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

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

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

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

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

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

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

1 On ReConFort's Research Programme in General

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Method of Comparative Constitutional History

2.1 Targeted Sources of ReConFort

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

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

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

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

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

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

2.2 *Methodological Challenges: Finding the* Tertia Comparationis

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

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

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

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

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

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

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

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

2.3 Constitutionalisation by Public Sphere

2.3.1 Press Media as Roadster of Politicisation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.1 Anti-estate Societal Meaning of National Sovereignty

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

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

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

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

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

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

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

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

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

3.2.2 Anti-monarchical Meaning of National Sovereignty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[103] 1746–1794.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Les subsides doivent être librement consentis, et proportionellement répartis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4 The Nation in the Polish May-Constitution 1788

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[162] Ibid. (n. 151).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5 National Sovereignty in the Cádiz Constitution 1812

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5.4 Primacy of the Cortes in the Constitution of Cádiz

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5.6 Struggle of the *realistas* for the Monarchical Principle

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

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

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

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

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

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

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

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

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

3.5.7 Contemporary Ambigous Evaluation of the Cádiz Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.6 The Constituent Sovereignty in the Norwegian Grunnloven

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[327] Constituted on April 10, 1814.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[369] Governing 1814–1824.

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

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

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

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

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

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

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

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

4.1 The Constitutional Movement After the French July Revolution 1830

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 Belgian Constitution of 1831

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3 Parliamentarism in England

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

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

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

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

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

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

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

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

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

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

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

5 Octroi of the Statuto Albertino 1848

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

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

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

[405] 312 yes und 311 no-votes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.2 *Italian costituzione flessibile Under the* Statuto Albertino

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 Improvised Parliamentarism in the Frankfurt National Assembly

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Summary and Outlook

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

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

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

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

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

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

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

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

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

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

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

References

N.N. 1816. Allgemeine Zeitung München, Jan 18, Beilage [insert].
N.N. 1848. Archivio di Stato di Torino, Miscillanea Quirinale, Consiglio di conferenza, m. 6, n. 3, Bl. 62.
N.N. 1820. Colección de los Decretos y Ordenes que han expedido las Cortes extraordinarias y Generales, Madrid, vol. 1.
N.N. 1879. Constitutions qui ont régi la France depuis 1789 jusqu'à l'élection de M. Grévy comme Président de la République, conférées entre elles et annotées par Louis Tripier, deuxième édition augmentée d'un supplément, Paris.
N.N. 1848. Der Freund der Wahrheit und des deutschen Volkes, No. 73, Nov 7.
N.N. 1811. Diario de las discusiones y Actas de la Córtes, Cádiz en la Imprenta Real.
N.N. 1870. Diario de Sesiones de las Cortes Generales y Extraordinarias: dieron principio el 24 de setiembre de 1810 y terminaron el 20 de setiembre de 1813, vol. 3, Sesion del dia 25 de agosto de 1811, Madrid.
N.N. 1791. Gazeta Narodowa i Obca, No. 4, Jan 14.
N.N. 1791. Gazeta Narodowa i Obca, No. 27, March 9.
N.N. 1791. Gazeta Narodowa i Obca, No. 37, May 1.
N.N. 1791. Gazeta Narodowa i Obca, No. 46, June 8.
N.N. 1791. Gazeta Narodowa i Obca, No. 63, July 6.
N.N. 1848. Neue Berliner Zeitung, No. 62, Aug 30.
N.N. 1882. The legal opinion of the Faculty of Law of Christiania on the right of sanction of the King during alterations of the Fundamental Law, emitted due to the royal resolution of August 30, 1880, dated March 23, 1881, trans. [into German] and ed. Emil Jonas, Leipzig/Oberhausen.
Álvarez Cuartero, Izaskun/Sánchez Gómez, Julio (ed.). 2007. Visiones y revisiones de la independencia americana. Salamanca.
Andersson, Ingvar. 1961. Sveriges historia. Stockholm, 7th edition.
Annino, Antonio/Ternavasio, Marcela. 2012. El laboratorio constitucional iberoamericano, Madrid et al.
Aquinas, Thomas. 1975, Über die Herrschaft der Fürsten, ed. Friedrich Schreyvogel, Stuttgart.
Arbós, Xavier. 1986. La idea de nació en el primer constitucionalisme espanyol, Barcelona.
Archer, Christon (ed.). 2000. The Wars of Independence in Spanish America, Wilmington.
Argüelles, Agustín de. 1989. Discurso preliminar a la Constitución de 1812 (1811), First Part, Madrid.
Artola Gallego, Miguel. 1991. Antiguo Régimen y revolución liberal, Barcelona.
Artola Gallego, Miguel. 1975. Los origenes de la España contemporánea, vol. 2, 2nd edition, Madrid.
Augdahl, Per, Art. 1924. Getz, Bernhard. In Norsk Biografisk Leksikon, ed. Bull, Edv./Jansen, Einar, vol. IV, Kristiania (=Oslo), 430–437.
Bacot, Guillaume. 1985. Carré of Malberg and the distinction between sovereignty of the people and national sovereignty, Paris Édition du C.N.R.S.

