Granted Constitutions. The Theory of *octroi* and Constitutional Experiments in Europe in the Aftermath of the French Revolution

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The *Charte* and the *octroi*: the origins of the 'model' – Theory of the *octroi*: the tale of the king-patriarch – Absorbing the Revolution into the Monarchy – Different words to say 'constitution': *Charte constitutionnelle*, *Landständische Verfassung, Statuto* – The granted constitution as context of legitimacy: the monarchy comes *before* and is *within* the constitution – Interpreting the granted constitution – The fate of the monarchic constitution

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Le mot octroyer et tous ses dérivés doivent être bannis à jamais de la science politique
(E.-J. Sieyès, *Vues sur les moyens d'exécution dont les représentants de la France pourront disposer en 1789*, s.l., 1789, p. 47)

Nous avons volontairement, et par le libre exercice de notre autorité royale, accordé et accordons, fait concession et octroi à nos sujets, tant pour nous que pour nos successeurs, et à toujours, de la Charte constitutionnelle
(*Charte constitutionelle*, 1814, Preamble)

M. Constant: Comme tous les pouvoirs, en France, émanent de la Charte...
(Voix a droite): Non, ils émanent du roi...
M. Josse de Beauvoir: Ce n'est pas la Charte qui a donné le roi, mais le roi lui-même qui a octroyé la Charte.
M. Constant: Tous les pouvoirs ne sont légitimes que par la Charte...
M. de Vogué: Non, par le pouvoir du roi...
M. Benoit: La Charte n'est légitime que parce que le roi l'a donnée...
M. Constant: Il me paraît que c'est faire au monarque la plus grande injure [...] de déclarer que ses pouvoirs ne viennent pas de la Charte
(11 January 1822, *Discours de M. Benjamin Constant à la Chambre des députés*, Paris, Dupont, 1828, II, pp. 3-4)

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European Constitutional Law Review, 9: 285–314, 2013

doi: 10.1017/S1574019612001150

> Und man kann hinzulegen: eine bloß octroyierte Verfassung ist gar keine Verfassung (K. Welcker, *Octroyierte Verfassungen*, in K. von Rotteck und K. Welcker, *Das Staats-Lexikon. Encyklopädie der sämmtlichen Staatswissenschaften für alle Stände*, Leipzig, Brockhaus, 1864, vol X, p. 735)

> Il demande quelle est la ligne à suivre par le Ministère? Si S.M. juge inévitable une Constitution, ainsi que tout porte à le croire, il faudrait tout préparer pour la donner, avec le plus de dignité possible pour la Couronne, avec le moins de mal possible pour le pays. Il faut la donner, non se la laisser imposer; dicter les conditions, non les recevoir; il faut avoir le temps de choisir avec calme les moyens et l'opportunité, après avoir promis de les employer
> (Count G. Borelli, Ministry of Interior, *Conseil de Conférence*, 3 February 1848)

Introduction

The category of the 'granted constitution' occupies an important place in constitutionalism in the era of the Restoration; indeed, the years between 1814 and 1848 may be said to be its Golden Age. During this period, political processes and constitutional debates hinged on the significance of granting a constitution, on the general constitutional form which derived from it and, more particularly, on its actual impact upon the form of government, upon the guaranteeing of rights, and upon the rules and procedures established for changing the constitution itself. The phenomenon of the 'granted constitution' can be clearly demarcated both temporally and spatially. In terms of space, this phenomenon was restricted to a triangle consisting primarily, but not exclusively, of France from 1814 until 1830; secondly, of the German lands from the Congress of Vienna and the emergence of the so-called *Frühkonstitutionalismus* onward; and thirdly, of the Italian states, in particular, the Kingdom of Sardinia. How was it possible for one and the same constitutional form to apply to so many different contexts and yet to spark markedly similar reflections and experiences? What was the common ground, and what were the points of divergence, that characterised the era of the granted constitution? What model (or, indeed, models)[1] informed the constitutional policies of the Restoration?

[1] Regarding the use of models in comparative constitutional history, *see* L. Lacchè, 'La Costituzione belga del 1831', 9 *Storia Amministrazione Costituzione* (2001) p. 74, at p. 76. In the present article, by monarchical constitutionalism and monarchy I simply mean that which is intrinsic to the dynastic authority and hereditary power of the king. While it is certainly possible (and for other reasons, necessary) to broaden this category, in the sense of including every form of domination exercised by a single subject (which M. Kirsch proposes in 'La trasformazione politica del monarca europeo nel XIX secolo', in 34 *Scienza & Politica* (2006) p. 21 at p. 35; and, more broadly, Id., *Monarch und Parlament im 19. Jahrhundert. Der monarchische Konstitutionalismus als europäischer Verfassungstyp – Frankreich im Vergleich* (Vandenhoeck & Ruprecht 1999), it seems just as necessary

https://doi.org/10.1017/S1574019612001150 Published online by Cambridge University Press

This essay is intended to be a preliminary contribution to the study of this phenomenon, and to stimulate theoretical debate concerning a topic which is in need of more systematic scrutiny. I propose to interpret nineteenth-century constitutionalism in terms of the function of the monarch (or the monarchy) within the different constitutional systems, considering this question on a European scale.[2] My intention here is to scrutinize the pivotal role played by the category of granted constitution in European constitutional history. This kind of constitution is something more than simply a transitional phenomenon, or an 'interval' (albeit an important one) between the novel and strategic idea of the eighteenth-century constitution based upon the constituent power of the people and the full realisation of democratic constitutionalism in the course of the twentieth century. The intrinsic interest of this approach lies in its capacity to portray granted constitutions as instruments serving to preserve ancient forms of sovereignty alongside post-revolutionary innovations. 'Monarchical constitutionalism' established an important and long-enduring workshop in which we can observe 'old' and 'new', tradition and change, conflicts and mediations, ancient words and new concepts, the ideology of *octroi* and parliamentary experiments.

From a common starting-point, namely, the concern to reconcile monarchical 'machinery' with the new aspirations towards constitutionalism and parliamentary representation, the model of granted constitutions led to a range of different outcomes. This model fostered the development, by a number of routes, of the constitutional idea of democracy founded upon popular representation and legal guarantees. Conversely, it sometimes justified a new form of monarchical constitutionalism, thereby bolstering authoritarian regimes. What is peculiarly fascinating about granted constitutions is their capacity to lead to more than one outcome.

The Charte and the octroi: the origins of the 'model'

The Spanish, German and Italian languages have each traced the use of the word and concept (*otorgar/otorgado*; *oktroyren/oktroyert*; *ottriare/ottriato*)[3] to the French term *octroyer/octroi*. In the Preamble to the *Charte constitutionnelle* of 4 June 1814 granted by Louis XVIII, we thus read:

to be aware of the profound diversity of forms and sources of sovereignty, legitimacy/legitimisation, constitutional organization, forms of power, etc.

[2] *See* A.G. Manca, 'La monarchia costituzionale nell'Europa del lungo Ottocento: da forma a strumento di governo', in L. Blanco (ed.), *Dottrine e istituzioni in Occidente* (Il Mulino 2011) p. 151, at p. 184.

[3] It is important to note that the French term *octroi* could at times lose something in the translation. In German, for instance, *oktroyiern* has a somewhat stronger sense, implying 'to impose upon' rather than 'to grant'. The various renderings of the word *octroi* thus create a semantic field that is both complex and nuanced.

