

The Sovereignty of the Constitution. A historical Debate in a European Perspective*

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1. *Introductory elements*

In recent decades sovereignty and other, related concepts (people, nation, State, legitimacy, representation) have provoked an intense and wide-ranging debate. Its "golden age" seems very far removed from us. Can sovereignty still be a basic idea for the contemporary legal order? Can a concept that is so "contested" be helpful for our legal and political practice? Is it really a useful concept for the constitutionalization of the European Union?¹

In some ways those who today invoke popular sovereignty to overcome the so-called "democracy deficit" at the European Union level have to combat several counterarguments². Faced with this debate it may therefore prove useful to focus on certain "sovereignty issues" that were at the centre of European liberal thought in the nineteenth century, during the Restoration (1814-1848). In particular, we would like to stress the political-constitutional thought

of the "Doctrinaires", especially in France, but looking also at other European experiences. This topic does thus bring into play the concrete relationships between sovereignty and constitution/constitutionalism. It deals with an original and structural tension between two major "movements" characterizing Western political and legal thought: on one side the "absolutist" (and monistic) idea regarding the modern concentration of power in a unique "point" (unity, indivisibility, inalienability), on the other side the cooperation between different parts of the "constitution" according to the ideas of political moderation and constitutional equilibrium. This tension has been transformed over time but it has nonetheless been transmitted to us and finds today a controversial "laboratory" in the European Union experiment. For this reason the debate conducted throughout the nineteenth century may prove instructive in terms of "compromise strategies" and the "neutralization of sovereignty".

The “unlimited” sovereignty concept emerged between the sixteenth and seventeenth centuries in the context of the European religious-civil wars³. From Bodin to Hobbes, though passing through several other authors, the challenge was to affirm the idea of a new legitimated power that could never again be placed in question. Speaking about a “new” power we essentially refer to a specific ideological conceptualization⁴. In fact it is always important to remind ourselves that “sovereignty” and “people” have a long, “local”, pre-history and history and it is impossible to understand authors such as Bodin or Grotius, Hobbes or Rousseau without taking into account the great importance of Roman Law and the civilian tradition in reconstructing the intellectual history of statehood⁵.

The great constitutional movements of the eighteenth Century, and especially the French version, can be seen as a sort of “powerful dynamo”. The Revolution is an extraordinary “energy store”. So strong and so deep a movement was it that societies and peoples would need much more time to “assimilate” these energies. The two most relevant forces emerging at that time are the idea and the reality of the constituent power of the people and, then, the principle of “natural” equality as the pivot of a “constitutionalized” society⁶. *We the People*, *Nous la Nation* defined – albeit with a wide range of different outcomes and in markedly different forms – a conceptual order destined to leave an indelible mark upon modern constitutional doctrine⁷. It was the people who represented themselves as a totality, as a political unity conscious of its own existence and of having the capacity to act politically. All “extraneous” bodies – extraneous, that is to say, to the people becoming na-

tion – could no longer exist save by merging with popular sovereignty. The revolutionary constituent power has matched in an innovative way two old and polymorphic concepts: sovereignty and people. In concrete terms the American and the French Revolutions established, in contexts so far removed one from the other, two different kind of transfer of sovereignty⁸.

In America the constitutional order remains linked to the ancient right to resist the sovereign once it has become a tyrannical power. The French people – according to Rousseau’s sovereignty theory based on the exercise of the general will⁹ – became after the Revolution the new bearer of that sovereign power. The abbot Sieyès made a crucial contribution to the revolutionary concept of “*souveraineté nationale*”. Sovereignty belonged to the people becoming nation; people/nation acted as a “constituent power” (*fiat*) implementing modern constitutionalism¹⁰. The transfer of powers to an abstract concept – the nation – was an attempt to build a different “space” (different from both popular sovereignty and monarchical sovereignty). It was one of the strategies employed in order to find a “compromise” serving to neutralize¹¹ the inevitable conflict. In the French Constitution of 1791¹² the attempt was made to find an “equilibrium point” giving birth to a “republican monarchy”. But, as we know, the conflict was shortly to be “resolved”, and in favour of popular sovereignty.

The French Revolution addressed these issues without being able to resolve them. Whereas in the United States – as Tocqueville would later emphasise – the federal system (with its specific bicameralism) and therefore the absence of administrative centralization, the culture and

attitude of traditional common lawyers, the jury as political institution and the creation of the Supreme Court helped in practice to limit the principle of sovereignty (or, as Tocqueville glossed it, the "tyranny of the majority"), in France the concentration of power tended to prevail. After the Revolution the *absolutist* vision was transferred to the people and political sovereignty was the *space* of political unity and of Statehood. We could say that while in America sovereignty was tamed by "constitutional" solutions, in France that was precisely the problem¹³. The protagonists of the Revolution – as Tocqueville stressed – were the heirs, in some respects, of the claim to absolute sovereignty of the modern age¹⁴. The French Revolution inaugurated an age in thrall to a sort of "constituent obsession"¹⁵.

The constitutional revolutions of the eighteenth century did not change the nature of political sovereignty as a monistic concept. When sovereignty "meets" in concrete historical reality constitutionalism, we are faced with a "paradox" based on two conceptual "areas" that are fundamentally at odds¹⁶. On the one hand, constitutionalism is considered a political philosophy and a strategy of limited government. The idea is that public authority, in all its forms, must somehow be limited and circumscribed within the bounds of law. On the other hand, political sovereignty has to do with the idea of an unlimited and absolute quality. The constitutional revolutions announce the advent of this contemporary paradox. But in America the «sharing strategy»¹⁷ of the English tradition underwent a fortunate metamorphosis. In France, however, sovereignty and constitutionalism were at odds, in a nation marked by a political culture of conflict¹⁸. After the Revolution and

especially after the fall of the ancient monarchy, the throne was empty¹⁹ and the people-nation was under an obligation to fill it.

2. *Absorbing the Revolution into the Monarchy?*

After the Restoration the "new" governments (most of them monarchical) followed two main strategies: a) the first, to avoid the constitutional common core elaborated after the Revolution and to revert to the previous forms of organization; b) the second, to devise a political "compromise" by adopting a new type of constitutional framework.

We would like to consider this second perspective. Here, the main constitutional reality is what we define paradoxically as "granted constitutionalism". This is a phenomenon characterizing in particular the period 1814-1848, starting from the French experience. In the Preamble to the *Charte constitutionnelle* of 4 June 1814 granted by the "restored king" Louis XVIII, we thus read: *We have, willingly and by virtue of the free exercise of our royal authority, consented to and consent to, have conceded and granted the Constitutional Charter to our subjects, both for us and for our successors, and forever.*

The French *Charte constitutionnelle*, the German *Frühkonstitutionalismus*, the Brazilian/Portuguese Charters of 1824 and 1826, and the Italian "Statuti" (and especially the "Statuto" granted in March 1848 by the King of Sardinia) represent only the most famous constitutional documents of this European historical period. Our purpose is not to scrutinize here the pivotal role played by the category of granted

constitution in European constitutional history. For us this kind of constitution is something more than simply a transitional phenomenon, or an 'interval' (albeit an important one) between the idea of the eighteenth-century constitution based upon the constituent power of the people and the complete future realization of democratic constitutionalism in the course of the twentieth century²⁰.

In this paper I wish simply to underline the fact that this "granted constitutionalism" has also served as an attempt to neutralise – according to different groups of Liberals as well as of course of the ultraroyalists – that most terrible of powers, the constituent power of the people, that is the power allowing those who invoked it to "constitutionalize" popular sovereignty. Some monarchs tried to "appropriate" the "artificial" voluntarism of revolutionary constitutionalism. Urging Louis XVIII to follow the "sovereign" path of promulgating the *Charte*, Chancellor Count Beugnot reminded him that «The plan proposed [...] has this rare, indeed, very rare, merit, of absorbing the Revolution into the Monarchy; whatever is contrary to this plan, and tends to bring either the Senate or the Legislative Body or else the electoral colleges into deliberation, tends, on the contrary, to absorb the Monarchy into the Revolution». Absorbing the Revolution into the Monarchy: here is a very clear and significant message.

This attempt is interesting also because it shows that the Restoration did not in fact allow anyone to lead a nation without by the same token proposing an "idea of Constitution". Monarchs and conservatives thought to "absorb" the constitution into the Monarchy (as *Charte constitutionnelle* or

landständische Verfassung or *Statuto costituzionale*). They devised their strategy by giving value to the *letter of the text*, whereas the liberals (using here very general categories) sought to stress the *spirit of the text*. The *royalistes* entrenched themselves behind the bulwark of the *lettre* and of the form of the concession; the liberals insisted on the presumed liberal character of the *esprit*.

In this article, given limitations of space, we can only hope to consider one, albeit very important aspect of the "sovereignty dispute". The "struggle" over the "constitution" in the years after 1814 has led to the formulation of some noteworthy reflections on sovereignty.

