of the Provinces (or seats of Government).

45. The ordinary Dietines will take place every two years, preceding the Assembly of Estates [Sejm].

46. The Government will fix the times of session.

47. The Members will be elected for six years.

48. One-third [of the Members] will be renewed every two years.

49. The Assembly will vote for a President or a Marshal of the estate of the Equestrian Order, and a Secretary for the writing of the minutes and the proposals made at the Diet.

50. The duration of every Dietine term may not exceed three weeks.

II.

Attributions

51. Dietines are in charge of:

    1. The expression of their opinion on the impartial distribution of taxes and the most appropriate procedure of tax collection for villages and their inhabitants;

    2. [The expression of their opinion] on the condition and needs of the various classes in their respective Districts, in order to enlighten the Government on the best way to facilitate and improve public administration.

52. They will send their observations and perceptions, in this respect, directly to the Governing Council, by the respective Ministers, and the same objects will be the content of the instructions of the chosen Envoys and Deputies for the Assembly of the Estates [Sejm].

53. They will be obliged to examine the accounts for the use of the sums that are destined for the local needs of every District and *arrondisement*.

TITLE V

Of the Equestrian Order

54. The noble landowners form the first order of the nation.[14]

55. The noble estate of Poland is equal in terms of dignity to that of all other countries.

56. All members of that estate enjoy all the privileges granted to the Russian nobility by the Charter of the Nobility (Дворьиская Грамота).

57. From amongst them, the most high-ranking dignitaries and all other officials of the Kingdom will be chosen, with the exception of those offices for which the Deputies of the Towns and Communes compete in accordance with the constitution.

58. All members of this [noble] corps are equal, not only concerning the rights of property in the Kingdom, all kinds of charges, and the fulfilment of their functions, but also concerning the other privileges and prerogatives that are attributed to the Equestrian Order by this constitution.[15]

59. The members of the Equestrian Order are the first defenders of the liberty of the Kingdom and the nation.

60. The Equestrian Order participates in legislation through the meeting of its Deputies, as landowners, in the Dietines, in order to confirm an impartial distribution of taxes.

61. It participates in legislation through the election of Envoys at the Diet (see Assembly of Estates).

62. It also participates in the judicial power by choosing the Judges and being chosen as candidates, for the majority of the judicial posts.

TITLE VI

Of Free Towns and Citizens

63. The Free Towns, as the corporations of the citizens, form the second order of the state.

[14]Here, the terms ‘class’, ‘order’, and ‘estate’ are effectively used interchangeably.
[15]The original French refers to ‘immunities’ (*immunités*), though the meaning in practice refers to the system of privileges.

64. They enjoy all privileges and rights that are attributed to the Towns of the Russian Empire by the Charter of the Towns (Городовое положение).[16]
65. They will participate in legislation by assembling their Deputies in Dietines in order to confirm the distribution of taxes.
66. They will participate in legislation through the election of the Deputies at the Diet (or the Assembly of the Estates [Sejm]).
67. The Diet will occupy itself with a bill concerning the Constitution, to be handed over to other Towns.

TITLE VII

Of Settlers and Peasants

68. The Constitution guarantees a legal status for the peasant class.
69. Labours and fees imposed on the peasants, as usufructuaries of the land (belonging to the proprietors of the land), will not be arbitrary, but determined by particular laws and regulations, or by contracts.
70. The principle by which royalties due to the proprietors will be fixed is that which requires that the usufructuary receives a benefit commensurate to his labour and the produce of the land.
71. For this purpose a Special Commission will occupy itself with a bill about land surveying and estimation, and the preparation of a land registry.
72. To this end, the farmers or peasants established on lands of a certain extent will form Communes, being jointly and severally responsible to the State and the proprietors in regard to their obligatory rights and taxes.
73. These Communes will enjoy, in respect to civil rights, the right of corporations.
74. Several Communes will form a Canton.
75. Every Commune will choose its elders for maintaining internal order, and for settling disagreements of little importance.
76. They will be supervised by Judges of the Peace, or Commissions of Good Order.
77. In the case of litigation, the peasants will only participate in judicature concerning issues of fact. The application of law will be entitled to the ordinary Judges chosen by the Dietines.