> We have, willingly and by virtue of the free exercise of our royal authority, consented to and consent to, have conceded and granted the Constitutional Charter to our subjects, both for us and for our successors, and forever.[4]

'Faire concession et octroi' is, therefore, the constitutional formula which defines an entire era. Upon landing in France on 2 May 1814 after his exile in England, the future king, Louis XVIII, issued the Declaration of Saint-Ouen,[5] in which he stated that he would retain a number of important features of the Napoleonic era, among them the civil code and the sale of *biens nationaux* (confiscated land). One month earlier, on 6 April, after the Fall of Napoleon, what remained of the Napoleonic Senate had hastily approved the 'outlines' of a constitutional project.[6] The senators wanted to '*instaurer* – et non *restaurer* – la monarchie traditionnelle, extraordinaire paradoxe dans les termes. Ils se refusaient à la reconnaître ou à la déclarer: ils voulaient la constituer.'[7] However, Louis XVIII, 'par la grâce de Dieu, Roi de France et de Navarre', stated in a proclamation of 2 June that the constitution was his affair, a thing that he alone might grant. The possibility of a sworn pact to make Louis and his successors the kings of the French people seemed thus to have evaporated. Even before the important question of the form to be imparted to the monarchy was addressed, there was the basic issue of legitimacy to be resolved. The king's advisers set to work, and a new constitutional text was hastily drafted and presented to the Senate in the session on 4 June 1814.[8]

Theory of the octroi: the tale of the king-patriarch

The *octroi* was the instrument employed to affirm the constitutional position of 'restored' sovereigns, or of sovereigns whose political authority was under threat.

[4] 'Nous avons volontairement, et par le libre exercice de notre autorité royale, accordé et accordons, fait concession et octroi à nos sujets, tant pour nous que pour nos successeurs, et à toujours, de la Charte constitutionnelle.'

[5] The text is in P. Rosanvallon, *La monarchie impossible. Les Chartes de 1814 et 1830* (Fayard 1994) p. 209 at p. 210.

[6] On the senatorial constitution, *see* J. De Soto, 'La Constitution sénatoriale du 6 avril 1814', 3 *Revue internationale d'histoire politique et constitutionnelle* (1953) p. 268, at p. 304; S. Rials, 'Constitution sénatoriale', in J. Tulard (ed.), *Dictionnaire Napoléon* (Fayard 1989) p. 504, at p. 506; Rosanvallon, *supra* n. 5, at p. 15; M.S. Corciulo, 'La constitution sénatoriale française du 6 avril 1814', 17 *Parliaments, Estates and Representation* (1997) p. 139, at p. 150.

[7] S. Rials, 'Une grande étape du constitutionnalisme européen. La question constitutionnelle en 1814-1815: dispersion des légitimités et convergence des techniques', in Id., *Révolution et contre-révolution au XIXème siècle* (DUC Albatros 1987) p. 130.

[8] As regards the composition of this text, and the various drafts, *see* now: Rosanvallon, *supra* n. 5, p. 29 ff.; A. Laquièze, *Les origines du régime parlementaire en France (1814-1848)* (Puf 2002) p. 38.

By this means, the restored monarch endeavoured to bring a fundamental element of the new 'political theology'[9] within his sphere of influence:[10] a political theology that was hostile and dangerous, that had risen up against the monarchy and was summed up in the idea of the constitutional act. The Restoration thus attempted to neutralise that most terrible of powers, the constituent power of the people. In the second half of the eighteenth century *We the People*, *Nous la Nation* served to define – albeit with a wide range of different outcomes and in markedly different forms – a new conceptual order destined to leave an indelible mark upon modern constitutional doctrine. It was the people who defined and represented themselves as a totality, as a political unity that was conscious of its own existence and of having the capacity to act politically. All 'extraneous' bodies – extraneous, that is to say, to the nation – could no longer exist save by merging with popular sovereignty. The French Revolution was the stage upon which this momentous drama had been enacted.

In granting the *Charte*, Louis XVIII and his entourage intended to assert the monarch's uncontested paternal rights over the constitution. Count Beugnot – the principal author of the 'Charte' – observed that every deliberation of the two Houses which aimed at making the king dependent upon the will of the nation was inadmissible, 'especially as regards the constituent power.'[11] The sovereign, though reluctant to grant the *Charte*, ended up using the constitution as an ideological instrument; he declared that he was granting the constitution because he wished to do so, and because he thereby reasserted his authority against all attempts at restricting it.

In actual fact, granted constitutions were often issued following vague promises, partial reforms and constitutional 'outlines'. A constitution granted by royal fiat could not escape the paradox of having appropriated the 'artificial' voluntarism of revolutionary constitutionalism, but behind it there also lay a pragmatic strategy. The Congress of Vienna (1 November 1814–8 June 1815) was seen as the natural context for inaugurating in Europe a new era based on the political ideologies of the Restoration. It is true that the idea of the 'restored' sovereign emerged from the Congress of Vienna, but it only in part reflected the standard image of dynastic legitimacy (widely paraded though it was). The monarch had now to perform a range of functions, namely to reintegrate the nation, to pacify, to mediate, to defend the interests of a ruling caste and, indeed, to pre-empt unwelcome

[9] C. Schmitt, 'Definition der Souveränität', in Id., *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 2nd edn. (Duncker & Humblot 1934).

[10] *See* P. Colombo, *Con lealtà di Re e con affetto di padre. Torino, 4 marzo 1848: la concessione dello Statuto albertino* (Il Mulino 2003) p. 37.

[11] Quotation from Laquièze, *supra* n. 8, at p. 56.

developments within the state.[12] Thus, the figure of the *rational* monarch came into being, one that was soon to oust the old forms of royal divinity. One could therefore be 'king by function', as in the case of the monarchies of Scandinavia or, in certain cases, of Eastern Europe, and this while adhering to a strictly political logic.

At the same time, however, and here the monarchy still had the capacity to express a *surplus* of extra-juridical dimensions, even the monarch who had been enthroned, more or less ambiguously, with the explicit consent of popular sovereignty (for example, Louis-Philippe after the July Days in France, or Leopold I in Belgium, in 1831), would not willingly renounce being the sovereign. This was the case especially with regard to specific spheres of governance. Such circumstances clearly had a major impact upon the decision to adopt one form or other of government, or at any rate upon the way in which it was subsequently to develop.

I refer here to the situation in France, or to that of the monarchies of Southern Germany, where a return to the *ancien* régime, to a time in which there had been no written and 'perpetual' constitution-guarantee, no longer seemed possible. In the case of Italy in 1848, however, it seemed politically expedient to provide a constitution rather than submit to one under duress. During the early days of February 1848, Count Borelli in Turin remarked to King Charles Albert of Savoy who, though undecided, saw how things stood: 'we have to provide it [the constitution], not let it be imposed; dictate terms, not suffer them to be dictated to us; we need time to choose calmly what approaches to adopt and in which circumstances to act … .'[13] Only thus could the king retain most of his authority and powers.[14]

[12] An interesting new analysis of the Restoration period can now be found in S. Chignola, *Il tempo rovesciato. La Restaurazione e il governo della democrazia* (Il Mulino 2011).