3. *Two threats*

The "obsession" of liberals during the nineteenth century was how to reconcile "liberties" affirmed after the Revolution with the "sovereignty dispute". For different "families" of liberals, Constitution (as ideology, as movement, or as a mere document and subject as such to interpretation) became the strategic resource exploited to address two "convergent" threats, namely, the spectre of the constituent power embodied in the sovereignty of the people (the people as "mass") and the absolute sovereignty of the monarch (a notion by then weakened in France but nonetheless sustained by the *ultras* and theocrats).

In this context we would like to reflect above all on the thought of the so-called "Doctrinaires", viewed often as French centre-left political theorists during the period of the 1814 *Charte*²¹ and, conversely, as "right-wing" liberals under the July

Monarchy, but in reality they attempted to establish middle-class rule as a *juste milieu* between the extremes of revolution and reaction. I would also stress the fact that the Doctrinaire tendency was a wider "European movement", and one that included a number of different "political-constitutional thinkers" from the 1820s to the 1860s.

Pierre-Paul Royer-Collard, Pierre François Hercule de Serre, Camille Jordan, Abel-François Villemain, François Guizot, Charles de Rémusat, Prosper de Barante, Victor de Broglie, Victor Cousin, Pellegrino Rossi are usually considered to have been the main exponents of this composite movement in France.

The Doctrinaires owed an intellectual debt to the liberalism of the Coppet circle²², evident for instance in their realisation that popular sovereignty, being itself absolute also, could be "dangerous". In the *Principes de politique* (1806), Benjamin Constant thus criticized both Rousseau, on the one hand, and Ferrand and Molé on the other, since one and all were theorists, in different ways, of the idea of unlimited sovereignty leading to the same tyrannical outcome. Constant's lexicon is dominated by the words dam, barrier, bound and so on, his concern being to express the need for a constitutional solution²³. «A constitution is itself an act of defiance since it prescribes limits to authority»²⁴. So «Sovereignty has only a limited and relative existence. At the point where independence and individual existence begin, the jurisdiction of sovereignty ends. If society oversteps this line, it is as guilty as the despot who has, as his only title, his exterminating sword»²⁵.

Limiting sovereignty means drawing the impassable line of the "freedom of the

moderns" which guarantees citizens *contre le pouvoir*²⁶. This «liberalism of the rule»²⁷ is closely linked to the idea of the constitution as "mistrust". After the Terror of 1793-94 it seemed impossible to have confidence in popular sovereignty as a *per se* reliable safeguard of individual freedom. The French Revolution, instead of destroying absolute power once and for all, would seem to have transferred it, thereby making possible a despotism based on a new idol: the general will. Post-revolutionary liberals (especially Constant and Guizot, but with significant differences between them) were concerned to combat Rousseau's ideas on liberty and sovereignty, although at times they would seem to have chosen the wrong adversary. According to Constant: «Two systems have always dominated the world: the sovereignty of the people which I deny and the divine right which I detest... The divine right destroys both legitimacy and liberty... The will of all is not more legitimate than the will of one man simply because it is – or claims to be – the will of all. There is no unlimited sovereignty. There is only limited sovereignty and sovereignty becomes usurpation when it exceeds its competence»²⁸.

Doctrinaires underscored the fact that – as Pierre-Paul Royer-Collard remarked – the sovereignty of the people was always a potential "souveraineté de la force". In 1820, François Guizot likewise declared that there was an equivalence between the usurpation of force²⁹ and every form of sovereignty that sought to be absolute, whether of the people or of divine right. He then added that popular sovereignty was a form of tyranny, in that it was the absolute power of the numerical majority over the minority ("souveraineté du nombre")³⁰. In 1816

Guizot had lost no time in translating into French the work of the Prussian political thinker Friedrich Ancillon³¹. Both thinkers criticized Montesquieu's classification of political regimes and thought that the doctrine of popular sovereignty was a threat to political order making possible a "despotism of liberty" never seen before. French Doctrinaires opposed popular sovereignty because in their view, the latter was an impracticable and flawed political principle that postulated the equal right of all individuals to exercise sovereignty.

Guizot and the Doctrinaires criticized democracy as a political regime based on universal suffrage. But they recognized the sense of democracy as a social condition. For them the will of the majority (number) was not automatically synonymous with justice and wisdom.

4. Neutralizing the sovereignty in the constitution?

The philosophical "antidote" to the popular sovereignty of will and force is seen in the "sovereignty of reason"³². «I believe – Guizot said – in the sovereignty of reason, justice and law: such is the legitimate sovereign the world is in search of, and always will be in search of; because reason, truth and justice are not to be found complete and infallible anywhere»³³. The "reasonableness" here is a synonym for prudence and a "middling" or moderate stance³⁴.

Sovereignty of reason is an abstract and ambiguous concept, but it is not without institutional implications³⁵. Doctrinaires dealt with the specific mechanisms of a limited monarchy based on "representative

government", namely, division of powers, bicameralism, open parliamentary debates, popular elections, free press and so on³⁶. The idea of the sovereignty of constitution can be seen as a concept linking reason and constitution.

While the *ultras* considered the *Charte* of 1814 to be a sort of appendix of the "ancient constitution of the Kingdom"³⁷, Liberals tried to valorize the written constitution as a compromise³⁸ between ancient and modern constitution. The Charter of 1814 was for Doctrinaires the expression of the interests, conditions and state of society. But the "July Revolution" of 1830 looked as if it might be the "French" opportunity to imitate the British "Glorious Revolution". As in 1688-89 a King had attempted to shift the constitutional equilibrium towards an absolutist outcome. The promoters of the "liberal interpretation" of the *Charte constitutionnelle* according to its "spirit" had reacted as representatives of the nation: the King Charles X was dethroned and Louis-Philippe d'Orléans became "King of the French". The new constitutional regime affirmed the need for collaboration between the King and the two Chambers. "The Charter – it was said – will henceforth be a truth" ("La Charte désormais sera une vérité"). Long live the Charter, *Vive la Charte*, was the rallying cry during the revolutionary *journées*. The *Glorious Revolution* had been popular in its principles but aristocratic in its execution, thus giving rise to a «happy mix of hierarchy and harmony in the social order»³⁹. In November 1830 Guizot distinguished between the popular character of the Revolution and the different origins of the new government⁴⁰.

The Charter of 1830⁴¹ was the result of an "agreement" between representatives

and Peers appointed by the Charter of 1814⁴² and the new monarch Louis-Philippe, King of the French, who swore an oath on the amended Charter on 9 August. Both Chambers now had the right of legislative initiative (art. 15), the chamber of Peers was reorganized, the primacy of law over regulations and decrees was affirmed. The Charter laid the foundations for a representative government with a monarchical executive. The dualistic constitutional system (based on a 'double trust') could evolve towards a stronger parliamentarisation according to constitutional practice⁴³.

The Revolution of July 1830 introduced (or reintroduced) into France the "reality" of national sovereignty. We can, however, find nothing comparable to the article 25 of the Belgian Revolution of 1831, that affirmed literally the principle of national sovereignty. Indeed, art. 25 established that «All powers come from the nation. They are exercised as stipulated in the constitution». The Belgian debate – as Brecht Desaure has proved⁴⁴ – illustrates the various meanings of the formula "national sovereignty" and the interchangeability of the words "nation" and "people" in combination with sovereignty. Certainly, popular sovereignty is by no means necessarily a "synonym" of universal suffrage.

Conversely, in France a different combination of sovereignty with people or nation was hotly contested throughout the nineteenth century. In August 1830 a number of deputies proposed that the "model" of the French Constitution of 1791 (sovereignty belongs to the nation) be adopted, but finally the "Constituent meeting" followed the recommendation of the Deputy Dupin. According to him the new political regime was clearly based on national sov-

eignty. There was no need for further explanation.

In particular, Doctrinaires worked to link the national sovereignty concept to their political philosophy of the sovereignty of reason. Now, in 1830, the ambiguous notion of the "sovereignty of reason" could find a sort of fulfilment in the amended *Charte*. The constitution was itself the parameter of reason and the attribute of a sovereign entity was assigned to it, so that neither the prince, the people, the monarchy nor democracy could invoke a monistic conception intertwined with the exercise of the intimidating constituent power⁴⁵. This led to an idea of a constitution, sovereign within and for itself, based on a "pluralistic concept".

During the July Monarchy the doctrine of the constitution had been forged as the source of sovereignty. National sovereignty and sovereignty of the constitution were finally two sides of the same coin.

Among the Doctrinaires – from Royer-Collard to Guizot, Cousin, de Rémusat – the "sovereignty of reason" is the point of convergence between the theory of representation and the major distinction between the origin and the exercise of the sovereignty⁴⁶. Representation is for the Doctrinaires the process of "detecting" all the elements connected to reason and capacity present in society. It is based on the "majorité des capables"⁴⁷. This is a process that only an electoral system based on censitary criteria and capacity can sustain. In a pluralistic society different ideas and interests coexist and only a regime of publicity and free discussion can "produce" reason and truth.