Badía, Juan Ferrando. 1963. Die spanische Verfassung von 1812 und Europa. Der Staat 2: 153–180.
Badía, Juan Ferrando. 1962. Vicisitudes e influencias de la Constitución de 1812. Revista de Estudios Políticos 126: 203–213.
Ballini, Pier Luigi. 1988. Le elezioni nella storia d'Italia dall'Unità al fascismo. Bologna: Profilo storico-statistico.
Bastid, Paul. 1939. Les Discours de Sieyès dans les débats constitutionnels de l' an III, Paris.
Bastid, Paul, 1954. Les institutions politiques de la monarchie parlamentaire française (1814–1848), Paris.
Bastid, Paul. 1978. Sieyès et sa pensée, Geneva.
Bernecker, Walther L., and Sören Brinkmann. 2006. Spanien um 1800. In *Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel*, ed. Brandt, Peter/Kirsch, Martin/Schlegelmilch, Arthur, 886–929. Bonn: Volume 1: Um 1800.
Berg, Roald. 2005. Storting og Unionen med Sverige 1814–1905. Oslo: Dokumenter fra Stortingets arkiver.
Beymes, Klaus v. 1973. Die parlamentarischen Regierungssysteme in Europa, 2nd edition, Munich.
Bickart, Roger. 1932. Les Parlements et la nation de souverainetés nationale au XVIIIe siècle, Paris.
Bluntschli, Johann Caspar. 1863. Allgemeines Staatsrecht, vol. I, 3rd edition, Munich.
Botzenhart, Manfred. 1974. Die Parlamentarismusmodelle der deutschen Parteien 1848/49. In *Gesellschaft, Parlament und Regierung*, ed. G.A. Ritter.
Bravo Lira, Bernardino. 1992. El Estado Constitucional en Hispanoamérica 1811–1991, Mexico.
Brey Blanco, José Luis. 2012. Liberalismo, nacíon y soberanía en la Constitución española de 1812. In *Las Cortes de Cádiz y la Constitución de 1812: ¿la primera revolución liberal española?*, ed. Álvarez Vélez, Isabel, 69–108. Madrid.
Böckenförde, Ernst-Wolfgang. 1967. Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert In *Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert*, ed. Werner Conze, Stuttgart.
Borst, Arno. 1974. Valmy 1792 – Ein historisches Ereignis?, In *Der Deutschunterricht*, Vol. 26/6, 88–104.
Brandt, Hartwig (ed.). 1979. Restauration und Frühliberalismus 1814–1840, Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert, Volume 3, Darmstadt.
Broglio, Emilio. 1865. Delle forme parlamentari. Brescia.
Burckhardt, Jakob. 1869. Die Cultur der Renaissance in Italien (The culture of the Renaissance in Italy), Leipzig.
Burke, Edmund. 1999. Reflections on the Revolution in France, ed. with an introduction and notes by Leslie George Mitchell, Oxford.
Carlsson, Sten. 1961. Svensk historia, Vol. 2, ed. V. S. Carlsson/U. J. Rosén, 2nd edition, Stockholm.
Carnicero, José Clemente. 1830. El liberalismo convencido por sus mismos escritos, ó examen crítico de la constitucion politica de la monarquia española publicada en Cádiz y de la obra de Don Francisco Marina "Teoría de las Cortes" y de otras que sostienen las mismas ideas acerca de la soberania de la nacion, Madrid.
Caroni, Pio. 2003. Gesetz und Gesetzbuch, Beiträge zu einer Kodifikationsgeschichte, 5–21, Basel/Genf/Munich.
Cassirer, Ernst. 1991. Rousseau, Kant, Goethe, ed. and introduced by Rainer A. Bast, Hamburg.
Castellote, Salvador. 2007. Der Beitrag zur Spanischen Spätscholastik zur Geschichte Europas. In *Macht und Moral – politisches Denken im 17. und 18. Jahrhundert*, ed. Kremer, Markus/ Reuter, Hans-Richard. Stuttgart.
Chevallier, Jean-Jacques/Conac, Gérard. 1991. Histoire des institutions et des régimes politiques de la France de 1789 à nos jours, 8th edition, Paris.

Chust, Manuel/Serrano, José Manuel. 2007. Debates sobre las independencias iberoamericanas, Madrid et al.

Clere, Jean-Jacques. 1987. Etat-Nation-Citoyen Au Temps de la Revolution. In *L' Idée de Nation*, ed. Marie-Françoise Conrad/Jean Ferrari/Jean-Jacques Wunenburger, 97–113. Dijon.

Clere, Jean-Jacques. 1995. L' emploi des mots nation et peuple dans le langage politique de la Révolution française (1789-1799). In *Nation et République, les éléments d'un débat, actes du colloque de l'AFHIP des 6–7 avril 1994 à Dijon*, 51–65, Presse Universitaires d' Aix-Marseille.

Ciaurro, Luigi. 1996. Lo Statuto albertino illustrato dai lavori preparatori, Rome.

Collingham, Hugh A.C. 1988. The July Monarchy, A Political History of France 1830–1848, London et al.

Coronas González, Santos Manuel. 1995. Las Leyes Fundamentales del Antiguo Régimen (Notas sobre la Constitución histórica española), Anuario de Historia del Derecho Española, LXV, 127–218.

Cortes generales y extraordinarias (ed.). 1813. Colección de los Decretos y Órdenes que han expedido las Cortes generales y extraordinarias desde su instalación en 24 de setiembre de 1810 hasta igual fecha de 1811, vol. 1, Madrid.