[13] 'Bisogna darla [la costituzione], non lasciarsela imporre; dettare le condizioni, non riceverle; bisogna avere il tempo di scegliere con calma i modi e l'opportunità, dopo aver promesso di impiegarli.' The text is in G. Falco (ed.), *Lo Statuto albertino e la sua preparazione* (Capriotti 1945) p. 180. *See also* E. Crosa, *La concessione dello Statuto. Carlo Alberto e il Ministro Borelli 'redattore' dello Statuto (con lettere inedite di Carlo Alberto)* (Istituto giuridico dell'Università 1936) p. 68 ff. Regarding this constitutional episode, *see* R. Ferrari Zumbini, *Tra idealità e ideologia. Il Rinnovamento costituzionale nel Regno di Sardegna fra la primavera 1847 e l'inverno 1848* (Giappichelli 2008).

[14] Count Borelli observes 'That, in his view, the Constitution is without doubt a misfortune, but that they have reached the point of choosing the lesser evil, in order to avoid more serious ones' ('Qu'à son avis la Constitution est sans doute un malheur, mais qu'on est arrivé au point de choisir le moindre mal, pour en éviter de plus grands') (G. Negri and S. Simoni (eds.), *Lo Statuto albertino e i lavori preparatori* (Fondazione San Paolo 1992) p. 47). Count Ferrand, one of those who had drafted the 1814 French *Charte*, had already considered the constitution, which he nevertheless was opposed to, as a 'lesser evil'. *See* A.-F.-C. Ferrand, *Mémoires du comte Ferrand, ministre d'Etat sous Louis XVIII* (Picard 1897) p. 73.

The granted constitutions should, first and foremost, be read from the perspective of the *ancien régime* and the Revolution. Once again, Count Beugnot[15] proved to be remarkably perspicacious. Urging Louis XVIII to follow the 'sovereign' path of promulgating the *Charte*, he reminded him that 'The plan proposed by the Chancellor has this rare, indeed, very rare, merit, of absorbing the Revolution into the Monarchy; whatever is contrary to this plan, and tends to bring either the Senate or the Legislative Body or else the electoral colleges into deliberation, tends, on the contrary, to absorb the Monarchy into the Revolution.'[16] Absorbing the Revolution into the Monarchy: this is one of the strongest messages relayed by the category of the granted constitution. The Revolution was still indubitably the French Revolution, but in the course of the nineteenth century it was destined to become that set of principles and values which founded the new middle-class society and engendered the liberal constitutional state.[17]

The granted constitutions were often preceded by preambles. Contrary to what one might suppose, these were not 'celestial prologues', ornamental flourishes put there only for show.[18] The ceremonial and procedural aspects that accompanied the promulgation of the texts produced symbolic effects that were not devoid of substance. Divine Providence upheld the hands of the sovereigns who 'bestowed' the constitutions upon their grateful peoples. A monarch's intentions were still construed as paternal, for was he not a good father to his beloved and faithful subjects? '*Il ne veut être*' – said Chancellor Ferrand – '*que le chef suprême de la grande famille dont il est le père.*'[19] It was 'with the loyalty of a King and with the affection

[15] For a very short biography, *see* Laquièze, *supra* n. 8, at p. 44 at p. 45. *See* V. Sellin, 'Die Erfindung des monarchischen Prinzips. Jacques-Claude Beugnots Präambel zur Charte constitutionnelle', in A. Heinen and D. Hüser (eds.), *Tour de France. Eine historische Rund reise. Festschrift für Rainer Hudemann* (Franz Steiner Verlag 2008) p. 489 at p. 497.

[16] 'Le plan proposé par Monsieur le Chancelier a ce rare et très rare mérite d'absorber la Révolution dans la Monarchie; tout ce qu'on oppose à ce plan et qui tendrait à faire délibérer ou le Sénat ou le Corps législatif ou les collèges électoraux tend au contraire à absorber la Monarchie dans la Révolution', *Rapport de Beugnot au Roi sur la forme de promulgation de la Charte*, 2 June 1814, in Rosanvallon, *supra* n. 5, at p. 241.

[17] From the German perspective, *see* E.-W. Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Suhrkamp 2006) p. 143 ff. For some valuable insights, *see* P. Schiera, 'Nuovi elementi di statualità dall'Ottocento', in A. de Benedictis (ed.), *Costruire lo Stato costruire la storia* (Clueb 2003) p. 11, at p. 29.

[18] Thus P. Bastid, *Les institutions politiques de la Monarchie parlementaire française (1814-1848)* (Sirey 1954) p. 139.

[19] *Discours du chancelier Ferrand précédant la lecture de la Charte* (4 Juin 1814), in *Archives parlementaires*, 2nd series, Vol. 12, p. 32-33, quoted from Rosanvallon, *supra* n. 5, at p. 248. Regarding the patriarchal dimension, cf. S. Rials, 'Monarchie et philosophie politique: un essai d'inventaire', in Id., *supra* n. 7, at p. 84.

of a Father'[20] that Charles Albert of Savoy granted his Constitution (*Statuto*) in 1848. The king-patriarch was depicted as having returned to the throne, as in France, or as having reluctantly placed himself at the head of the 'constitutional' movement in order to 'satisfy the wishes of our faithful subjects'[21] or to find 'the safest means of reinforcing the ties of indissoluble affection which bind the people to our Italian Crown.'[22] The peace, prosperity and well-being of the subjects as well as of the Kingdom were the objectives the Monarchs said they wished to pursue. The royal 'we' was designed to enhance will, autonomy and *puissance*: We, We, We. 'For this reason, by Our certain knowledge and Royal Authority, having heard the opinion of Our Council, We have ordered and We do order, in execution of the Statute and Fundamental Law of the monarchy, which is perpetual and irrevocable' (Statute of the Kingdom of Sardinia). In the preamble to the Charter its author, Count Beugnot,[23] underlined the fact that royal sovereignty was the sole source of political legitimacy: even though all authority resided in the person of the monarch, the king had decided, for the good of France, to grant a 'free and monarchical' constitution that interpreted the transformations under way in society and conserved the rights and prerogatives of the Crown. Only the supreme authority 'can give the institutions that it has founded, the power, permanence and majesty in which it itself is clothed.'[24] Reconnecting the 'chain of time', sundered by years of anarchy and violence, Louis XVIII had sought in French tradition for the principles of the constitutional Charter, in order to ensure peace and security to his long-suffering people.

How many different words to say 'constitution'

Can we speak of a constitution, even when the text in question does not call itself one? Between 1814 and 1848 this seems to be the case. In this regard, the texts of granted constitutions testify to the use of words being not just descriptive but often 'performative' also.[25] So far as the French ultras and moderate conservatives were concerned, the very mention of a constitution brought with it a disquieting

[20] 'Con lealtà di Re e con affetto di Padre.'

[21] Constitution of the Grand Duchy of Württemberg, 25 Sept. 1819.

[22] 'Un mezzo il più sicuro di raddoppiare coi vincoli d'indissolubile affetto che stringono all'itala Nostra Corona un Popolo', Statute of the Kingdom of Sardinia, 4 March 1848.

[23] On the drafting of the preamble (in the first version written by Fontanes), *see* Rosanvallon, *supra* n. 5, at p. 46. There is an accurate and exhaustive reconstruction in S. Rials, 'Essai sur le concept de monarchie limitée (autour de la charte de 1814)', in Id., *supra* n. 7, p. 103, at p. 105.

[24] 'Peut seule donner aux institutions qu'elle établit, la force, la permanence et la majesté dont elle est elle-même revêtue… .'