The "sovereignty of reason" is above the Constitution, and is thus a stratum of moral

values that should offer a lead to human institutions. In certain respects it deals with the exercise of national sovereignty. There is often a concern to locate sovereignty in «une région suffisamment lointaine et éthérée pour que nulle autorité constituée ne puisse se dire elle-même souveraine»⁴⁸. But this philosophical doctrine was liable to be transformed during the Orleanist Monarchy as a legal doctrine, too. Royer-Colard had said that «Once there is a sovereignty, there is despotism, whenever there is despotism, there is social death if not, at the least, profound economic disorder. To ask where sovereignty is, is to be of a despotic inclination and to declare that one is precisely that»⁴⁹. Sovereignty does not belong to any of the authorities legitimized by the *Charte* as «national Constitution». Liberals attempt to «neutralize» sovereignty as an «absolute» concept because they fear the recurring risk of its concentration in a single «place»⁵⁰.

Any power can be said to be sovereign. Reason inheres in the *Constitution* and is the «result» of a common discussion and co-operation. The claims of sovereignty made by the King or the people had to be absorbed by the constitution. It is not by chance that in 1834 Guizot, as minister of education, established in Paris the first chair of constitutional law, summoning therefore from Geneva the brilliant Pellegrino Rossi⁵¹. The first aim was to affirm the full legitimacy of the new regime. But political interpretation was not sufficient.

They needed to affirm strongly the normativity of the constituted sovereignty as a text of law⁵², thereby fixing the political-legal order.

The purpose and form of teaching constitutional law is determined by its title; it is the expound-

ing of the Charter and individual guarantees as political institutions enshrined therein. It is no longer, so far as we are concerned, a simple philosophical system subject to the disputes of men, it is a written law, a recognized [law], that can and should be explained, commented upon, in the same guise as civil law or any other part of our legislation. Such teaching, both broad and specific, based on the national public law and the lessons of history, capable of being extended by comparisons and foreign analogies, must replace the errors of ignorance and the temerity of superficial notions with solid and positives knowledge⁵³.

5. *Shall the Charter really be a truth?*

The political debate under the July Monarchy on the “sovereignty of the constitution” served to deepen the reflection on the «superiority» of the *Charte*. We can pose a number of questions: should judges undo decrees and ordinances that were contrary to the Constitution? In which cases? What were the limits? Shall the Charter really be a *truth*?

The *Charte* of 1830 contains two articles strictly linked to the affair of the ordinances of Charles X (25 July 1830). Art. 13 states that «The King [...] makes the regulations and ordinances necessary to execute the laws but he cannot suspend them nor dispense from their application» and art. 70 that «All laws and ordinances, inasmuch as they are contrary to the provisions adopted for the reform of the Charter, are as of now and remain». These articles would seek to limit the power of the monarch to issue decrees and are an attempt to find a solution to issues arising from 1827⁵⁴. On 28 July 1830 – while the revolution was in its

second day – the court of commerce of Paris declared not applicable, because contrary to the Charte, the order of Charles X forbidding the publication of newspapers without a preventative permission⁵⁵.

In 1832 an ordinance of the King (6 June) imposed a state of siege upon Paris. The *citoyen* Geoffroy⁵⁶, on the basis of this ordinance, is sentenced to death by a war council (18 June). His lawyer, Odilon Barrot, an important liberal politician, then leader of the "Dynastic Left", appealed to the Supreme Court, claiming that the ordinance was unconstitutional, on the grounds that it breached the principle of the natural judge (arts. 53 and 54 of the Charter). The court of cassation declared that it was indeed unconstitutional, restoring to Mr. Geoffroy his natural judge. On that occasion Barrot said:

the constitution would be a mere chimera... A constitution that was simply « optional » would not be a true constitution: because a constitution only means something if it is a real and positive truth⁵⁷.

It is not by chance that Jean-Baptiste Sirey accords to the Court's decision an important place among the "monuments" of French public law. This sentence will be a solemn precedent «which serves to prove that our new constitution is not deprived of all sanction, that the rights and guarantees which it stipulates in favour of the citizens are not at the disposal of power, and have not been vainly placed under the safeguard of the Judiciary»⁵⁸.

Some rulings of the law courts under the July Monarchy might lead one to posit the formation of an embryonic « control of the constitutionality » of the laws. But the Court of Cassation repudiated this putative

development. Tocqueville's argument as regards the French situation, by contrast with the American, is well known:

If, in France, the courts could disobey the laws on the grounds that they found them unconstitutional, the constituent power would actually be in their hands, since they alone would have the right to interpret a constitution whose terms no one could change. They would therefore take the place of the nation and would dominate society, at least in so far as the inherent weakness of the judicial power would allow them to do so.

I know that by denying judges the right to declare laws unconstitutional, we indirectly give the legislative body the power to change the constitution, since it no longer encounters a legal barrier that stops it. But better to grant the power to change the constitution of the people to men who imperfectly represent the will of the people, than to others who represent only themselves⁵⁹.

Tocqueville's arguments about the « dangers » deriving from an hypothetical claim for judicial review in France reflect also the opinion of the majority of French jurists at the same period, for example Charles Hello or Armand Dalloz⁶⁰. Félix Berriat-Saint-Prix states that «any law contrary to the text of the Charter is unconstitutional» and judges, when they have to choose between the text of the law and that of the Constitution, will follow the Constitution as the basis of their judgement», but he fears two risks: the judges can usurp the legislative power or, conversely, refuse to declare unconstitutional an "irregular" law⁶¹.

During the July Monarchy there was, for the first time, a reflection upon the distinction between constitutional and ordinary laws, in particular, during the significant parliamentary debate in 1842 on the institution of regency. The Duc de Broglie then observed that «Appealing to sovereignty founded and settled by the Charter against

any other sovereignty is appealing to number, to brute force; it is to pretend to organize disorder itself [...]»⁶². Some days before, François Guizot, at that time foreign minister, had sarcastically rejected the theory of two powers: «one ordinary and one extraordinary; one constitutional, the other constituent; one for working days (if you will allow the term), the other for holidays: this is a thing unheard of, full of danger and fatal»⁶³.

Doctrinaires and liberal constitutionalists identified the constituent power with the “brute force” of the people-mass, the sovereignty of majority. But the “constituted”, national sovereignty overrode the constituent power. So, «Be calm, gentlemen: we, the three constitutional powers, we are the only legitimate and regular organs of national sovereignty. Aside from us, there is nothing, I repeat, but usurpation or revolution»⁶⁴. The “absorption” of the sovereignty of the people into the constitution sanctions the fact that the Charter was the sole depositary and for it, according to the English phrasing – often recalled – the powers according to the theory of the King in Parliament⁶⁵.

Tocqueville observed, comparing French judicial power with the American, that «In France, the constitution is, or is considered to be, an immutable work. No power can change anything in it; such is the accepted theory»⁶⁶. Tocqueville was probably referring here to the attempt to “neutralize” the constituent power. According to the majority of the constitutionalists active under the July monarchy the constituent power died at the very moment that the constitution was born: «Is it not clear that this latent, reserved sovereignty would be in opposition to the establishment of the

constitution? We thereby see how the constituent power dies the very instant that the constitution is born, only to live again when this latter dies»⁶⁷. For Firmin Laferrière the constituent power was a “temporary” exercise of sovereignty⁶⁸. «In the political order there does not exist any sovereign but the constitutional law and the powers determined by the Constitution»⁶⁹. Politicians and jurists used the doctrine of the *omnipotence of Parliament* to affirm the sovereignty of constitution. «National will – Serrigny noted – or political sovereignty, is expressed by the cooperation of the three branches of the same power»⁷⁰.

6. *Legacy of the European dimension of Doctrinaire thought*

The Orleanists had tried to forge an ideology and a juridical doctrine of the sovereignty of the constitution. Carl Schmitt has seen in the “sovereignty of the constitution” a “mask” theory or, in other words, an attempt to conceptualize a dilatory compromise⁷¹. In 1848, as we know, “reason” could do nothing against the “machine arithmétique”⁷². This phase was marked by political failure. Guizot’s reply to the deputy Garnier-Pagès’s plea for universal suffrage is well known: «There is no day for universal suffrage. There is no day when all human creatures, whatever they are, can be called upon to exercise political rights. The question does not deserve to distract me at this moment from what we are dealing with»⁷³. Some months before the Revolution, Guizot wrote to Pellegrino Rossi telling him that «It is the first and natural mission of governments to be conservative. We are con-

servative because we follow on after a series of revolutions, and we feel ourselves to be entrusted with the task of restoring order, duration, respect for the powers, laws, principles, traditions, everything that ensures the regular and long life of society [...]»⁷⁴.

But *Doctrinaire liberalism*, so meaningful in France in the first half of the nineteenth century, was not a purely French phenomenon. Indeed, some of its ideas and arguments were spread further afield because – transcending what was contingent in them – they formed part of a “common core” of European liberal thought. We are thus concerned with a number of different contexts united by the problem of a transition from the “ancient” to the “new” political regimes living a sort of “doctrinaire moment”. *Juste milieu* liberalism underwent a variety of different incarnations.