[16]Isabel de Madariaga, *Politics and Culture in Eighteenth-Century Russia* (Abingdon: Routledge, 1998), 187.

78. It will be the responsibility of proprietors to conclude contracts with their settlers, setting fees and labour by common agreement.

79. From such conventions, concluded with the entire community, or separately with each inhabitant of the village, a common and reciprocal obligation will arise for the contracting parties, following the specific enunciation and the content of the contract, under the protection of the Government.

TITLE VIII

Of Foreigners

80. Every individual whose entry into the Kingdom is not prohibited by law will enjoy the freedom of conducting business in the manner and at the place he wishes, of choosing an estate, and of leaving the country at his discretion, complying with the Laws of Police established in this case.

81. Every foreigner who establishes himself in the Kingdom and who lives there peacefully for a certain time will have the opportunity to be naturalised in the case of fulfilling the conditions required by the law in this regard.

82. Naturalisation cannot be offered to a foreigner of noble origin, except by the consent of the Diet.

83. The reception of a bourgeois foreigner or peasant in the corporations of Towns and Communes of villagers will depend on the consent of the local authorities there established, in accordance with what is required by the Laws of Police.

TITLE IX

Of the Central Administration

84. The executive power of the administration is vested:

    1. In the Governing Council (прави тельствующий совет)[17];

    2. In the Council of State.

85. The members of these Councils are nominated and dismissed by the King.

[17]The term 'Governing Council' is used as a more exact translation of the original French *Conseil Dirigeant*, although the English translation of the 1791 Constitution refers to the 'Council of Inspection.' Czubaty refers to the 'Council of Ministers.' Jaroslaw Czubaty, *The Duchy of Warsaw 1807–1815: A Napoleonic Outpost in Central Europe* (London: Bloomsbury, 2016), 37 ff.

I.

Of the Governing Council

86. The Lieutenant of the King, the Heads of the Departments, and a Secretary of State form the Governing Council (or the Ministry), which is headed by the King and, in His absence, by His Lieutenant.

87. The Lieutenant of the King exercises in His name royal attributions, particularly delegated to him by His Majesty.

88. At the same time he will supervise the police of the Kingdom.

89. The following Ministers or Heads sit in the Governing Council:

    1. The Primate, as Head of the Clergy and President of the Commission of Education;
    2. The Minister of Foreign Affairs;
    3. The Minister of War (or Hetman);
    4. The Minister of the Interior;
    5. The Minister or Chancellor of Justice and Keeper of the Seals;[18]
    6. The Treasurer and Inspector of the Kingdom.

90. The Governing Council is located in the capital of the Kingdom of Poland, which is Vilnius.

91. Every Head will have a Department and will manage the same throughout the Kingdom.

92. The organisation of the Authorities established in different Provinces (Palatinate Governments), as well as the Districts and Communes, will take responsibility for the attributions of the Governing Council. Particular regulations will contain these developments in detail.

93. When the King sends for a Head of Department (a Minister), he will be replaced *ad interim* by the Deputy Head or the most senior member of the same Department.[19]

94. In the Assembly of the Heads of the Departments, the opinion of the Lieutenant of the King is decisive.

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[18]See Burdette Poland, *French Protestantism and the French Revolution: A Study in Church and State, Thought and Religion 1685–1815* (Princeton: Princeton University Press, 1957), 54

[19]The French term used here is *Vice Chef*—literally, 'Vice Chief.' In the context, this role is analogous to a deputy head or undersecretary.

95. Any Minister who ignores his duties will be held responsible.

96. Having left office, he can be prosecuted before the Supreme Court, if the Council of State determines that prosecution should be brought.