[25] Concerning 'doing things with words', I hinted at this in 'Una Convenzione per l'Europa', in 3 *I Giornale di storia costituzionale* (2002) p. 6.

https://doi.org/10.1017/S1574019612001150 Published online by Cambridge University Press

association with Revolution, and with the constituent power of the nation. It was not only Metternich who did not want to hear so insidious a word uttered. Indeed, this taboo had a more general relevance. Are the *Charte constitutionnelle*, the *Landständische Verfassung* and the (fundamental) *Statuto* linguistic devices employed to express the sense of a controversial word without actually voicing it, or, conversely, do they represent a 'new' category of constitutionalism? The answer is not so simple as one might suppose. My own conviction is that the lexicon used has to be taken seriously, since it has a manifestly communicative and ideological dimension.[26] We are concerned here with a manoeuvre which 'by itself acquires a politically "cooling" meaning, one of reformist moderation which *a priori* excludes the overthrowing of the established order.'[27]

The lexicon in question smacks of feudal privileges, parliaments based on medieval dispensations and free medieval Communes, and calls to mind diplomatic formulas of the distant past and concepts of the ancien régime. The semantic ground covered implies the notion of privilege, the concepts of bestowal and imposition, but also those of disposition and agreement. Once terms such as *acte constitutionnel*, *ordonnance de réformation* or *édit* had been ruled out, the expression *Charte*,[28] combined with the epithet *constitutionnelle*, came up for consideration. The intention was to capture the nature of the sovereign's free bestowal of a political settlement while at the same time guaranteeing individual freedom: 'the name used in ancient times, consecrated by the history of several peoples and by ours, is that of Charte.'[29] Louis XVIII dated the granting of the *Charte* to the nineteenth year of his reign, or rather from the very moment he had succeeded Louis XVII, in 1795. The preamble therefore excluded any and every reference to national sovereignty in the guise of a juridical entity distinct from the supreme authority vested in the person of the king. The archaism[30] of the text is therefore not contingent but intrinsic to it. It may seem paradoxical that a text destined to

[26] L. Lacchè, 'Constitución, Monarquía, Parlamento: Francia y Belgica ante los problemas y "modelos" del constitucionalismo europeo', 2 *Fundamentos* (2000) p. 467, at p. 557.

[27] Colombo, *supra* n. 10, at p. 95. On this point L. Ciaurro (ed.), *Lo Statuto albertino illustrato dai lavori preparatori* (Dipartimento per l'informazione e l'editoria 1996) p. 45.

[28] On the 'category' *Charte, see* the critical comments in K. von Rotteck and K. Welcker, 'Charte', in Idd., *Das Staats-Lexikon* (Brockhaus 1859), III p. 491, at p. 497.

[29] '... le nom anciennement utilisé, celui consacré par l'histoire de plusieurs peuples et par la nôtre est celui de Charte', J.-C. Beugnot, *Mémoires du comte Beugnot* (Dentu 1866) II p. 219.

[30] This aspect, already emphasised by J. Bonnefon, *Le régime parlementaire sous la Restauration* (Giard et Brière 1905) and by C. Rohmer, *Le droit d'ordonnance et l'esprit de la Charte de 1814* (Les Presses Modernes 1931), has been studied in depth by Rials, *supra* n. 23, at p. 88 at p. 125 and especially by Laquièze, *supra* n. 8. We should not, however, overlook the fact that Louis-Philippe d'Orléans in his memoirs of 1814 had already emphasised the archaic character of the Charter. Regarding the manuscript, *see* H. Robert, 'Louis-Philippe constitutionnaliste', 63 *Commentaire* (1993) p. 577, at p. 580.

become one of the most influential models of European constitutionalism in the nineteenth century, falls more within the rationalised tradition of the ancien régime than within the purview of revolutionary constitutionalism. In reality, the 1814 *Charte* retained what was strictly indispensable to the latter, starting with some measures regarding the *Droit public des Français* and ending with the *Droits particuliers garantis par l'Etat*. The whole of the section devoted to the organisation of powers reflects the concept of limited monarchy and expresses the constitutional centrality of *royauté*.

The 'historical' constitution

Eighteenth-century constitutionalism had introduced the idea of constitution-making or, in other words, the notion that it was the sovereign people that made the constitution. In the early nineteenth century the appeal to history reflects a concern to temper so radical a notion. As is well known, the difficulty of reconciling the French Revolution with history gave rise to the somewhat desperate project of saving the monarchy of the ancien régime by grafting it on to the hostile space of popular sovereignty. Then, in 1814, the task was to 'correct' the rigidity of the artificial constitution by rereading it in the light of historicist 'rationalisation'. Charles de Sismondi, in his *Recherches*,[31] does not conceive of the constitution as existing outside of its historical context. The constitution, like freedom, is a product of history, or rather of social development within a specific historical period; it is neither an arbitrary result nor is it a fortuitous outcome. Another Swiss liberal intellectual, Benjamin Constant, although loyal to a rational idea of the constitution, tried to find a point of balance between reason and history. In his works written after 1794, the doctrine of perfectibility already posed the question of the relationship between ideas and institutions, with time acting as a balance wheel. In the *Principes* of 1806, Constant plainly endorses the notion that history is the foundation of political theory. 'Time, says Bacon, is the great reformer. Do not refuse its assistance. Let it march in front of you; it will smooth your path. If what you establish has not been prepared by it, you will command in vain.'[32] At the beginning of the Restoration, Constant was inclined to balance the rational fact ('Constitutions are rarely made by the will of men') with that of history ('Time

[31] J.C.L. Sismondi, *Recherches sur les constitutions des peuples libres*, edited and introduced by M. Minerbi (Droz 1965). The historicist concepts of Sismondi are particularly emphasised in the late *Etudes sur les constitutions des peoples libres* (H. Dumont 1836). *See also* the *Introduction* to his *Histoire des Français* (Treuttel et Wurtz 1821) Vol. I.

[32] 'Le temps, dit Bacon, est le grand réformateur. Ne refusez pas son assistance. Laissez-le marcher devant vous, pour qu'il aplanisse la route. Si ce que vous instituez n'a pas été préparé par lui, vous commanderez vainement...', B. Constant, *Principes de politique*, Hofmann (ed.) (Droz 1980) p. 412.

makes them'). 'Making' the constitution is sometimes indispensable, but once the powers are constituted, it is as well to leave the appropriate space for the 'two reforming powers',[33] time and experience. This stance cannot be traced back simply to the concept of the historical constitution, for Constant's argument had shifted from a simple contrast between rational constitution and historical constitution, to a rather more complex perspective, without which it is difficult to see how the rationalisation of the constitutional monarchy could ever have been undertaken.

The monarch of 1814 wanted to reconnect the 'chain of time', to take up where he had left off, and to reconcile archaic 'form' and content with 'modern' experience, prescribed by time, beginning with the prevailing British model, though reinterpreted in the light of its historicity, its capacity to develop as a historical constitution able to produce a felicitous combination/interweaving of legislative and executive power.

The Landständische Verfassung

If the language of the *Charte constitutionnelle* immediately raises the issue of terminological ambiguity,[34] the formula adopted in 1815 in Article 13 of the constitutive Act of the German Confederation (*Die deutsche Bundesakte*)[35] is still more 'open' to interpretation. 'In every federal state an estates-based constitution will be established',[36] states Article 13. Member states were to provide themselves with a constitution, or better still, a representative regime.[37] In the course of the debate, both the time limit of one year in which to comply and its more strongly prescriptive character ('es soll') disappeared from the formula. The 'regime', in reality, postulated the need for 'some' form of collaboration by the estates in the exercise

[33] B. Constant, *Réflexions sur les constitutions, la distribution des pouvoirs et les garanties, dans une monarchie constitutionnelle* (H. Nicolle 1814).