Cox, Gary W. 1994. The Development of Collective Responsibility in the United Kingdom. Parliamentary History 13: 32–47.

Crosa, Emilio. 1936. Lo statuto del 1848 e l'opera del ministro Borelli, (=Nueva Antologia nel 16 giugno 1915, p. 533–541), Torino.

Deazley, Ronan. 2004. On the origin of the right to copy, charting the movement of copyright law in eighteenth-century Britain (1695–1775). Oxford.

Démeunier, Jean Nicolas (ed.). 1784. Encyclopédie méthodique, Economie politique, vol. 1. Paris.

Dippel, Horst (ed.). 2008. Constitutions of the world from the late 18th century to the middle of the 19th century, sources on the rise of modern constitutionalism, Europe, Vol. 6. Munich.

Dippel, Horst. 1999. Die Bedeutung der spanischen Verfassung von 1812 für den deutschen Frühliberalismus und Frühkonstitutionalismus. In *Denken und Umsetzung des Konstitutionalismus in Deutschland und anderen europäischen Ländern in der ersten Hälfte des 19. Jahrhunderts* ed. Martin Kirsch and Pierangelo Schiera, 219–237. Berlin.

Dippel, Horst. 1998. La Significación de la Constitución Española de 1812 para los Nacientes Liberalismos y Constitucionalismos Alemanes. In *Constitución en España: Orígenes y Destinos*, ed. José María Iñurritegui Rodrígez/José María Portillo Valdés, 287–307. Madrid.

Dreier, Horst. 2008. Gilt das Grundgesetz ewig? Fünf Kapitel zum modernen Verfassungsstaat, Munich.

Duverger, Maurice. 1986. Le système politique français, Droit constitutionnel et systèmes politiques, 19th edition, Paris.

Eisenträger, Stian A.E. 2013. The European Press and the Question of Norwegian Independence in 1814, Norwegian University of Life Sciences, Masterthesis.

Errera, Paul. 1909. Das Staatsrecht des Königreichs Belgien, Tübingen.

Estrada Sánchez, Manuel. 1998. El enfrentamiento entre doceañistas y moderados. Revista de Estudios Políticos 100: 241–272.

Fehrenbach, Elisabeth. 1992. Verfassungsstaat und Nationenbildung 1815–1871, Munich.

Ferrer, Padre Magín Ferrer y Pons. 1845. Las Leyes Fundamentales de la Monarchía Española, segun Fueron antiguamente, y segun conviene que sean en la época actual, I-II, Barcelona.

Flammermont, Jules Gustave/Tourneux, Maurice. 1895. Remonstrances, II, Paris.

Florez Estrada, Alvaro. 1996. Representación hecha a S.M.C. el señor Don Fernando VII (1820), Madrid.

Fontana, Josep. 1992. La crisis de Antiguo régimen 1808–1833, Barcelona.

Frängsmyr, Tore. 2002. Svensk idéhistoria, Bildning och vetenskap under tusen år, Del 2: 1809–2000, Stockholm, 10–100.

Fritz, Kurt von. 1954. The theory of mixed constitution in antiquity: A critical analysis of polybius' political idea, New York.