The Doctrinaires and the political system of the July Monarchy show certain similarities (but also several differences) with the Whig dispensation in the aftermath of the Reform Bill of 1832. Vincent Starzinger⁷⁵ has focused in particular on Royer-Collard and Guizot’s thought and the reflections of the Reform Whigs Henry Peter Brougham and Thomas Babington Macaulay. One of their common preoccupations was a concern to reconcile the idea of sovereignty with a pluralized political system, the sovereignty of reason and the mixed State, with a range of different outcomes. The Spanish Donoso Cortés, «before veering towards extreme conservatism in the late 1840’s»⁷⁶, passed in the mid-1830s through a “doctrinaire” phase (when he lived in Paris), being deeply influenced then by Guizot and *juste milieu* liberalism⁷⁷. Cortés in his *Lecciones de Derecho Político*

(1836)⁷⁸ reflected on sovereignty, rejecting all “dogmas of social omnipotence” and following Guizot’s theory of the sovereignty of reason and representative government.

These Doctrinaire ideas⁷⁹ filtered through to the Netherlands, as in the case of Johan Rudolf Thorbecke (1798-1872), professor of law in Leiden, one of the reformers of the Dutch constitution of 1848 and several times prime minister⁸⁰, but also to the Hungarian Baron József Eötvös (1813-1871), politician and reformer in 1848, author of *The Dominant Ideas of the Nineteenth Century and Their Impact on the State* (1851-1854)⁸¹. In Italy, Cesare Balbo, as likewise other Italian thinkers and politicians from 1840 onwards, criticized the dangerous theory of the constituent power and appealed to the sovereignty of the constitution based on the national idea and its corollary, parliamentary omnipotence. We demonstrated – Balbo wrote – that «[...] National representation does not reside or cannot reside in any of these three powers, but in all three; that none of these alone, but all three must constitute Parliament; and that in this Parliament alone can and ought to reside the power of making and unmaking laws and changing the state constitution, the power that is appropriately and accurately called parliamentary omnipotence»⁸². This empirical “dogma” of English constitutionalism was re-read in a “doctrinaire” sense.

The theory of the sovereignty of the constitution has to be properly contextualized. The main goal of this theory was to dispense with a sort of “political theological dispute” on sovereignty. Finally, the Doctrinaires tried to “neutralize”, to “encapsulate” sovereignty in a “neutral” and higher space combining and limiting the

risk of each possible absolutisation. These liberals were perfectly well aware of *democracy* as the new *social condition* but they were nonetheless not democrats. The political side of democracy scared them. For this reason, the “democratic vocation” of sovereignty, expressed through the constituent power identified with the people become nation, has been seen, during this age, as a brute force, a river that does not seem to recognize either embankments, or barriers, which breaks down the pluralism of powers, reduces the space of autonomy of individuals, disputes differences and social ranks. They were trying in various ways to “neutralize” sovereignty because they knew from experience that it tended to concentrate power in one “place”. Indeed, the liberal topography was based on a plurality of “places”, divided and yet cooperating, moderating each other, directed to the same goal and unity. The “centre”⁸³ and “moderation”⁸⁴ were the moral, ideological and political reference points of European Doctrinaire thought. The cooperation between the three powers renewed the ancient myth of a mixed government. Political moderation and constitutional equilibrium might at last be achieved. Eclecticism was the «necessary philosophy of the age»⁸⁵, according to Victor Cousin. His thought had a significant influence in various European countries, but it mirrored a deeper stratum of liberal culture⁸⁶.

In 1847 Cesare Balbo sketched the “autobiography” of a generation: his “party” was that of the liberals «less extreme, less pure, who nominate themselves as liberals of the “middle”, or liberal moderates; and so they are universally named, because this denomination is necessary, inevitable, because it alone expresses the relative fact of

being in the middle of the other two parts [...]»⁸⁷, namely the pure conservatives and the most progressive liberals.

The «moderate party» «seeks to follow progress – Count Cavour wrote to Victor Cousin – without resorting to revolutionary means»⁸⁸. The notion of the Sovereignty of the constitution did not disappear with the Doctrinaires but continued to be one of the essential components and issues of “liberal State building” during the second half of nineteenth century. This concept, elaborated especially by the Doctrinaires, contained some elements (not all, of course) used by liberal politicians and jurists. Certain of these elements merit closer scrutiny: a) a critical approach to the theory of the general will and the constituent power; b) an idea of constitution (granted or deliberated) in which a historicist perspective prevails, thereby counterbalancing the “contractualist point of view”; c) a renewed idea of nation as *historical-natural reality*; d) institutions and constitutions as the result of experience and history according to the “British constitution” experiment; e) a notion of the authority of the state⁸⁹; f) elitist liberalism based on the idea of representative government through socio-political capacity; f) the sovereignty of the constitution as “moral and political superiority”.

The above-mentioned elements, along with other aspects, contributed in different ways, during the nineteenth century, to the forging and consolidation of a European doctrine of the Constitution based on the sovereignty of the State. In Germany the idea, implicit in Doctrinaire thought, that the parliamentary institutions could be considered as “organs” of the Constitution and not of the people was common to the organicist construction of the *Staatslehre* from

Carl Friedrich von Gerber onwards⁹⁰. This setting aimed at neutralising the emergent conflict between monarchical and popular sovereignty and hypostatizing a constitutional compromise⁹¹. The sovereignty of the constitution can be seen as a concept able to subordinate the monarch and the people to the law⁹². But in the second half of the nineteenth century the doctrine of self-limitation is affirmed. Only the State is sovereign as *Staatsgewalt* and in the German doctrine the monarch is the supreme organ («a super-organ»)⁹³ and the “holder” of the *Herrschaft*. As the monarchs in the first half of nineteenth century granted constitutions, so now the State – which cannot have any power above itself – “granted” its “auto-limitation” (*Selbstbindung*). In Germany the State as legal person, and not the nation, holds the sovereignty⁹⁴.

In France, as Ernest Renan remarked in 1869, the State-administration was so deep-rooted and strong that it absorbed all liberties. According to him «popular sovereignty cannot establish constitutional government»⁹⁵. But it was during the Third Republic that the Alsatian Raymond Carré de Malberg (1861-1935) based his general theory of the State (1920-1922) on the principles of public law of the 1789 Revolution. In particular, Carré de Malberg highlighted the national sovereignty concept as a crucial revolutionary heritage⁹⁶. The nation, as an abstract, “eternal”, indivisible and collective being, subordinated itself to the constitution organizing the State’s powers⁹⁷, the constitution as “unifying organization”⁹⁸. The national State was the modern sovereign. According to Carré the French Revolution had achieved a conceptual transformation of sovereignty. The nation had obtained the “puissance”

but – unlike the absolute monarch – it could not exercise it save through representation, creating therefore a new model of State organization. In this sense, the specific notion of Carré de Malberg (national sovereignty as the constitutive element of the state) was based on various “materials” derived from the new German doctrine (*Staatsrechtslehre*) but ultimately with the aim of criticizing Bismarck’s political system⁹⁹ and of demonstrating, where the German experience was concerned, its incompatibility with the subordination of the nation to the monarch as supreme organ¹⁰⁰. Carré de Malberg joined together two “concrete” forms of sovereignty, monarchical sovereignty and popular sovereignty (as democracy), arguing that they both claimed to exercise the sovereign power without mediation. De Malberg’s reinterpretation of the revolutionary foundations led him to reformulate the theory of representation as a theory of the organ of State¹⁰¹. This theory was however based on the principle of national sovereignty and thus formally the nation retained the “puissance de l’État”. In this case the State was the legal personification of the nation¹⁰² which manifested its will through Parliament and the law¹⁰³. The Strasbourg professor had “reinvented” the distinction between popular and national sovereignty from the Revolution onwards. He emphasized the contribution of the Revolution to the language and the doctrines of national sovereignty, but it is evident that he had borrowed a more refined theory from the *Doctrinaires*¹⁰⁴. Nevertheless, *Doctrinaire* philosophical references to reason and justice could not satisfy the new theory of the State and a positivist jurist such as Carré de Malberg. Only the

State and its organs could determine what was right and reasonable¹⁰⁵.

Between the nineteenth and the twentieth century jurists attributed political sovereignty to the various paradigms of the Liberal State¹⁰⁶. This was a new step replete with consequences. They "juridified" the constitution by the State. They used the doctrinaires' concept of political capacity and representation. Before the advent of mass democracy and industrial society most of public law doctrine had sought shelter in the legal personality of the State with its "autonomous will". Their "barriers", as

we know, failed to stem the new era of the masses. Nonetheless it seems rewarding and useful to investigate further the links, evident or not, between these two phases in the European history of constitutional and public law.