97. In addition, any public official who injures the rights of a citizen by abusing his power can be brought before the civil courts for the compensation of the injured individual.

II.

Of the Council of State

98. The Council of State resides with His Majesty the Emperor and King, who presides over it.

99. The Council of State is composed:

    1. Of a President, who has precedence in the King's absence, and who manages the course of business;

    2. Of some Referendaries, and a Secretary of State;[20]

    3. Of Extraordinary Members, who attend the sessions when they are called.

100. The Ministers and Senators are, by virtue of their offices, Extraordinary Members of the Council of State.

101. The President is the general rapporteur of all affairs, and the organ of the King's orders.

102. The Council of State usually convenes once a month.

103. Furthermore, the President calls the Council of State together whenever the King orders him to do so.

104. Outside of sessions, the President, the Referendaries, and the Secretary of State work in committee.

105. The purpose of the activity of the President and the Counsellor-Referendaries is to report to the King on the function and the status of affairs, according to the reports that have been issued by the Governing Council, in order to collate all data that may serve to ascertain facts and enlighten the King's Religion.

[20]The term 'Referendaries' is used in the English edition of the 1791 constitution. The original French translates to 'referendum members'; in practice, these members could also be referred to as 'law clerks.'

TITLE X

Of the Executive Administration in the Provinces

106. The Kingdom is divided, in regard to the administration, into Provinces (Palatinate Governments), Districts, and Communes.

107. Concerning the military aspect, the division will be fixed by a particular regulation.

I.

In the Administrative Centres

108. In every Province there will be a President (Palatine) (Civil Governor) and a few Members, who will form a Central Administrative Department, whose functions shall correspond with those of the Governing Council, to which the first is subordinate.

109. The President and the Members will be nominated by the King.

110. They will supervise the activities of District Authorities, as well as those of Judges of the Peace and the Commissions of Good Order.

111. Judicial authorities are not under the control of the Administrative Department.

112. Concerning administrative affairs, the vote of the Head is decisive.

113. The Head will assist in discussions of the Dietines regarding the distribution of taxes, about their accounting, and other objects, which the Government has communicated to them.

II.

In the Districts

114. In every District, there will be:

    1. A Head of the District (Castellan, *Wojewoda*), with one or more Deputies (according to the demands of the localities) exercising their attributions, which correspond with those of the Administrative Department without the Administrative Centres[21];

    2. A Commission of Good Order consisting of a Judge of the Peace and a few Members (or Commissioners).

115. These officials will be elected by the Dietines every four years and half of the members will be newly elected every two years.

[21]The original draft uses the term *Woewod*, though this is certainly a misspelling of the Polish *Wojewoda*.

116. The Commission of Good Order is responsible for the judicial police in the District.

117. The Judge of the Peace and the Commissioners are charged with Conciliation. A particular regulation will govern this object.

118. In the Provinces in which the localities require it, several Commissions of Good Order may be established in one District.

119. Their jurisdictions will extend to all classes.

120. The local authorities of the Communes (art…[114]) will be supervised by the Commissions of Good Order.

121. No one may become Head or Member of the Administrative Department of the Province, the Court of Appeal, the Supreme Court, Envoy, or Senator, without holding at least one seat for two years in the Commissions of Good Order or in the administration of a District.

III.

In the Free Towns

122. The administration of the Free Towns will be organised in the same way, as will be developed in a particular regulation.

TITLE XI

Of the Administration of Justice

123. There will be three orders of tribunals:

    1. A Tribunal of First Instance in the Districts and in the Towns;

    2. A Court of Second Instance in the Administrative Centres of the Provinces (Palatinate Governments);

    3. A Court of Last Instance for the whole Kingdom.

I.

Tribunals of First Instance

124. The Tribunals of First Instance will be composed of a President and a few Members.

125. They will be elected by the Dietines every four years and half of the Members will be newly elected every two years.