Fusilier, Raymond.1960. Les monarchies parlementaires, Étude sur les systèmes de gouvernement (Suède, Norvège, Danemark, Belgique, Pays-Bas, Luxembourg), Paris.
Gadamer, Hans-Georg. 1972. Wahrheit und Methode, Grundzüge einer philosophischen Hermeneutik, 3rd extended edition, Tübingen.
Gallardo y de Font, Jerónimo. 1910. Apertura de las Cortes de Cádiz en 24 de Septiembre de 1810, vol. 1, Segovia.
Gammelgaard, Karen/Holmøyvik, Eirik (ed.). 2014. Writing democracy, The Norwegian Constitution 1814–2014, New York/Oxford a.o.
García, Antonio Fernández (ed.). 2002. La Constitución de Cádiz (1812) y Discurso Preliminar a la Constitución, Madrid.
Ghisalberti, Carlo. 2012. Storia costituzionale d'Italia 1848–1948, 8th edition, Roma et al.
Gil Novales, Alberto. 1985. La revolución burguesa en España, Madrid.
Gil Novales, Alberto. 1985. Las contradicciones de la revolución burguesa española, Madrid.
Gilissen, John. 1967. Die belgische Verfassung von 1831 – ihr Ursprung und ihr Einfluß. In *Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert*, ed. Werner Conze, Stuttgart.
Gmelin, Hans. 1905. Studien zur spanischen Verfassungsgeschichte, Berlin.
Goetel, Walery. 1969. Stanisław Staszic, Kraków.
Goethe, Johann Wolfgang von. 1902. Die Kampagne in Frankreich. In *Goethes sämtliche Werke*, Stuttgart.
González-Trevijano Sánchez, Pedro José. 2011. El concepto de Nación en la Constitución de Cádiz. In *Cortes y Constitución de Cádiz, 200 años*, vol. 2, eds. Escudero López, José Antonio, Madrid.
Görres, Joseph von. 1822. Die heilige Allianz und die Völker auf dem Congresse von Verona, Stuttgart.
Gosewinkel, Dieter/Masing, Johannes (ed.). 2006. Die Verfassungen in Europa 1789–1949, Munich.
Goubert, Pierre/Denis, Michel (ed.). 1775. Les Français ont la parole, Paris.
Grimm, Dieter. Gewaltengefüge, Konfliktpotential und Reichsgericht. In *Konstitutionalismus und Verfassungskonflikt*, ed. Ulrike Müßig, 257–267. Tübingen.
Grunenthal, Friedrich von/Dengel, Karl Gustav. 1819. Spaniens Staats-Verfassung durch die Cortes aus der Urschrift übertragen und herausgegeben von Friedrich von Grunenthal und Karl Gustav Dengel, Berlin.
Gutierrez, Joaquín/de Torres, Camilo. 1810. Motivos que han obligado al Nuevo Reyno de Granada á reasumir los derechos de la Soberanía, remover las Autoridades del antiguo Gobierno, è instalar una Suprema Junta baxo la sola dominación y en nombre de nuestro soberano Fernando VII y con independencia del Consejo de Régencia, y de qualquiera otra representacion, Santafé de Bogotá.
Habermas, Jürgen. 1979. Communication and the Evolution of Society, Boston.
Habermas, Jürgen. 1962 (trans 1989). The Structural Transformation of the Public Sphere: An Inquiry into a category of Bourgeois Society, Cambridge.
Hafen, Thomas. 1994. Staat, Gesellschaft und Bürger im Denken von Emmanuel Joseph Sieyès, Bern.
Haimann, Miecislaus. 1935. The Fall of Poland in Contemporary American Opinion, Chicago.
Halévi, Ran. 1989. Orateurs de la Révolution française, édition Pléiade, vol. I, Paris.
Haller, Carl Ludwig von. 1820. Ueber die Constitution der Spanischen Cortes, s.l.
Handelsman, Marceli. 1907. Konstytucja Trzeciego Maja roku 1791 [Die Konstitution vom 3. Mai 1791; The Constitution of May 3, 1791], Warsaw.
Hartmann, Carl Friedrich. 1820. Die spanische Constitution der Cortes und die provisorische Constitution der Vereinigten Provinzen von Südamerika; aus den Urkunden übersetzt mit historisch-statistischen Einleitungen, Leipzig.
Hassler, Konrad Dieterich. 1984 (Reprint 1984). Verhandlungen der Reichsversammlung, vol. II: Frankfurt am Main.

(E.H.) Abs. T. 1915. Art. Brandt, Frederik Peter. In *Salmonsens konversationsleksikon*, vol. III, ed. Anden Udgave, 854. Kopenhagen.
(E.H.) Abs. T. 1919. Art. Getz, Bernhard. In *Salmonsens konversationsleksikon*, vol. IX, ed. Anden Udgave, 652–654. Kopenhagen.
Heivoll, Geir. 2008. En introduksjon til Kants begrep om statforfatning. In *Forfatningsteori møter 1814*, ed. D. Michalsen, 95–144. Oslo.
Hélie, Faustin-Adolphe. 1878. Les Constitutions de la France, ouvrage contenant outre les constitutions, les principales lois relatives au culte, à la magistrature, aux élections, à la liberté de la presse, de réunion et d'association, à l'organisation des départements et des communes, avec un commentaire, 3. fascicule : Le premier empire et la restauration, Paris.
Hermann, Friedrich von. 1849. Die Reichsverfassung und die Grundrechte, Zur Orientierung bei der Eröffnung des bayerischen Landtags im September 1849, Munich.
Hintze, Otto. 1962. Das monarchische Prinzip und die konstitutionelle Verfassung (1911). In *Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte*, ed. Gerhard Oestreich, 2nd Edition, Göttingen.
Hofmann, Hasso. 2006. Souverän ist, wer über den Ausnahmezustand entscheidet (Carl Schmitt). In *Konstitutionalismus und Verfassungskonflikt*, ed. Ulrike Müßig, 269–284. Tübingen.
Höjer, Nils Jakob. 1882. Norska Grundlagen och dess Källor, 171–198, Stockholm.
Holmes, Stephan, Bodin, Jean. 1988. The paradox of sovereignty and the privatization of religion. In *Religion, Morality and the Law*, ed. James Roland Pennock/John W. Chapman. New York.
Holmøyvik, Eirik. 2012. Maktfordeling og 1814, Bergen.
Huber, Ernst Rudolf. 2003. Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung. In *Handbuch des Staatsrechts*, vol. 1, 3rd edition, ed. Josef Isensee/Paul Kirchhof, Heidelberg.
Huber, Ernst Rudolf. 1978. Deutsche Verfassungsgeschichte seit 1789, vol. 3, 2nd edition, Stuttgart/Berlin/Köln.
Hume, David. 1994. Essays and Treatises on Several Subjects (1758), In *Political Essays*, Cambridge.
Worm-Müller, Jacob, S. 1923. Art. Aschehoug, Torkel. In *Norsk Biografisk Leksikon*, Vol. I, ed. Edv. Bull/Anders Krogvig,/Ferhard Gran, 275–287. Kristiania (=Oslo).
Jardin, André/Tudesq, André-Jean. 1973. La France des notables, vol. 1: L'èvolution générale 1815–1848 (Nouvelle histoire de la France contemporaine 6), Paris.
Jeschonnek, Bernd. 1989. Revolution in Frankreich 1789–1799. Berlin.
Jourdan, Athanase Jean Léger/Decrusy/Isambert, François André. 1931, reprint 1964. Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789, Tome XXII: 1er janvier 1737–10 mai 1774, Paris, reprint Ridgewood.
Kawecki, J. 2014. 'Miasta nasze królewskie wolne w Rzeczypospolitej', In '*Konstytucja 3 maja 1791*', 125–136 PWN, Warsaw.
Kleinhenz, Roland. 1991. Königtum und parlamentarische Vertrauensfrage in England 1689–1841, Berlin.
Koht, Halvdan. 1934. Art. 'Hertzberg, Ebbe'. In *Norsk Biografisk Leksikon*, ed. Einar Jansen, vol. VI, p. 55–60, Oslo.
Kołłątaj, Hugo. 1790. Uwagi nad pismem… Seweryna Rzewuskiego… o sukcesyi tronu w Polszcze rzecz krótka, Warsaw.
Konetzke, Richard (with completion by Hans Otto Kleinmann). 1981. Die iberischen Staaten von der Französischen Revolution bis 1874. In *Handbuch der Europäischen Geschichte*, ed. Theoder Schieder, vol. 5, Stuttgart.
Konic, Charles-Etienne-Léon. 1918. Comparaison des Constitutions de la Pologne et de la France de 1791 (thèse doct. Univ. de Neuchatel), Lausanne.
Kovarik, Bill. 2011. Revolutions in communications: Media history from Gutenberg to the Digital Age, New York.
Kühne, Jörg-Detlef.1998. Die Reichsverfassung der Paulskirche, Vorbild und Verwirklichung im späteren deutschen Rechtsleben, 2nd ed., Neuwied and others.