[34] *See* R. Car, *La genesi del cancellierato. L'evoluzione del potere governativo in Prussia 1848-1853* (Edizioni Università di Macerata 2006) p. 41.

[35] The Act of the German Confederation was signed by representatives of 38 German states at the Congress of Vienna. This Act established the general framework under which the negotiations took place at the Ministerial Conference which ended with the Final Act (*Wiener Schlussakte*) on 15 May 1820, qualified as 'Fundamental Law that has the same force and validity as the federal Act' of the German Confederation of 1815.

[36] 'In allen Bundesstaaten wird eine Landständische Verfassung statt finden.'

[37] J. Hummel, *Le constitutionnalisme allemand (1815-1918): le modèle allemand de la monarchie limitée*, (Puf 2002), translates the German phrase as 'representative constitution'. On this aspect, *see* the observations of R. Car, 'Tra Pacta e Charte. Per una visione unitaria del costituzionalismo tedesco della Restaurazione', 7 *I Giornale di storia costituzionale* (2004), p. 115; Car, *supra* n. 34, at p. 40.

of political power.[38] This provision would seem to be designed to steer the debate both towards medieval forms of representation in a constitution structured in terms of the estates and towards types of assemblies which could be primarily traced back to the French model of the *Charte*. The semantic ambiguity of the laconic Article 13 is reflected in the first constitutions written in Southern Germany after 1815. It would seem difficult to trace back the preoccupations and constitutional dynamics, particularly in this phase, to a dialectic between the 'liberal-representative' and the 'monarchic-constitutional' models.

The preamble to the Bavarian constitution of 1818 'tells' a story that cannot but be different from the French story of the *Charte*. In the former narrative we can perceive the monarchic reformism which pervades the second half of the eighteenth century and which proceeds 'from above' and through administrative channels. We also catch a glimpse of the promises of *landständische Verfassungen* which the vicissitudes of the early nineteenth century, and later certain political decisions, nipped in the bud. We can sense the emergence of the German nation and its federated 'peoples', who, like the Bavarians, proved themselves to be sublime both 'in their misfortunes and on the field of battle.' We discern a 'continuity'[39] which, by contrast with events in France, had not been irreparably interrupted by the social and political Revolution. The task was to transform the old corporate structure by 'attuning' it to the 'new' political order.[40] Although German representative constitutions share the conceptual configuration of monarchic constitutionalism[41] (limited royalty) with the 1814 *Charte*, nevertheless the conditions for the existence of a constitutional monarchy are more deeply rooted in German history.[42] What in France

[38] *See* W. Mager, 'Das Problem der landständischen Verfassungen auf dem Wiener Kongress 1814/1815', 222 *Historische Zeitschrift* (1973) p. 296, at p. 346; B. Wunder, 'Landstände und Rechtsstaat. Zur Enstehung und Verwirklichung des Art. 13 DBA', 5 *Zeitschrift für historische Forschung* (1978) p. 139, at p. 185.

[39] Upon this controversial issue, *see* M. Kirsch and P. Schiera, 'Einleitung', in M. Kirsch and P. Schiera (eds.) *Denken und Umsetzung des Konstitutionalismus in Deutschland und anderen europäischen Ländern in der ersten Hälfte des 19. Jahrhunderts* (Duncker & Humblot 1999) p. 9, at p. 10.

[40] Otto Hintze, in the constitutional system based on estates, saw a socio-political structure which was not completely different from nor hostile to the modern idea, in brief a general stage of transition towards modern constitutionalism (O. Hintze (1930), 'Typologie der ständischen Verfassungen des Abendlandes', in Id., *Gesammelte Abhandlungen, I. Staat und Verfassung*, G. Oestreich (ed.) (Vandenhoeck & Ruprecht 1970) p. 120, at p. 139). Regarding the acceptance by German Liberals of the monarchic principle also in the light of the difficulty of making the voluntaristic dimension of popular sovereignty their own, *see* H. Hofmann, *Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert* (Duncker & Humblot 2003).

[41] Kirsch, *supra* n. 1.

[42] Now *see* M.J. Prutsch, *Making Sense of Constitutional Monarchism in Post-Napoleonic France and Germany* (Palgrave Macmillan 2013). Id., 'The "Legal Model" of the Charte Constitutionnelle

was defined as the 'impossible monarchy',[43] a sort of 'phase' in French history fated soon to pass,[44] in Germany became 'possible' and assumed a concrete form in the guise of a predominantly monarchic structure which was destined to last a century and to find its own 'solution' in the 'neutralising' of sovereignty in the context of the organic theory of the state.[45] The Bavarian 'Constitution' of 1818 contained an effective synthesis of what would be called the *monarchisches* Prinzip. 'Das Königreich Baiern in der Gesammt-Vereinigung aller ältern und neuern Gebietstheile ist ein souverainer monarchischer Staat nach den Bestimmungen der gegenwärtigen Verfassungs-Urkunde.'[46]

In these very years, in France, the *Charte* (especially in the 1830 'national' version) became the alpha and omega, the strategic resource exploited to address two convergent threats, namely, the spectre of the constituent power embodied in the sovereignty of the people and the absolute sovereignty of the monarch (a notion by then disempowered). It was Pierre-Paul Royer-Collard after the Restoration who reaffirmed that the sovereignty of the people was simply the 'souveraineté de la force.' In 1820, François Guizot likewise declared that there was an equivalence between the usurpation of force and every form of sovereignty that sought to be absolute, whether of the people or of divine right. He then added that popular sovereignty was a form of tyranny, in that it was the absolute power of the numerical majority over the minority.[47] 'I believe in the sovereignty of reason, justice and law: such is the legitimate sovereign the world is in search of, and always will be in search of; because reason, truth and justice are not to be found total and infallible anywhere.'[48] The constitution was becoming itself a parameter of reason and to it was assigned the attribute of a sovereign entity, so that neither the prince,

and the 1818 Baden Constitution', in L. Beck Varela et al. (eds.), *Crossing Legal Cultures* (Meidenbauer 2009) p. 383, at p. 398.

[43] Rosanvallon, *supra* n. 5.

[44] Hintze had already spoken of a brief transitional phase (O. Hintze, 'Das monarchische Prinzip und die konstitutionnelle Verfassung', in Hintze, *supra* n. 40, at p. 360).

[45] *See* E.-W. Böckenförde, 'Der Staat als Organismus. Zur staatstheoretisch-verfassungspolitischen Diskussion im frühen Konstitutionalismus', in Böckenförde, *supra* n. 17, p. 263, at p. 272.

[46] Bavarian Constitution, 26.5.1818, tit. I, Art. 1.

[47] F. Guizot, 'Philosophie politique: de la souveraineté', in Id., *Histoire de la civilisation en Europe depuis la chute de l'Empire romain jusqu'à la Révolution française*, P. Rosanvallon (ed.) (Librairie générale française 1985), p. 309 (*Présentation* by Rosanvallon) as well as p. 374.