* I publish here my Honorary Lecture, Mid-term ReConFort Conference, *On the Way to Juridification by Constitution*, 21 September 2016, Carl Friedrich von Siemens Stiftung, Munich. I have revised the paper adding also the end-notes. I wish to thank Professor Dr. Ulrike Müßig and ReConFort Project for the invitation to give this lecture and for their wonderful hospitality.

¹ For an in-depth overview N. Walker (ed.), *Sovereignty in transition. Essays in European law*, Oxford-Portland, Hart Publishing, 2006; and N. McCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford-New York, Oxford University Press, 1999.

² For a synthesis v. R. Cavallo, *Il laboratorio europeo e le sfide del costituzionalismo globale*, in «Journal of Constitutional History», 32, II, 2016, pp. 119-130.

³ O. Beaud, *La puissance de l'État*, Paris, PUF, 1994, pp. 42 ff.

⁴ See M. Fioravanti, *Costituzione e popolo sovrano*, Bologna, il Mulino, 1998, pp. 47 ff. and Id., *Costituzione*, Bologna, il Mulino, 1999,

pp. 71 ff.; L. Lacchè, *Constitución, Monarquía, Parlamento: Francia y Belgica ante los problemas y "modelos" del constitucionalismo europeo (1814-1848)*, now in Id., *History & Constitution. Developments in European Constitutionalism: the comparative experience of Italy, France, Switzerland and Belgium (19th-20th centuries)*, Klostermann, Frankfurt am Main, 2016, pp. 150 ff.

⁵ D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford, Oxford University Press, 2016; D. Quagliani, *La sovranità*, Roma-Bari, Laterza, 2004.

⁶ «That all men are by nature equally free and independent» (The Virginia Declaration of Rights, June 12, 1776); «Tous les Hommes naissent et demeurent libres et égaux en droits» (art. 1 Déclaration des droits de l'homme et du citoyen, August 28, 1789).

⁷ C. Schmitt, *Constitutional Theory*, Durham and London, Duke University Press, 2008 (1928), pp. 126 ff.

⁸ See A. Craiutu, *Liberalism under Siege. The Political Thought of the*

French Doctrinaires, Lanham, Oxford Lexington Books, 2003, pp. 124 ff.; S.M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in M. Loughlin, N. Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford, Oxford University Press, 2007, pp. 49-66; J. Ziller, *Sovereignty in France: Getting Rid of the Mal de Bodin*, in Walker (ed.), *Sovereignty in transition*, cit., pp. 261-277; J. Goldsworthy, *The Debate About Sovereignty in the United States: a Historical and Comparative Perspective*, Ivi, pp. 423-446.

⁹ L. Scuccimarra, *Sovranità popolare e Costituzione*, in M. Calamò Specchia (ed.), *La Costituzione Francese – La Constitution Française*, Torino, Giappichelli, 2009, pp. 78-84; Id., *Généalogie de la nation. Sieyès comme fondateur de la communauté politique*, in «Revue française d'histoire des idées politiques», 33, I, 2011, pp. 27-45.

¹⁰ Cf., for the reconstruction of the debate, L. Jaume, *Constituent Power in France: The Revolution and its Consequences*, in Loughlin, Walker (eds.), *The Paradox of*

- Constitutionalism*, cit., pp. 67-85. U. Müßig, *Juridification by Constitution. National Sovereignty in Eighteenth and Nineteenth Century Europe*, in Id. (ed.), *Reconsidering Constitutional Formation. I. National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Heidelberg-New York, Springer, 2016, pp. 13 ff.
- ¹¹ On the neutralization mechanisms see A. Jakab, *Neutralizing the Sovereignty Question. Compromise Strategies in Constitutional Argumentations about the Concept of Sovereignty before the European Integration and since*, in «European Constitutional Law Review», 2, 2006, pp. 375-397.
- ¹² «Sovereignty is one, indivisible, inalienable, and imprescriptible. It appertains to the nation; no section of the people, nor any individual may assume the exercise thereof» (art. 1, tit. III *Of public powers*); «The nation, from which alone all powers emanate, may exercise such powers only by delegation. The French Constitution is representative; the representatives are the legislative body and the king» (art. 2, tit. III *Of public powers*). On the first revolutionary French constitution cf. J. Bart, J.-J. Clère, C. Courvoisier, M. Verpeaux (eds.), 1791, *la première Constitution française*, Paris, Economica, 1993; F. Furet, R. Halévi, *La monarchie républicaine. La Constitution de 1791*, Paris, Fayard, 1996; P. Pasquino, *Sieyès et l'invention de la constitution en France*, Paris, Odile Jacob, 1998.
- ¹³ Cf. M. Gauchet, *La Révolution des pouvoirs. La souveraineté des pouvoirs. La souveraineté, le peuple et la représentation 1789-1799*, Paris, Gallimard, 1995.
- ¹⁴ Cfr. F. Furet, *Penser la Révolution française*, Paris, Gallimard, 1978; Id., *L'idée de tradition révolutionnaire dans la France du XIXe siècle*, in «Pouvoirs», 50, 1990, pp. 5-13.
- ¹⁵ R. Martucci, *L'ossessione costitutiva. Forma di governo e costituzione nella Rivoluzione francese (1789-1799)*, Bologna, il Mulino, 2001.
- ¹⁶ Some insights in A. Arato, *Post Sovereign Constitution Making. Learning and Legitimacy*, Oxford, Oxford University Press, 2016.
- ¹⁷ Jakab, *Neutralizing the Sovereignty Question*, cit., p. 377.
- ¹⁸ Cf. P. Rosanvallon, *La Monarchie impossible. Les Chartes de 1814 et de 1830*, Paris, Fayard, 1994, pp. 179-180; Furet, *L'idée de tradition révolutionnaire*, cit., p. 12.
- ¹⁹ According to the negative judgement of Jean-Joseph Mounier in 1792: quoted in P. Viola, *Il trono vuoto. La transizione della sovranità nella rivoluzione francese*, Torino, Einaudi, 1989, pp. VII-VIII.
- ²⁰ On this theme we refer to L. Lacchè, *Granted Constitutions. The Theory of octroi and Constitutional Experiments in Europe in the Aftermath of the French Revolution*, in «European Constitutional Law Review», 9/II, 2013, pp. 285-314. See also O. Ferreira, *Les équivoques du "constitutionnalisme octroyé": un débat transatlantique*, in «Historia Constitucional», 16, 2015, pp. 67-131, <<http://www.historiaconstitucional.com>>, november 2017.
- ²¹ G.A. Kelly, *The Human Comedy. Constant, Tocqueville and French liberalism*, Cambridge, Cambridge University Press, 1992, p. 18.
- ²² Cf. L. Lacchè, *Coppet et la percée de l'Etat libéral constitutionnel*, in Id., *History & Constitution*, cit., pp. 201-226.
- ²³ E. Hofmann, *Les "Principes de politique" de Benjamin Constant. La genèse d'une oeuvre et l'évolution de la pensée de leur auteur (1789-1806)*, Geneva, Droz, t. I, 1980, p. 315 and ff. For Sismondi the aim of a "free constitution" is first and foremost to prevent the nation from «confusing sovereignty with omnipotence [...]» («confondre la souveraineté avec la toute puissance [...]») (J.C.L. Sismondi, *Recherches sur les constitutions des peuples libres*, edition and introduction by M. Minerbi, Geneva, Droz, 1965, p. 91).
- ²⁴ «Une constitution est par elle-même un acte de défiance puisqu'elle prescrit des limites à l'autorité [...]» (B. Constant, *Opinion* 5 nivôse an VIII (5.I.1800)). On this passage cf. L. Jaume, *L'individu effacé ou le paradoxe du libéralisme français*, Paris, Fayard, 1997, p. 106.
- ²⁵ B. Constant, *Principle of politics applicable to all representative governments*, § *On the sovereignty of the people*, in *Political Writings*, translated and edited by B. Fontana, Cambridge, Cambridge University Press, 1988, p. 188 (ed. Paris, May 1815, *Principes de politiques*). In the édition of 1806 the text is: «La souveraineté n'existe que d'une manière limitée et relative. Au point où commence l'indépendance de l'existence individuelle, s'arrête la juridiction de cette souveraineté. Si la société franchit cette ligne, elle se rend aussi coupable de tyrannie que le despote qui n'a pour titre que le glaive exterminateur» (B. Constant, *Principes de politique*, ed. Hofmann, Genève, Droz, 1980, p. 49). The concept in Constant (Ivi, pp. 45, 46) evokes a speech of Sieyès before the Convention, 2 Thermidor, year III. Cf. E. Sieyès, *Opinion sur plusieurs articles des titres IV et V du projet de constitution*, in P. Bastid, *Les discours de Sieyès dans les débats constitutionnels de l'an III*, Paris, Hachette, 1939, pp. 17-18.
- ²⁶ «This is what we must declare; this is the important truth, the eternal principle which we must establish. No authority upon earth is unlimited, neither that of the people, nor that of the men who declare themselves their representatives, nor that of the kings, by whatever title they reign, nor, finally, that of the law, which, being merely the expression of the will of the people or of the prince, according to the form of government, must be circumscribed within the same limits as the au-

thority from which it emanates» (Constant, *Principle of politics applicable to all representative governments*, cit., p. 180).