Kwiatkowski, Hajetan 1790. Krótka rada względem napisania dobrej konstytucyji [Short piece of advice on how to elaborate a good constitution].
Lacchè, Luigi. 2015. L‘ opinione pubblica nazionale e l‘ appello al popolo: figure e campi di tensione. In *Burocracia, poder político y justicia*, Libro-homenaje de amigos del profesor José María García Marín, Madrid.
Lacchè, Luigi. 2002. Le carte ottriate, La teoria dell'octroi e le esperienze costituzionali nell'Europa post-rivoluzionaria. *Giornale di storia costituzionale* 18: 229-254.
Langewiesche, Dieter. 1983. Die Anfänge der deutschen Parteien – Partei, Fraktion und Verein in der Revolution 1848/49, Darmstadt.
Lelewel, Joachim. 1836. Légitimité de la Nation Polonaise, Rouen. B.r. Imp. D. Brière. 8°.
Libiszowska, Zofia. 1997. The Impact of the American Constitution on Polish Political Opinion in the Late Eighteenth Century. In *Constitution and reform in 18th-century Poland*, ed. Samuel Fiszman, 233–250, Indiana.
Lieberwirth, Rolf/Lück, Heiner (ed.). 2008. Akten des 36. Deutschen Rechtshistorikertages in Halle an der Saale 2006, Baden-Baden.
Lindvik, Adolf. 1934. Art. 'Ingstad'. In *Norsk Biografisk Leksikon*, ed. Jansen Einar, vol. VI, 525, Oslo.
Locorotondo, Giuseppe. 1970. Giacinto Borelli. In *Dizionario biografico degli Italiani*, vol. 12, 536 et seq. Rome.
Loewenstein, Karl. 1922. (Reprint 1964). Volk und Parlament nach der Staatstheorie der französischen Nationalversammlung von 1789: Studien zur Dogmengeschichte der unmittelbaren Volksgesetzgebung (People and parliament according to the theory of the state of the French National Assembly in 1789: Studies on the history of the doctrine of direct popular legislation), Munich, repr. Aalen.
Luhmann, Niklas. 2003. Macht, 3rd ed., Stuttgart.
Malec, Jerzy. 1995. Rec. on Nationale und Internationale Aspekte der polnischen Verfassung vom 3. Mai 1791, published by Rudolf Jaworski. Ius Commune 22, 431.
Maravall, José Antonio. 1973. Estudios de Historia del Pensamiento Español, Madrid.
Maravall, José Antonio. 1944. Teoría española del Estado en el siglo XVII, Madrid.
Marcuello Benedicto, Juan Ignacio. 1996. División de poderes y proceso legislativo en el sistema constitucional de 1812. Revista de Estudios Políticos 93: 137-163.
Martínez Marina, Francisco. 1813. Teoría de las cortes ó grandes juntas nacionales de los reinos de Leon y Castilla: Monumentos de su constitución política y de la soberanía del pueblo, vol. 1, Madrid .
Masferrer, Aniceto. 2011. La soberanía nacional en las Cortes gaditanas: su debate y aprobación. In *Cortes y Constitución de Cádiz, 200 años*, ed. Escudero López, José Antonio, 639–672, vol. 2, Madrid.
Maurer, Konrad. 1882. Der Verfassungskampf in Norwegen, Munich.
Mavidal, M.J./Laurent, MM. E./Clavel, E. 1875. première série (1789 à 1799), Tome VIII du 5 Mai 1789 au 15 septembre 1789, Paris.
Michalski, Jerzy, Emanuel Rostworowski, Janusz (ed.). 1955–1969. Materialy do dziejow Sejmu Czteroletniego [Sources concerning the deeds of the Four-Year Sejm], vol. 6 (together with Eisenbach Artur), Warsaw.
Mirkine-Guetzévitch, Boris. 1931. 1830 dans l'évolution constitutionelle de l'Europe, Revue d'histoire moderne 6 : 246–260.
Mirkine-Guetzévitch, Boris. 1936. La Souveraineté de la nation, Revue politique et parlementaire CLXVIII 43 : 139-157.
Molesworth, William (ed.). 1831 (Reprint 1962). The English works of Thomas Hobbes, vol. III, London, reprint Aalen.
Mohnhaupt, Heinz. 2006. Das Verhältnis der drei Gewalten in der Constitution der Cortes, In *Konstitutionalismus und Verfassungskonflikt*, ed. Ulrike Müßig, Tübingen.
Mohnhaupt, Heinz. 2002. Verfassung I. In *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart,* ed. Grimm, Dieter/Mohnhaupt, Heinz, 2nd ed., 62–66, 78–83, Berlin.