[48] 'Je crois à la souveraineté de la raison, de la justice, du droit: c'est là le souverain légitime que cherche le monde et qu'il cherchera toujours; car la raison, la verité, la justice ne résident nulle part complètes et infaillibles', F. Guizot, *Du gouvernement de la France depuis la Restauration, et du ministère actuel* (Ladvocat 1820) p. 201. Regarding the French debate, *see* L. Lacchè, *La garanzia della Costituzione. Riflessioni sul caso francese*, in L. Lacchè and A.G. Manca (eds.), *Parlamento e costituzione nei sistemi costituzionali europei ottocenteschi* (Il Mulino, Berlin, Duncker & Humblot 2003) p. 49, at p. 94. Cf. *also* Hofmann, *supra* n. 40.

the people, the monarchy nor democracy could invoke a monistic conception intertwined with the exercise of the intimidating constituent power.[49] This led to an idea of an autopoietic constitution, sovereign within and for itself, fallen from the heavens. The theory of the sovereignty of the constitution,[50] and in Germany, the gradual, organicist construction of the *Staatslehre*, although differing in outcomes and methodologies, aimed at neutralising the conflict and hypostatizing an idea of constitutional compromise.

If the *Charte* circumscribes clearly both the ideology of the *octroi* and the theory of the limited monarchy, thus acquiring 'categorial' importance,[51] the experience of the German 'granted' constitutions reveals foundations[52] that can only partially be explained using the transalpine model. Inspiration[53] is one thing, concrete developments on the ground quite another.[54] The constitutions granted in 1848 show even greater differences. In terms of political culture, they were born 'older' than those that followed the Restoration[55] and their archaism corresponds to the experience of a 'constituent' monarchy which was trying to take the heat out of the question of sovereignty in a context of contested political legitimacy.[56]

The political lexicon of the Restoration refers both to the monarchic principle,[57] which grants the 'constitution' (theory of the constituent power of the king), and to estates-based representation, with outlines that are compatible with the model of the pact and of an agreement expressed in the form of legislative 'collaboration'.[58]

[49] *See* C. Schmitt, *Verfassungslehre* (1928) (Duncker & Humblot 1993), p. 7-8, at p. 53.

[50] Friedrich Julius Stahl's interest in, and, in balance, positive judgement regarding the pragmatic and conservative line taken by Guizot through his doctrine of the *juste milieu* is not accidental. On this point, *see* G. Bonacina, 'Storia e indirizzi del conservatorismo politico secondo la dottrina dei partiti di Stahl', CXV, 2 *Rivista storica italiana* (2003) p. 617, at p. 618.

[51] Cf. the dissertation of E. Kaufmann, *Studien zur Staatslehre des monarchischen Prinzipes: Einleitung. Die historischen und philosophischen Grundlagen* (Brandstetter 1906).

[52] O. Meisner, *Die Lehre vom monarchischen Prinzip im Zeitalter der Restauration und des deutschen Bundes* (Marcus 1913).

[53] For example, R. Oeschey, *Die bayerische Verfassungsurkunde vom 26. Mai 1818 und die Charte Ludwig 18. vom 4. Juni 1814: ein Beitrag zur Lehre vom monarchischen Prinzip* (Beck 1914).

[54] *See* P. Schiera, Konstitutionalismus und Vormärz in europäischer Perspektive: Politische Romantik, Integrationsbedarf und die Rolle des Liberalismus, in M. Kirsch and P. Schiera (eds.), *Verfassungswandel um 1848 im europäischen Vergleich* (Duncker & Humblot 2001) p. 16.

[55] G. Rebuffa, *Lo Statuto albertino* (Il Mulino 2000) p. 47.

[56] *See* V. Sellin, '"Heute ist die Revolution monarchisch". Legitimität und Legitimierungspolitik im Zeitalter des Wiener Kongresses', 76 *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* (1996), p. 335, at p. 361. *See also* H. Becquet and B. Frederking (eds.), *La dignité du roi. Regards sur la royauté au premier XIXe siècle* (Pur 2009).

[57] M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Zweiter Band 1800-1914* (C.H. Beck 1992) p. 102, at p. 105.

[58] For these dilemmas, *see* K. Welcker, *Octroyierte Verfassungen*, in K. von Rotteck and K. Welcker, *Das Staats-Lexikon. Encyklopädie der sämmtlichen Staatswissenschaften für alle Stände* (Brockhaus 1864), Vol. X, p. 735, at p. 738. Cf. Schmitt, *supra* n. 49, at p. 51. Regarding the

The constitution granted by Maximilian Joseph in Bavaria in 1818, envisages a 'special' procedure for modifying or adding to the text 'with the consent of the states' (Title X, Article 7 of the constitution guarantee). The constitution of the Grand Duchy of Hessen-Darmstadt (1820) also follows this model. The Prussian constitution of 1850 allows for the modification of the text 'by ordinary legislative methods' (Article 107).

Limited monarchy and the monarchic principle: the granted constitution as context of legitimacy

As has already been pointed out, the preamble to the *Charte* of 1814 had delineated an 'updated' theory of Ancien Régime monarchy within the framework of a 'modernisation' of the mode of exercising power centred on the characteristics of representative government. The 1814 text hinges upon the centrality and unity of royal power. The monarch reserves a predominant role for himself: he alone wields the executive power and has a strong claim on the right to make laws, the process whereby they are created (initiating, sanction, enactment) being wholly under his control. The self-limitation of the sovereign[59] allows for the attainment of a compromise between the conflicting legitimacies which the revolutions of the eighteenth century had bequeathed to the history of constitutionalism: on the one hand, the traditional *plenitudo potestatis* of the sovereign, on the other, the constituent power of the people.[60] The use, implicit or otherwise, of the category of constituent power on the part of post-revolutionary monarchies reveals not only its strength but also the underlying theoretical paradox. The paradox of the 1814 *Charte* is evident, although in the preamble an attempt is made to tone it down a little. If, on the one hand, the catalogue of rights and freedoms originating in the French Revolution, first and foremost the principle of equality, is guaranteed, on the other hand, we find as premise an act of concession, which in philosophical terms is a negation of those self-same rights and freedoms. In the French context,

'middle-class' vision of the written constitution as sworn pact and as law, *see* Id., p. 29. Concerning the theme of *konstitutionnelle Verfassung* as political compromise, *see* E.W. Böckenförde, 'Geschichtliche Entwicklung und Bedeutungswandel der Verfassung', in *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991) p. 34 ff.

[59] Regarding the theoretical elaboration of the notion of "limited monarchy" – as a distinct concept from the broader, but too generic one of "constitutional monarchy" – *see* Rials, *supra* n. 19, atp. 87; Id., *supra* n. 23, at p. 112. *See also*, by the same author, 'Une doctrine constitutionnelle française?', 50 *Pouvoirs* (1990), p. 81, at p. 95; Laquièze, *supra* n. 8, at p. 66; P. Lauvaux, 'Les monarchies: inventaire des types', 78 *Pouvoirs* (1996) p. 26.