126. The Tribunals of First Instance will adjudicate civil affairs, those of correctional police, and criminal affairs.

127. In Districts with a higher population the Tribunal of First Instance will be divided into two Chambers.

128. In cases (civil and those of correctional police) in which the Judges of the Peace and Commissioners of Good Order as well as the authorities of the Communes have not decided in last instance, the parties can appeal to Tribunals of First Instance.

129. The Tribunals of First Instance will decide certain objects in last instance.

130. The inquiry and trial of a case will be separated from the question of law; the first will belong to the Jurors, chosen from the class of the litigating parties; the application of law will be reserved for Judges.

131. The Judicial Code, which will be presented before the Diet, will develop these provisions and apply them to the localities, both to the inhabitants of the countryside and the Towns, and will regulate other matters concerning the final organisation of the tribunals and forms of procedure to be followed.

II.

Courts of Appeal

132. The Courts of Appeal are situated in the Administrative Centres of the Provinces.

133. Their jurisdiction will extend to all classes.

134. They will be divided into two Chambers, one for civil affairs, the other for criminal affairs.

135. Each Chamber will be composed of a President and several Judges (*Conseillers*).

136. The President and the Members will be elected by the Dietines and confirmed by the King.

137. They will be elected for four years and half of the Members will be newly elected every two years.

138. No one may become be appointed as a Member of the Court of Appeal without having held a judicial office in a Tribunal of First Instance or as a Judge of the Peace for a certain period.

139. In the case of parity of votes, the vote of the President is decisive.

140. They will supervise the Tribunals of First Instance.

141. They adjudge in last instance on affairs of a certain importance.

142. Their judgements will be binding; in certain cases, judgements will only be binding by way of sureties.[22]

143. Criminal judgements will always be subject to review by the Supreme Court.

144. The two Chambers will meet under the chairmanship of the most senior President to judge on contentious administrative matters, as it is the task of the civil courts.

145. The time and duration of the sessions and other incidental articles will be regulated as per Article 131.

III.

Of the Supreme Court

146. There will be a Supreme Court of Justice for the whole Kingdom.

147. It will be composed of a First President among three Presidents, and of Members, all of whom are appointed by the King from a double number of candidates presented by the Diet.

148. The Envoys, who make up the Committee (or the Delegation) of the Laws in the Diet, are part of the Members of the High Court in the cases determined per Article 152.

149. The Supreme Court will supervise the administration of justice throughout the whole Kingdom.

150. The Court will be divided into three sections: the first, for civil affairs; the second, for criminal affairs; and the third, for the contentious cases concerning the Crown (proceedings in contentious administrative matters).

151. The sections will convene in a General Assembly: 1., When there are not two judgements consistent with each other and the votes have been shared; 2.[,] If the King orders them to do so; 3., For general purposes relating to the service and the Police of the Court.

152. The Envoys (Art. 149) will join the General Assembly: 1., If a Member of the Central Administration is to be tried; 2., In cases in which there is a loophole in the law and the lower courts request a regulatory provision on this matter.

153. If the Supreme Court decides that the object is sufficiently determined by existing laws, it remits the case to the Court of Appeal in order to find a solution in accordance with the law.

[22]The French *secreté* ('secret') is used in the original. This is most likely intended to be *sûreté* ('surety').

154. If it finds there is indeed a loophole, it will present the object before the Governing Council, which will submit to the King its opinion with regard to a preliminary provision, until the next Diet provides for it.

155. All these cases will be brought to discussion by the Diet which will decide them in the legislative aspect.

156. In the cases of Articles 148 and 152 the King shall appoint the person who will preside over the Supreme Court.

157. The judgements of the Supreme Court are not subject to appeal and will always be enforceable.

158. Criminal judgements, entailing the loss of civil or political rights, cannot be executed without the confirmation of the King or His Lieutenant.

159. A special act will determine the functions of the Royal Prosecutors (or Commissioners), those of the Chancelleries, the Secretaries, as well as the supervision exercised by the Minister or the Chancellor of Justice over judicial authorities.

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