²⁷ B. Manin, *Les deux libéralismes: la règle et la balance*, in I. Théry e C. Biet (eds.), *La famille, la loi, l'Etat: de la Révolution au Code civil*, Paris, Imprimerie nationale-Centre Georges Pompidou, 1989, pp. 372-389.

²⁸ B. Constant, *De la souveraineté*, in H. Cockerham and E. Ehrman (eds.), *Ideology and Religion in French Literature*, Camberley, Porphyrogenitus, 1989, quoted by Craiutu, *Liberalism under Siege*, cit., pp. 137 and 303.

²⁹ F. Guizot, *Du gouvernement de la France depuis la Restauration et du ministère actuel*, Paris, Ladvocat, 1820, p. 201.

³⁰ F. Guizot, *Philosophie politique: de la souveraineté*, in Id., *Histoire de la civilisation en Europe depuis la chute de l'Empire romain jusqu'à la Révolution française*, edition by P. Rosanvallon, Paris, Gallimard, 1985, p. 309 (Présentation by Rosanvallon) as well as p. 374. See also A. Laquière, *Les origines du régime parlementaire en France (1814-1848)*, Paris, PUF, 2002, p. 111.

³¹ *De la souveraineté et des formes de gouvernement: essai destiné à la rectification de quelques principes politiques, accompagné de notes du traducteur François Guizot*, Paris, Le Normant, Imprimeur-Libraire, 1816. In 1837 was published in France his book *Du juste milieu, ou du rapprochement des extrêmes dans les opinions*, translated by the baroness de Stassart. See Craiutu, *Liberalism under Siege*, cit., p. 134; on the *juste milieu* theories in France, England and Germany see U. Backes, *Political Extremes. A conceptual history from antiquity to the present*, London-New York, Routledge, 2010, pp. 69 ff.

³² For a deep and wide analysis of this concept Craiutu, *Liberalism under Siege*, cit., pp. 123-153. According to H.S. Jones, *The French State in Question. Public law and political argument in the Third Re-*

public, Cambridge, Cambridge University Press, 1993, the sovereignty of reason derived from Turgot and Condorcet (p. 23).

³³ Guizot, *Du gouvernement de la France depuis la Restauration*, cit., p. 201.

³⁴ Ch.H. Pouthas, *Guizot pendant la Restauration, préparation de l'homme d'Etat*, Paris, Plon, 1923, pp. 313 ff.

³⁵ Craiutu, *Liberalism under Siege*, cit., pp. 142 ff.

³⁶ On these themes cfr. Laquière, *Les origines du régime parlementaire en France (1814-1848)*, cit.; Craiutu, *Liberalism under Siege*, cit., pp. 185 ff.; Lacchè, *History & Constitution*, cit., pp. 301-377.

³⁷ Ferreira, *Les équivoques du "constitutionnalisme octroyé"*, cit., pp. 87 ff.

³⁸ On the *Charte* as "pact" cfr. Laquière, *Les origines du régime parlementaire en France (1814-1848)*, cit., pp. 113-120.

³⁹ F. Guizot, *Pourquoi la Révolution d'Angleterre a-t-elle réussi? Discours sur l'histoire de la Révolution d'Angleterre*, Paris, Masson, 1850, pp. 162-163.

⁴⁰ «Le principe qui a présidé à notre révolution ne doit pas présider à notre gouvernement» (Speech 9 November 1830).

⁴¹ See Rosanvallon, *La Monarchie impossible*, cit. and L. Lacchè, *La Libertà che guida il Popolo. Le Tre Gloriose Giornate del luglio 1830 e le Charte nel costituzionalismo francese*, Bologna, il Mulino, 2002.

⁴² J. Barthélemy, *La distinction des lois constitutionnelles et des lois ordinaires sous la Monarchie de Juillet*, in «Revue de droit public», t. 26, 1909, pp. 25 ff., refers to a «réunion constituante».

⁴³ Laquière, *Les origines du régime parlementaire en France (1814-1848)*, cit.

⁴⁴ B. Desauere, *National Sovereignty in the Belgian Constitution of 1831. On the Meaning(s) of Article 25*, in *Reconsidering Constitutional Formation*, cit., pp. 93-157.

⁴⁵ See Schmitt, *Constitutional Theory*, cit.

⁴⁶ On these aspects see especially P. Rosanvallon, *Le moment Guizot*, Paris, Gallimard, 1985, pp. 87 ff.; Id., *Les Doctrinaires et la question du gouvernement représentatif*, in *The French Revolution and the Creation of modern political Culture*, 4 voll., Oxford, Pergamon Press, 1989, vol. 3, F. Furet and M. Ozouf (eds.), *The Transformations of Political Culture 1789-1848*, Oxford, Pergamon Press, pp. 421 ff.; Id., *Guizot et la question du suffrage universel au XIX^{ème} siècle*, in M. Valensise (ed.), *François Guizot et la culture politique*, Paris, Gallimard, 1991, pp. 129-145; Id., *Le sacre du citoyen. Histoire du suffrage universel en France*, Paris, Gallimard, 1992, pp. 230-249. But also A.-F. Perny, *Le pouvoir constituant sous la monarchie de Juillet*, Paris, L. Boyer, 1901; M. Barbé, *Étude historique des idées sur la souveraineté en France de 1815 à 1848*, Paris, Pichon et Durand-Auzias, 1904; Barthélemy, *La distinction des lois constitutionnelles*, cit.; Pouthas, *Guizot pendant la Restauration*, cit., pp. 313 ff.; L. Diez Del Corral, *El liberalismo doctrinario*, Madrid, Instituto de Estudios Políticos, 1984, pp. 221 ff.; V. Starzinger, *The Politics of the Center. The Juste milieu in Theory and Practice, France and England, 1815-1848*, New Brunswick and London, Transaction Publishers, 1991 (1965), pp. 20 ff.; G. Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, Paris, CNRS, 1985, pp. 120 ff.; S. Rials, *Constitutionnalisme, souveraineté et représentation*, in Id., *La continuité constitutionnelle en France de 1789 à 1989*, Paris, Economica et Presses Universitaires d'Aix-Marseille, 1990, pp. 49-69; L. Jaume, *Guizot et la philosophie de la représentation*, in «Droits», 15, 1992, pp. 141-152; Id., *La raison politique chez Victor Cousin et Guizot*, in «La pensée politique», 2, 1994, pp. 242-253; Id., *L'individu effacé*, cit., pp. 130 ff.; D. Roldán, *Charles de Rémusat. Certitudes et*