Mohnhaupt, Heinz. 1998. Von den “leges fundamentales” zur modernen Verfassung in Europa. Zum begriffs- und dogmengeschichtlichen Befund (16.-18. Jahrhundert). In Ius Commune 25: 121–158.
Montesquieu, Charles Louis Secondat, Baron de la Brède et de. 1994. De l’Esprit des Lois, Pléiade-Edition, Oeuvres complètes, published by Roger Caillois, tome II, Paris.
Morán Orti, Manuel. 1994. Revolución y reforma religiosa en las Cortes de Cádiz, Madrid.
Moreau, Jacob Nicolas. 1789. Exposition et défense de notre constitution monarchique française, précédé de l’Histoire de toutes nos Assemblées Nationales, dans deux mémoires où l’on établit qu’il n’est aucun changement utile dans notre administration, dont cette constitution même dont cette constitution même ne nous présente les moyens, vol. II, Paris.
Muß, Florian. 2013. Der Präsident und Ersatzmonarch, Die Erfindung des Präsidenten als Ersatzmonarch in der amerikanischen Verfassungsdebatte und Verfassungspraxis, Munich.
Müßig, Ulrike. 2008. Die europäische Verfassungsdiskussion des 18. Jahrhunderts, Tübingen.
Müßig, Ulrike. 2014. Reconsidering Constitutional Formation – Research challenges of Comparative Constitutional History. Giornale di Storia Costituzionale 27: 107–131.
Müßig, Ulrike. 2006. Konflikt und Verfassung. In *Konstitutionalismus und Verfassungskonflikt*, ed. Ulrike Müßig, Tübingen.
Müßig, Ulrike. 2011. L’ouverture du mouvement constitutionnel après 1830: à la recherche d’un équilibre entre la souveraineté monarchique et la souveraineté populaire, Tijdschrift voor Rechtsgeschiedenis 79 : 489–519.
Müßig, Ulrike. 2015. Reconsidering Constitutional Formation – The Polish May Constitution 1791 as a masterpiece of constitutional communication, CPH 67: 75–93.
Müßig, Ulrike. 2009. Recht und Justizhoheit, Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich, 2nd ed., Berlin.
Noiret, Serge. 1994. Political parties and the political system in Belgium before Federalism, 1830–1980. In EHQ 24: 85–122.
Oestreich, Gerhard. 1967. Die Idee des religiösen Bundes und die Lehre vom Staatsvertrag. In *Die Entstehung des modernen souveränen Staates*, ed. Hasso Hofmann, 137-151, Köln/Berlin.
Paine, Thomas. 1792. Rights of men: Being an answer to Mr. Burke’s attack on the French revolution, London.
Palmer, G. (ed.). 1814. Constitution of the Spanish Monarchy, Promulgated at Cadiz on the 19th of March, 1812, Philadelphia.
Pasquino, Pasquale. 1998. Sieyès et l’invention de la constitution en France, Paris.
Pasztor, Maria. 1991. Hugo Kołłątaj na Sejmie Wielkim w latach 1791–1792, Warsaw.
Paulmy, René-Louis de Voyer de, Marquis d’Argenson. 1858. Mémoires et journal inédit du marquis d’Argenson, éd. Rathéry, Edme Jacques Benoît, vol. 4, Paris.
Pérez Ledesma, Manuel. 1991. Las Cortes de Cádiz y la sociedad española. In *Las Cortes de Cádiz*, ed. Miguel Artola, Madrid.
Pölitz, Karl Heinrich Ludwig. 1820. Die Constitutionen der europäischen Staaten seit den letzten 25 Jahren, Dritter Theil, Leipzig.
Pölitz, Karl Heinrich Ludwig. 1833. Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit, Mit geschichtlichen Erläuterungen und Einleitungen, vol. 2/vol. 3., 2nd Restructured, Corrected and Revised ed., Leipzig.
Ponteil, Félix. 1966. Les institutions de la France de 1814 à 1870, Paris.
Portillo Valdés, José María, 1998. La Libertad entre Evangelio y Constitución, Notas para el Concepto de Libertad Política en la Cultura Española de 1812. In *Constitución en España: Orígenes y Destinos*, ed. José María Iñurritegui Rodrígez/José María Portillo Valdés, 139–177, Madrid.
Portillo Valdés, José María. 2000. Revolución de nación. Orígines de la cultura constitutional en España, 1780–1812, Madrid.