[60] Regarding the transformations and centrality of the concept of sovereignty, *see* M. Stolleis, 'Souveränität um 1814', in U. Müssig (ed.), *Konstitutionalismus und Verfassungskonflikt* (Mohr Siebeck 2006) p. 102, at p. 115.

the gap between *Revolutionary practice* and *Restoration theory* remains the thorniest problem to solve.[61]

> De facto this could not succeed. The monarch, whose position rests upon an institution with a juridical structure, that is upon the monarchy with a determined law of succession to the throne, cannot himself be also conceived as foundation and source, as the formless former (das Formlos-Formende) of the politico-social order which is outlined in the constitution.[62]

By means of the abovementioned concession, the monarch sought to retain, while at the same time recasting, the substance of his original power. 'The king', we read in Title II, Article 1of the 1818 constitution of Bavaria, 'is the supreme head of State: he unites in his person all the rights of supreme power and exercises them following those resolutions, which were established by himself, with this constitutional act.' Without impairing the principle of the unity of state power, the granted constitution is, at the same time, both 'a juridical act' and a 'political act': a unilateral act of constitutional determination and an act of political expediency entailing a compromise (the theory of the agreement) which mediates between the interests of executive-monarchic legitimacy and political principles of a liberal complexion. It could be said that the granted constitution is not, to use a term from political theology, a *constituent constitution*. In its 'full' meaning, the monarch's constitution is the monarch himself (like the historical constitution embodied in the fundamental laws). It is not the paper constitution that gives the sovereign his legitimacy and discretionary powers over the *Staatsgewalt.*[63] The constitution is a limit which does not establish the monarchy,[64] rather, it founds competences and rules which the sovereign solemnly undertakes, through specific procedures, to respect and guarantee, as may be seen in the first constitutions of Southern Germany. The monarchy, in this way, comes *before* the constitution (essence), but is *within* the constitution (implementation) once it assumes the *octroi* as an instrument for the 'modernisation' of a historical continuity and a monarchic reformism.

[61] The commentator who had best grasped the «mortal contradiction» of the Charte and of the Restoration, was Charles de Rémusat, *see* in particular *Politique libérale où fragments pour servir à la défense de la Révolution française* (M. Lévy 1860) p. 207 ff. Concerning this aspect, *see* A. Craiutu, *Le Centre introuvable. La pensée politique des doctrinaires sous la Réstauration* (Plon 2006) p. 75.

[62] 'In der Sache konnte das nicht gelingen. Der Monarch, dessen Stellung auf einer rechtlich geformten Einrichtung, nämlich der Monarchie mit einer bestimmten Thronfolgeordnung, beruht, kann selbst nicht auch als Urgrund und Quelle, das Formlos-Formende der politisch-rechtlichen Ordnung, wie sie in der Verfassung Gestalt gewinnt, gedacht warden' (E.-W. Böckenförde, 'Die verfassunggebende Gewalt des Volkes. Ein Grenzbegriff des Verfassungsrechts', in Böckenförde, *supra* n. 58, at p. 95 at p. 96).

[63] Hummel, *supra* n. 37, at p. 55. *See also* V. Sellin, *Gewalt und Legitimität. Die europäische Monarchie im Zeitalter der Revolutionen* (Oldenbourg 2011).

[64] Hintze, *supra* n. 44.

'The government established by the *Charte* is of all governments with representative institutions, the only one where monarchic power is the principle of social organisation and source of political life.'[65] Showing great perspicacity, Royer-Collard observed in 1824 that it was not enough to define the system as 'a mixed monarchy, called representative government, where the elective Chamber combines with the monarch together with a hereditary Chamber to make law and to administer the affairs of state.' Indeed, it was the 'regulatory power' which imparted a specific character to this form of government. In the French case, in and through the *Charte* the king retains

> a dazzling primacy among the powers which surround him. He alone represents the moral unity of Society; he alone acts, he alone rules, he alone is the maker of the law, the right to initiate which is exclusively reserved for him. This last circumstance means that, with regard to him, the other powers are strictly speaking only limits; but they are limits which are living and liable to shift.[66]

Nevertheless, within the context of the secularised state order, the *ex gratia Dei* monarch found himself in the hostile space of the constitution and beset by an 'insurmountable difficulty'.[67] The *sacre* of Charles X in Reims in 1825, accompanied by the practice of touching and 'healing' the scrofulous in the name of St. Marcolph, was an awkward ritual, a gesture of unmitigated political romanticism.[68] It was as if a medieval monarchy existing by divine right had absorbed the 'law' into the space of the legitimacy of the sovereign, thaumaturge and representative

[65] 'Le gouvernement établi par la Charte est de tous les gouvernements à institutions représentatives, le seul où le pouvoir monarchique soit principe de l'organisation sociale et source de la vie politique', Ch. His, *De la monarchie représentative* (Heideloff 1829) p. 4, at p. 5.

[66] 'Une monarchie mixte, appelée Gouvernement représentatif, où la Chambre élective concourt avec le monarque et une Chambre héréditaire à la formation de la loi et à la direction des affaires publiques… .' The monarch retained 'une éclatante primauté entre les pouvoirs qui l'entourent. Seul il représente l'unité morale de la Société; seul il agit, seul il commande, seul il est l'auteur de la loi dont l'initiative lui est exclusivement réservée. Cette dernière circonstance exprime qu'à son égard, les autres pouvoirs ne sont proprement que des limites; mais ce sont des limites vivantes et capables de se mouvoir…', P. de Barante, *La vie politique de M. Royer-Collard. Ses discours et ses écrits* (Didier 1863), II p. 216, at p. 217. With regard to the constitutional vision of Royer-Collard, and his interpretation of the *Charte*, *see* M. Pertué, 'Royer-Collard et la Charte de 1814', 382 *Revue administrative* (2011) p. 341, at p. 357.

[67] H. Heller, *Staatslehre*, in G. Niemeyer (ed.) (Sijthoff 1934). L. Diez Del Corral, *El liberalismo doctrinario* (Instituto de Estudios Politicos 1945) p. 66, observes: 'The doctrine of the constituent power could not be transferred to the Monarchy without running into contradictions and vagueness.'

[68] M. Bloch, *The Royal Touch. Sacred Monarchy and Scrofula in England and in France* (Routledge and Kegan 1973 (1924)). On the representation of this ritual on the stage by Gioacchino Rossini, *see* M. Schnettger, 'Il viaggio a Reims oder die Restauration auf der Opernbühne', 12 *Majestas* (2004), p. 161, at p. 194.

of God on Earth. The Restoration did its utmost to reunite legitimacy and legality, an operation doomed to failure, and yet – as we know – the monarchy of the *octroi* continued to play a pivotal role in the history of the socio-political organisations of the nineteenth century.

The monarch of the granted constitutions is the sovereign in the true sense of the term, but at the same time, through the representative constitution – understood as a functional tool in the exercise of single and limited spheres of the *Staatsgewalt* – it is he who stipulates agreements with non-unitary representatives of the people. The king, supreme head of state, is the person who 'makes the rules and ordinances which are necessary for the execution of laws and for the security of the State.' Article 14 of the *Charte* was considered by Carl Schmitt to be an exemplification of the decision mechanism on the 'state of exception'.[69] Although not discussed during the rapid drafting of the *Charte*, the question of the 'power of ordinance' acquired noteworthy importance during and at the end of the reign of Charles X, when the 'radicalisation' of the political struggle between liberals and ultras made Article 14 the emblem of their respective positions on the issue of constituent power. Charles X held that Article 14 was his *lit de justice* for overcoming the opposition of the parliamentary majority. The monarch thought he was entitled to wield the 'right of the last word', as if he were facing a state of emergency, although this latter was simply the liberals' demand for the fundamental rule of representative government. When enacting the ordinances, Charles X refused to accept such a logic, resorting to a legal instrument (Article 14) in order to obtain a result, which by that date was contrary to the letter and spirit of the *Charte*.[70] It was not by chance that in the *Rapport au Roi* of 25 July 1830, the king's minister, Polignac, declared that the 'normal conditions of representative government' had broken down. The sombre picture which he draws – focused entirely upon the subversive use of the press – negates the essential characteristics of such a form of government.