- impasses du libéralisme doctrinaire, Paris, L'Harmattan, 1999, pp. 133 ff.; Craiutu, *Liberalism under Siege*, cit., pp. 244 ff.; Laquière, *Les origines du régime parlementaire en France (1814-1848)*, cit., p. 116.
- ⁴⁷ See also H. Hofmann, *Rappresentanza – rappresentazione. Parola e concetto dall'antichità all'Ottocento*, Milano, Giuffrè, 2007, p. 538.
- ⁴⁸ Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, cit., p. 135.
- ⁴⁹ Quoted by G. Remond, *Royer-Collard. Son essai d'un système politique*, Paris, Sirey, 1933, p. 39. See P. De Barante, *La vie politique de M. Royer-Collard. Ses discours et ses écrits*, Paris, Didier, 1863, 2 voll.
- ⁵⁰ «Il n'y a de souveraineté absolue nulle part [...]» (Speech of F. R. de Chateaubriand, Chamber of the Peers, 7 August 1830, in «Archives parlementaires», 2 serie, t. 63, pp. 85-87).
- ⁵¹ On Pellegrino Rossi and his chair of constitutional law, cf. G. Colmet-Daage, *M. Rossi à l'école de Droit*, notice lue par Ernest Glanville à l'Académie des Sciences morales et politiques, séance du 22 mai 1886; P. Lavigne, *Le comte Rossi, premier professeur de droit constitutionnel français (1834-1845)*, in *Histoire des idées et idées sur l'histoire. Études offertes à Jean-Jacques Chevallier*, Paris, 1977, pp. 173-178; Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, cit., p. 142 ff.; Rosanvallon, *Le moment Guizot*, cit., pp. 285 ff.; Id., *La monarchie impossible*, cit., pp. 162 ff.; L. Lacchè, *Tra politica e diritto, ovvero Rossi e la Monarchia di Luglio*, in Id. (ed.), *Un liberale europeo: Pellegrino Rossi (1787-1848)*, Milano, Giuffrè, 2001, pp. 69-108, e Id., *La Libertà che guida il Popolo*, cit., pp. 164-173; J. Boudon, *Introduction to P. Rossi, Cours de droit constitutionnel*, Paris, Dalloz, 2012.
- ⁵² On the debate about the "constitutional position" of the *Charte* see also Ferreira, *Les équivoques du "constitutionnalisme octroyé"*, cit., pp. 103-109.
- ⁵³ *Rapport au Roi sur la création d'une chaire de droit constitutionnel*, 22 August 1834.
- ⁵⁴ Cfr. Ch. Durand, *Les décrets-loi napoléoniens devant la jurisprudence de la Restauration*, in *Études offertes à Jean Macqueron*, Aix-en-Provence, University of Aix-en-Provence, 1970, pp. 269-277 and above all the works of J.-L. Mestre, *Les juridictions judiciaires et l'inconstitutionnalité des ordonnances royales de la Restauration au Second Empire*, in «Revue française de droit constitutionnel», 15, 1993, pp. 451-461; Id., *La Cour de Cassation et le contrôle de constitutionnalité. Données historiques*, in *La Cour de Cassation et la Constitution de la République*, Aix-en-Provence, Presses Universitaires de Aix-en-Provence, 1995, pp. 35-67; Id., *L'inconstitutionnalité des actes réglementaires de 1814 à 1851*, in F. Burdeau (ed.), *Administration et droit*, Paris, L.G.D.J., 1996, pp. 123-133; G. Bigot, *L'autorité judiciaire et le contentieux de l'administration. Vicissitudes d'une ambition, 1800-1872*, Paris, L.G.D.J., 1999; M. Fioravanti, *La potestà normativa del governo. Dalla Francia d'Ancien Régime all'Italia liberale*, Milano, Giuffrè, 2009.
- ⁵⁵ Court of commerce, *La Pelouze et Chatelain c. Caultier-Laguione*, 28 July 1830, in «Recueil Sirey», 1830, second part, p. 223. Cfr. A.M. Dupin aîné, *Révolution de Juillet 1830. Caractère légal et politique du nouvel établissement fondé par la Charte constitutionnelle acceptée et jurée par Louis-Philippe 1er, roi des Français, en présence des deux Chambres le 9 août 1830*, Paris, 1833, pp. 82 ff.
- ⁵⁶ On this case cf. J. Luther, *Idee e storie di giustizia costituzionale nell'Ottocento*, Torino, Giappichelli, 1990, pp. 128-131; Mestre, *La Cour de Cassation*, cit., pp. 42-43; Bigot, *L'autorité judiciaire*, cit., pp. 214-216; P. Alvazzi Del Frate, *Il giudice naturale. Prassi e dottrina in Francia dall'ancien régime alla Restaurazione*, Roma, Viella, 1999, p. 211 ff.
- ⁵⁷ «[...] la cour rendra un service, et le plus grand de tous; elle ramènera le Gouvernement à la loi, elle fera échouer, par une résistance patriotique et généreuse, toute atteinte à la constitution du pays [...] Voilà, Messieurs, ce qui est profondément triste. Si vous ne pouvez faire justice, s'il est vrai qu'il n'y a aucun moyen légal de protéger un citoyen condamné à mort par un tribunal que la constitution défendait d'établir, il faudra se voiler la tête et désespérer à jamais de la légalité dans notre pays» (*Cour de Cassation*, Geoffroy, 29 June 1832, in «Recueil général des lois et des arrêts» par J.-B. Sirey, Paris, 1832, t. XXXII, part I, pp. 401 ff.).
- ⁵⁸ Ivi, p. 401. Already in 1818 Sirey evoked the need of a control by the Court of Cassation to verify if the ordinances were "constitutional", that is comply with the provisions of the *Charte*. Cfr. Bigot, *L'autorité judiciaire*, cit., pp. 179-181. For a broad analysis of the French debate in legal theory and court decisions on the art. 14 of the Charter of 1814 cfr. Fioravanti, *La potestà normativa del governo*, cit., pp. 73 ff.
- ⁵⁹ A. De Tocqueville, *Democracy in America*, *Historical-Critical Edition of De la démocratie en Amérique*, ed. Eduardo Nolla, translated by J.T. Schleifer, Indianapolis, Liberty Fund, 2010, <<http://oll.libertyfund.org/titles/2285>>, november 2017. See Laquière, *Le contrôle de constitutionnalité de la loi aux États-Unis vu par les penseurs libéraux français du XIX^{ème} siècle*, in «Giornale di storia costituzionale», 4, 2002, pp. 155-171.
- ⁶⁰ See Bigot, *L'autorité judiciaire*, cit., pp. 217 ff. and above all Mestre, *La Cour de Cassation*, cit., pp. 47 ff. Cf. also P. Laroque, *Les juges français et le contrôle de la loi*, in «Revue du droit public», 33, 1926, p. 72.

- ⁶¹ F. Berriat-Saint-Prix, *Commentaire sur la Charte constitutionnelle*, Paris, Videcoq, 1836, pp. 119 ff. «Ce sont – Barthélemy would write at the beginning of the twentieth century – les objections que l'on adresse encore à l'introduction en France du système de l'inconstitutionnalité des lois» (*La distinction des lois constitutionnelles et des lois ordinaires sous la Monarchie de Juillet*, cit., p. 21).
- ⁶² Chamber of Peers, 27 August 1842, in «Le Moniteur Universel», 28 August 1842, p. 1866. Shortly before de Broglie had declared: «The compromise of 1830 has brought about the sharing of the public powers; the contract of 1830 has founded national sovereignty. If this great act is not absolute, definitive; if beyond the Charter there exists something other than the individuals that it protects, than the wills that are subject to it; if our power has got other limits than reason, justice and wisdom, in that case the Charte is simply a lie, the king does not reign, the Chambers, the elected bodies, the electoral body, all that is precarious and provisional».
- ⁶³ Chamber of Pairs, 19 August 1842, in «Le Moniteur Universel», 20 August 1842, p. 1811.
- ⁶⁴ Chamber of Pairs, 19 August 1842, in «Le Moniteur Universel», 20 August 1842, p. 1811. See. Laquière, *Les origines du régime parlementaire en France (1814-1848)*, cit., p. 115.
- ⁶⁵ «[...] Maintenant, quelle est la présomption ordinaire dans un gouvernement, dans une constitution où le pouvoir constituant et le pouvoir constitué n'ont pas été distingués? La présomption, la voici d'après ce qui s'est passé en Angleterre et chez nous. Quand la constitution n'a pas distingué un pouvoir constituant et un pouvoir constitué, et qu'il s'agit d'un acte important, quel que soit le caractère, on s'adresse à qui? Aux trois pouvoirs auxquels la constitution a délégué la souveraineté, a délé-

ré les actes les plus importants» (House of Representatives, 20 August 1842, in «Le Moniteur Universel», 21 August 1842, p. 1829).

- ⁶⁶ De Tocqueville, *Democracy in America*, vol. 1, cit., p. 170. «The laws of 1830 do not, any more than those of 1814, indicate any means to change the constitution. Now, it is clear that the ordinary means of legislation cannot be sufficient for that. From what does the king derive his powers? From the constitution. From what the peers? From the constitution. From what the deputies? From the constitution. How then would the king, the peers and the deputies be able, by uniting, to change something in a law by the sole virtue of which they govern? Outside the constitution they are nothing; so on what ground would they stand in order to change the constitution? One of two things: either their efforts are powerless against the charter, which continues to exist in spite of them, and then they continue to rule in its name; or they succeed in changing the charter, and then, since the law by which they exist no longer exists, they are no longer anything themselves. By destroying the charter, they are destroyed. That is still much more obvious in the laws of 1830 than in those of 1814. In 1814, the royal power put itself, in a way, outside and above the constitution; but in 1830, by its own admission, it is created by the constitution and is absolutely nothing without it. Thus a part of our constitution is immutable, because it has been joined with the destiny of a family; and the whole of the constitution is equally immutable, because no legal means are seen to change it» (Ivi, vol. 2, p. 258).
- ⁶⁷ D. Serrigny, *Traité du droit public des Français, précédé d'une introduction sur les fondements des sociétés politiques*, Paris, 1846, t. I, p. 37). See also Ch. Hello, *Du régime constitutionnel dans ses rapports avec l'état actuel de la science sociale*

et politique, Bruxelles, Meline, 1849, p. 265; «Today there is an unanimous reprobation of these both organized and organizers powers, always standing, useless if they are inert, redoubtable if they are active, and whose hand full of storms is constantly open on the constituted powers». Cfr. also O. Jouanjan, *La Constitution de 1791 dans la doctrine constitutionnelle libérale française du XIX^{ème} siècle*, in 1791, la première Constitution française, cit., pp. 437-442.