Potocki, Ignacy. Na pismo, któremu napis “O Konstytucji 3 Maja 1791.”… odpowiedź, Gazeta Narodowa i Obca, no. 46.
Pradt, Dominique Georges Frédéric de. 1820. De la révolution actuelle de l’Espagne et de ses suites, Paris.
Ramos Santana, Alberto. 2000. La Constitución de 1812 en su Contexto Histórico. In *Constitución política*, ed. Alberto Ramos Santana/Juan Marchena Fernández, vol. I, 9–67, Sevilla.
Ramos Santana, Alberto. 2014. 1808–1810. La nación reasume la soberanía. In *Die spanische Verfassung von 1812. Der Beginn des europäischen Konstitutionalismus*, ed. Czeguhn, Ignacio/Puértolas, Francesc, Regenstauf.
Reibstein, Ernst. 1955. Johannes Althusius, als Fortsetzer der Schule von Salamanca: Untersuchungen zur Ideengeschichte des Rechtsstaates und zur altprotestantischen Naturrechtslehre, Karlsruhe.
Reichardt, R./Schmitt, E. (ed.), Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680-1820, Munich 1986.
Riall, Lucy. 2009. The History of Italy from Napoleon to Nation State, Basingstoke/New York.
Riall, Lucy. 1994. The Italian Risorgimento. State, society, and national unification, London.
Riis, Thomas/Loebert, Sönke a.o. (ed). 1809–1849. Forfatningsdokumenter fra Danmark, Norge og Sverige 1809–1849/Constitutional Documents of Denmark, Norway and Sweden. Berlin.
Rotteck, Carl von. 1836. Cortes und Cortes-Verfassung in Spanien. In *Staats-Lexikon oder Encyklopädie der Staatswissenschaften*, ed. Carl von Rotteck/Carl Welcker, vol. 3, Altona.
Rousseau, Jean-Jacques. 1964a. Du contrat social ou Principes du droit politique, ed. Robert Derathe (Pleïade), Paris.
Rousseau, Jean-Jaques. 1964b. Oeuvres complètes, Edition Pléiade vol. III (du contrat sociale, écrits politiques), Paris.
Rzewuski, Seweryn. 1790. Myśli nad różnemi pismy popierającymi sukcesyą tronu.
Rzewuski, Seweryn. 1789. O sukcesyi tronu w Polszcze rzecz krótka.
Rzewuski, Seweryn. 1789. Uwagi dla utrzymania wolney elekcyi króla polskiego do Polaków, w Warszawie roku.
Rzewuski, Seweryn. 1790. Wiadomość chronologiczna, w którym czasie, które państwo wolność utraciło pod rządem monarchów sukcesyjnych, Warsaw, without a year.
Sánchez Agesta, Luis. 1964. Historia del Constitucionalismo Español, 2nd ed., Madrid.
Sánchez Agesta, Luis. 1989. Introducción, in: Agustín de Argüelles, Discurso preliminar a la Constitutión de 1812 (1811), First Part, Madrid.
Sánchez Agesta, Luis. 1987. La Democracia en Hispanoamérica, Madrid.
Sand, Inger-Johanne. 2014. The Norwegian Constitution and its multiple codes: Expressions of historical and political change. In *Writing democracy, The Norwegian Constitution 1814–2014*, ed. Karen Gammelgaard/Eirik Holmøyvik, New York/Oxford.
Sarasola, Ignacio Fernández. 2003. Opinión pública y “libertades de expresión“ en el constitucionalismo español (1726–1845). In Giornale di Storia costituzionale 6/2 (2003), 195–215, Macerata.
Schmale, Wolfgang. 1992. Constitution, Constitutionnel. In *Handbuch politsch-sozialer Grundbegriffe in Frankreich 1680–1820*, ed. Rolf Reichardt/Hans-Jürgen Lüsebrink, Munich.
Schmitt, Eberhard. 1969. Repräsentation und Revolution: Eine Untersuchung zur Genesis der kontinentalen Theorie und Praxis parlamentarischer Repräsentation aus der Herrschaftspraxis des Ancien régime in Frankreich (1760–1789), Munich.
Seif (=Müßig), Ulrike. 2000. Der mißverstandene Montesquieu: Gewaltenbalance, nicht Gewaltentrennung, ZNR (Zeitschrift für Neuere Rechtsgeschichte) 22: 149–166.
Sieyès. 1989. Orateurs de la Révolution française, édition Pléiade, vol. I, Paris.
Sieyès. 1970. Que’est-ce que le Tiers État?, Edition critique avec une introduction et des notes par Roberto Zapperi, Genève.
Slimani, Ahmed. 2004. La modernité du concept de nation au XVIIIe sciècle (1715-1789): Apports des Thèses Parlementaires et des Idées Politiques du Temps, Presse Universitaires d’ Aix-Marseille.

Smoleński, Władysław. 1897. Ostatni rok Sejmu Wielkiego, Krakow.
Soldevilla, Fernando. 1910. Las Cortes de Cádiz. Orígines de la Revolución española, Madrid.
Stang, Fredrik. 1925. Art. 'Aubert, Fredrik'. In *Norsk Biografisk Leksikon*, ed. Bull, Edv./Krogvig, Anders/Gran, Gerhard, vol. II, 138–140, Kristiania.
Staszic, Stanisław. 1954. Przestrogi dla Polski [Warnings to Poland], in Pisma filozoficzne i społeczne, published by Bogdan Suchodolski, vol. 1, Warsaw.
Stengers, Jean. 1992. L'action du Roi en Belgique depuis 1831, Pouvoir et influence, Essai de typologie des modes d'action du Roi, Paris inter alia.
Stolleis, Michael. 2006. Souveränität um 1814. In *Konstitutionalismus und Verfassungskonflikt*, ed. Ulrike Müßig, 101–115, Tübingen.
Stourzh, Gerald. 1988. Constitution: Changing Meanings of the Term from the Early Seventeenth to the late Eighteenth Century. In *Conceptual change and the constitution*, ed. Terence Ball/ Johna G.A.Pocock, 35-54, Lawrance.
Suárez, Francisco. 1973. Tractatus de legibus ac deo legislatore (1612), vol. IV, Madrid (Inst. de Estudios Politícos).
Suárez, Federico. 1982. Las Cortes de Cádiz, Madrid.
Suchodolski, Bogdan.1956. Art. zu Stanisław Staszic, in: Z dziejów polskiej myśli filozoficznej … vol. 2, Warsaw.
Suratteau, Jean-René. 1988. La nation de 1789 à 1799. Sens, idéologie, évolution de l'emploi du mot. In *Région, Nation, Europe: Unité et Diversité des processus sociaux et culturels de la Révolution française*, ed. Marita Gilli, Paris.
Świtkowski, Piotr. 1791, August. Dalsze myśli i uwagi względem Konstytucji 3 Maja, Pamiętnik Historyczno-Polityczny, 737–745.
Tamm, Ditlev. 2006. Cádiz 1812 y Eidsvoll 1814. In *Historia Constitucional* (revista electrónica), n. 7, 313–320, http://www.historiaconstitucional.com/index.php/historiaconstitucional/iisue/view/8/showToc [30.04.2016].
Taylor, P. M. 2003. Munitions of the mind. A history of propaganda from the ancient world to the present day. Manchester/New York.
Tenzer, Eva/Pleitner, Berit. 2006. Polen. In *Handbuch der europäischen Verfassungsgeschichte im 19*, ed. Peter Brandt/Martin Kirsch/Aerthur Schlegelmilch, Jahrhundert, vol 1: Um 1800, Bonn.
Thielemans, Marie-Rose. 1990. Image de la Révolution française dans les discussions pour l'adaption de la constitution belge du 7 février 1831. In *L'image de la Revolution française* 2, Michel Vovelle, ed. Paris.
Timmermann, Andreas. 2007. Die "gemäßigte Monarchie" in der Verfassung von Cádiz und das frühe liberale Verfassungsdenken in Spanien, Münster.
Timmermann, Andreas. 2000. Die Nationale Souveränität in der Verfassung von Cádiz (1812), Der Staat 39: 570-587.
Tønnesen, Kåre. 1990. Menneskerettighetserklæringene i det attende århundre og den norske Grunnlov. In *Menneskerettighetene i den nasjonale rett i Frankrike og Norge*, ed. E. Smith, 20–38, Oslo.
Torres del Moral, Antonio. 2012. Constitucionalismo histórico español, 7th ed., Madrid.
Torres del Moral, Antonio. 2011. La soberanía nacional en la constitución de Cádiz, Revista de Derecho Político, 82, 55–117.
Ull Pont, Eugenio. 1972. Derecho electoral de las Cortes de Cádiz, Madrid.
Unruh, Georg-Christoph v. 1974. Die polnische Konstitution vom 3. Mai 1791 im Rahmen der Verfassungsentwicklung der Europäischen Staaten. Der Staat 13, 185–195.
Valle Iberlucea, Enrique del. 1912. Las Cortes de Cádiz. La Revolución de España y la Democracia de América, Buenos Aires.
Varela Suanzes-Carpegna, Joaquín. 1983. La teoría del estado en los origines del constitucionalismo hispánico (Las Cortes de Cádiz), Madrid.
Varela Suanzes-Carpegna, Joaquín. 2007. Política y Constitución en España (1808–1978), Madrid.
Weber, Max. 1978. Economy and society, Two volumes set with a New Foreword by Guenther Roth, ed. By Guenther Roth/Klaus Wittich, Berkeley et al.

Wigard, Franz (ed.). 1848. Stenographischer Bericht über die Verhandlungen der deutschen constituirenden Nationalversammlung zu Frankfurt am Main, 1st vol. (Nr. 1–33), Frankfurt a.M.
Wilke, Jürgen. 1987. Foreign news coverage and international news flow over three centuries. Gazette 39, 147–180.
Willoweit, Dietmar/Seif (=Müßig), Ulrike (ed.). 2003. Europäische Verfassungsgeschichte (European Constitutional History), Munich.
Witte, Els/Craeybeckx, Jan. 1987. La Belgique politique de 1830 à nos jours : les tensions d'une démocratie bourgeoise, traduit du néerlandais par Serge Govaert, Brussels.
Wittgenstein, Ludwig. 1984. Tractatus logico-philosophicus, in: Werkausgabe, vol. 1, Stuttgart.
Zielińska, Zofia. 1991a. O sukcesyi tronu w Polszcze 1787–1790, Warsaw.
Zielińska, Zofia. 1991b. Republikanizm spod znaku buławy. Publicystyka Seweryna Rzewuskiego z lat 1788–1790, Warsaw.