- ⁶⁸ F. Laferrière, *Cours de droit public et administratif*, Paris, Joubert, 1841-1846³, p. 5.
- ⁶⁹ *Ibidem*.
- ⁷⁰ Serrigny, *Traité de droit public*, cit., t. I, p. 72.
- ⁷¹ On this point see Schmitt, *Constitutional Theory*, cit., pp. 85 ff., 103 ff., 328-329.
- ⁷² F. Guizot, *Histoire des origines du gouvernement représentatif en Europe*, Paris, Didier, 1851, t. 2, p. 150.
- ⁷³ «Le Moniteur Universel», 23 March 1847, p. 616. See Rosanvalon, *Guizot et la question du suffrage universel*, cit., pp. 129-145).
- ⁷⁴ Archives Nationales, 42, AP, 297, Letter (private) of Guizot to Pellegrino Rossi, Paris Friday 7 May 1847).
- ⁷⁵ Starzinger, *The Politics of the Center*, cit. On the parallel debate in France and England after 1830 on the limited suffrage see A.S. Kahan, *Liberalism in Nineteenth-Century Europe. The Political Culture of Limited Suffrage*, Basingstoke, Palgrave Macmillan, 2003, pp. 21 ff.
- ⁷⁶ Craiutu, *Liberalism under Siege*, cit., p. 140. See also J. Graham, *Donoso Cortés. Utopian Romantic and Political Realist*, Columbia, University of Missouri Press, 1974, p. 42.
- ⁷⁷ See Del Corral, *El liberalismo doctrinario*, cit., on the Spanish doctrinaire liberalism, especially on Cortés and Cánovas.
- ⁷⁸ Translated into English with the unsuitable title *A Defense of Representative Government*, North

- York-Ontario, Captus Press. Cou-sin, 1991.
- ⁷⁹ References in Craiutu, *Liberalism under Siege*, cit., pp. 44-45.
- ⁸⁰ J. Drentje, *Thorbecke. Een filosoof in de politiek*, Amsterdam, Boom, 2004.
- ⁸¹ New York, 1996.
- ⁸² C. Balbo, *Della monarchia rappresentativa in Italia. Saggi politici*, Firenze, Le Monnier, 1857, p. 209.
- ⁸³ A. Voßkuhle, *Die Verfassung der Mitte*, München, Carl Friedrich von Siemens Stiftung, 2015, pp. 10 ff.
- ⁸⁴ «La gestion de la complexité constitue la ténacité de l'esprit libéral, dont la vertu de modération forme la face morale: il faut combiner en vue du meilleur possible» (Jaume, *L'individu effacé*, cit., p. 546). See Craiutu, *Liberalism under Siege*, cit., pp. 291-295 and more widely Id., *A Virtue for Courageous Minds. Moderation in French Political Thought, 1748-1830*, Princeton and Oxford, Princeton University Press, 2012.
- ⁸⁵ Quoted by Craiutu, *Liberalism under Siege*, cit., p. 189.
- ⁸⁶ On this aspect see, for further references, L. Lacchè, *Il canone eclettico. Alla ricerca di uno stato profondo della cultura giuridica italiana dell'Ottocento*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», XXXIX, 2010, pp. 153-228.
- ⁸⁷ C. Balbo, *Dell'uso delle parole moderate, opinione moderata e parte moderata. Lettera al signor****, Torino, 19-23 giugno 1847, in Id., *Lettere di politica e letteratura edite ed inedite di Cesare Balbo precedute da un discorso sulle rivoluzioni*, Firenze, Le Monnier, 1855, p. 46.
- ⁸⁸ «[...] s'efforce d'opérer le progrès sans recourir aux moyens révolutionnaires [...]» (Letter of 4 february 1846, in C. Cavour, *Epistolario*, ed. by C. Pischella, III, 1844-1846, Firenze, Olschki, 1973, pp. 274-275). On this vision of the Italian Liberals in Turin in 1848-1849 see R. Ferrari Zumbini, *Tra norma e vita. Il mosaico costituzionale a Torino 1846-1849*, Roma, Luiss University Press, 2016.
- ⁸⁹ Jones, *The French State in Question*, cit., pp. 23-24.
- ⁹⁰ Hofmann, *Rappresentanza – rappresentazione*, cit., pp. 539-542.
- ⁹¹ M. Stolleis, *Storia del diritto pubblico in Germania. II. Dottrina del diritto pubblico e scienza dell'amministrazione 1800-1914*, Milano, Giuffrè, 2014 (1992), pp. 542 ff. See also Jakob, *Neutralizing the Sovereignty Question*, cit., p. 379.
- ⁹² Cf. C. Schmitt, *Hugo Preuß. Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre*, Tübingen, J.C.B. Mohr, 1930, pp. 8 ff.
- ⁹³ O. Jouanjan, *What Is a Constitution? What Is Constitutional History?*, in K.L. Grotke, M. J. Prutsch (eds.), *Constitutionalism, Legitimacy, and Power. Nineteenth-Century Experiences*, Oxford, Oxford University Press, 2014, p. 328.
- ⁹⁴ A. Laquière, *État de droit e sovranità nazionale in Francia*, in P. Costa, D. Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Milano, Feltrinelli, 2002, p. 287.
- ⁹⁵ «C'est que la souveraineté du peuple ne fonde pas le gouvernement constitutionnel. L'État, ainsi établi à la française, est trop fort, loin de garantir toutes les libertés, il absorbe toutes les libertés: sa forme est la Convention ou le despotisme » (E. Renan, *La monarchie constitutionnelle en France*, in «Revue des Deux Mondes», 1er novembre 1869, then in *La réforme intellectuelle et morale*, Paris, Michel Lévy, 1872, p. 240). For an overview L. Jaume, *L'Etat administratif et le libéralisme. Une histoire française*, Fondation pour l'innovation politique, Paris, June 2009.
- ⁹⁶ For a critical analysis of Carré de Malberg's theory of national sovereignty see O. Beaud, *La souveraineté dans la "Contribution à la théorie générale de l'État" de Carré de Malberg*, in «Revue du droit public et de la science politique en France et à l'étranger», 5, 1994, pp. 1264 ff.
- ⁹⁷ E. Maulin, *La théorie de l'État de Carré de Malberg*, Paris, PUF, 2003, p. 119.
- ⁹⁸ On national sovereignty as supremacy of the Constitution see Beaud, *La souveraineté dans la "Contribution à la théorie générale de l'État"*, cit., pp. 1289 ff.; on the ambiguity of the use of the concept of "constitution" in Carré de Malberg, Ivi, pp. 1300-1301.
- ⁹⁹ On the evolution of the concept of *Rechtsstaat* in Germany after 1848 and the distinction between *État légal* and *État de droit* according to Carré de Malberg, see J. Hummel, *Le constitutionnalisme allemand (1815-1918): le modèle allemand de la monarchie limitée*, Paris, PUF, 2002, pp. 123-127.
- ¹⁰⁰ Beaud, *La souveraineté dans la "Contribution à la théorie générale de l'État"*, cit., pp. 1266, 1269-1273.
- ¹⁰¹ P. Brunet, *Entre représentation et nation: le concept d'organe chez Carré de Malberg*, in O. Beaud, P. Wachsmann (eds.), *La science juridique française et la science juridique allemande de 1870 à 1918*, Strasbourg, Presses Universitaires de Strasbourg, 1997, pp. 273-293.
- ¹⁰² Laquière, *État de droit e sovranità nazionale in Francia*, cit., pp. 297-299.
- ¹⁰³ C. Schönberger, *Penser l'État dans l'Empire et la République: critique et réception de la conception juridique de l'État de Laband chez Carré de Malberg*, in Ivi, pp. 255-271; Id., *De la souveraineté nationale à la souveraineté du peuple. Mutations et continuité de la théorie de l'État de Carré de Malberg*, in «Revue française de l'histoire des idées politiques», 4, 1996, pp. 297-316; E. Maulin, *Carré de Malberg et le droit constitutionnel de la Révolution française*, in «Annales historiques de la Révolution française», 328, 2002, pp. 5-27. For a general overview on the French debate during the Third Republic see M.-J. Redor, *De l'État légal à l'État de droit. L'évolution des conceptions de la doctrine publiciste*

française (1870-1914), Paris-Aix, Economica-PUAM, 1992.

- ¹⁰⁴ Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, cit., pp. 131-136. See also P. Brunet, *Vouloir pour la nation. Le concept de représentation dans la théorie de l'état*, Paris, L.G.D.J., 2004, pp. 32-36.
- ¹⁰⁵ R. Carré de Malberg, *Contribution à la théorie générale de l'État*, Paris, Sirey, 1920, t. I, pp. 159-160. See A. Petrone, *Carré de Malberg e l'eredità della Rivoluzione: sovranità nazionale versus sovranità popolare*, in «Journal of Constitutional History», 33, I, 2017, pp. 262-263.
- ¹⁰⁶ For some insights see Maurizio Fioravanti, *Stato e Costituzione. Materiali per una storia delle dottrine costituzionali*, Torino, Giappichelli, 1993; Id., *Appunti di storia delle costituzioni moderne. Le libertà fondamentali*, Torino, 2014, pp. 118-133; Id., *La scienza del diritto pubblico. Dottrine dello Stato e della Costituzione tra Otto e Novecento*, Milano, Giuffrè, 2001, 2 vol.