> [...] No government on earth would stand, if it did not have the right to provide for its safety. This power pre-exists the law, because it is in the nature of things. There are, Sire, maxims which have, on their side, both the sanction of time and the endorsement of all the European public law jurists. But these maxims have another still more positive sanction, that of the *Charte* itself. Article 14 invested His Majesty with a power sufficient, without doubt, not for changing our institutions, but for strengthening them and rendering them more immutable. Imperious neces-

[69] Schmitt, *supra* n. 9, p. 12, at p. 13. On this point, *see* H. Hofmann, 'Souverän ist, wer über den Ausnahmezustand entscheidet', in Müssig, *supra* n. 60, p. 270, at p. 284.

[70] For a fuller account of the events surrounding the ordinances of Charles X and the July Days, *see* L. Lacchè, *La Libertà che guida il Popolo. Le Tre Gloriose Giornate del luglio 1830 e le 'Chartes' nel costituzionalismo francese* (Il Mulino 2002).

> sities do not permit us to delay any longer the exercise of this supreme power. The moment has come to resort to measures which are within the spirit of the *Charte*, but which are outside the legal system, whose every resource has been exhausted and to no avail.[71]

Interpreting the granted constitution

The Revolutionary days of July 1830 put an end to the concept of the *octroi* and to the attempt to establish a general *monarchische Prinzip* along French lines. They did not, however, satisfactorily consolidate a form of government whereby the king remained the 'supreme head of State'.

As we have seen, the claim made in the following years by the liberals, to the effect that the Bourbon Charter was two-dimensional in nature – the two dimensions being the formal one of the granting and the 'true' one, calculated to appeal to the liberal-minded, of a 'peace treaty' between the monarchy and the French people – does not bear scrutiny. As has already been observed, the theory of the *octroi* developed from the *Charte* was not merely a decorative flourish. Viewing the Restoration as an age of 'transition' does not, however, provide us with a proper interpretation of the granted text. The Second Restoration set in motion in France events that were destined to leave their mark upon the subsequent fifteen years. The liberal forces immediately took advantage of the Proclamation of Cambrai of 28 June 1815, through which Louis XVIII had given, in their opinion, an 'authentic' interpretation of the 'liberal' spirit of the *Charte*. Together with the oath of loyalty sworn by the king before the parliamentary representatives (16 March), even as Napoleon was marching on Paris, the Proclamation was one of the documents most frequently quoted by liberals intent upon reinforcing the interpretation of the *Charte* as being in essence a pact. On the other hand, on 16 June 1814, the Chamber of deputies had directed its *Adresse* to the monarch in order to unilaterally assign a "national" stamp to the *Charte*. 'We therefore, Sire, have the firm conviction that the assent of the French people will give this Charte a wholly national character.'[72]

[71] '[...] Nul gouvernement sur la terre ne resterait debout, s'il n'avait le droit de pourvoir à sa sûreté. Ce pouvoir est préexistant aux lois, parce qu'il est dans la nature des choses. Ce sont là, Sire, des maximes qui ont pour elles et la sanction du temps et l'aveu de tous les publicistes de l'Europe. Mais ces maximes ont une autre sanction plus positive encore, celle de la Charte elle-même. L'article 14 a investi Votre Majesté d'un pouvoir suffisant, non sans doute pour changer nos institutions, mais pour les consolider et les rendre plus immuables. D'impérieuses nécessités ne permettent plus de différer l'exercice de ce pouvoir suprême. Le moment est venu de recourir à des mesures qui rentrent dans l'esprit de la Charte, mais qui sont en dehors de l'ordre légal, dont toutes les ressources ont été inutilement épuisées.'

[72] 'Aussi avons-nous, Sire, l'intime confiance que l'assentiment des Français donnera à cette Charte un caractère tout à fait national.'

https://doi.org/10.1017/S1574019612001150 Published online by Cambridge University Press

The so-called ambiguity of the Charter, which is often emphasised, stemmed from the hermeneutic apparatus forged through the theoretical debate and the political-parliamentary struggle. The Restoration is characterised by an unceasing clash between two groups, one of which insisted upon the granted (indeed, unilaterally granted) nature of the *Charte,* while the other harped upon its intrinsically 'contractual' features. Needless to say, these two contrasting interpretations gave rise to arguments that are hard to reconcile, since they raise crucial issues touching upon legitimacy, the form of sovereignty and the nature of the political regime. The progressive radicalisation of the dispute, which culminated in the events of 1830, ended up – as is often the case – by grossly oversimplifying the terms of an ideological quarrel, obscuring nuances that were, nonetheless, discernible in the two 'parties'. Each side without a doubt chose to view its own position in the most favourable light: the *royalistes* – but not necessarily the ultras – entrenched themselves behind the bulwark of the *lettre* and of the form of the concession; the liberals insisted on the presumed liberal character of the *esprit*. One 'party' therefore possessed a strong juridical case, while the other thought it could deploy a political argument that needed, however, to be nurtured and circulated. The former was a static, defensive argument, whereas the latter was dynamic and oppositional.

The basic misunderstanding stemmed from the dual nature of the Charter, namely the juridical act of granting, on the one hand, and on the other hand a form establishing a measure of collaboration between the monarchic principle and the representative principles (as embodied in the Chamber of Deputies). The ambiguity of the procedure lay in the inevitable and insurmountable confusion between the juridical element – relatively strong from the point of view of legitimacy – and the political element, which was more fluid and dynamic. The formal and juridical aspect (the traditional royal prerogative, the ostensible source of the constitution) was contaminated and progressively undermined by the notion that the constitutional act was underwritten by a 'compromise', or rather by a new pact between the sovereign and his subjects. On this front, a whole host of heterogeneous aspects, variously historical, sociological and political, together served to deprive the formal and juridical aspect of its presumed force. Moreover, the contractual scheme could be said to rest upon two distinct theoretical foundations, on the one hand, that of 'medieval constitutionalism', which accorded legitimacy to the sovereign's obligations, performed in ceremonies sanctioned by time, towards feudal lords and estates and corporations, and on the other, that of modern constitutionalism, which, in its (then fashionable) British form, could be read as a rationalised form of balance between political powers, 'shared' by the monarch and the representative bodies.

Chateaubriand was among the first to speak of the *Charte* as a 'peace treaty signed by the two parties which divided the French people, a treaty whereby everyone gives up some of their claims in order to contribute to the glory of the nation.'[73] To consider the Charter as an attempt at compromise[74] bolsters the notion that it represents the sanctioning of an agreement reached by the two 'parties' that had divided France. Yet, the problem is that while the *royalistes* tended to see the 'compromise' in the light of historical circumstances, the liberals insisted upon its intrinsically 'contractual' nature. In the first case, the reference does not possess any juridical-constitutional content, or rather does not imply, where the concessionary nature of the *Charte* is concerned, any echo of the putative 'traité de paix', whereas in the second case the aim would seem to have been to launch a sort of 'imaginary constitution' which went beyond the *lettre* of the Charter and referred in the last analysis to the practical workings of the political system, or to concrete power relations and to the ebb and flow of *opinion*.

The interpretation that Guizot offers in his memoirs exemplifies the liberal attitude. The Charter 'appeared as a purely royal concession, instead of proclaiming what it really was, a peace treaty following a long war, a series of new articles added, by common accord, to the pact of ancient union between the nation and the king.'[75] Thus the constitutional monarchy reaffirmed the old alliance; modern constitutionalism was reunited with the medieval. But the peace treaty was, to all intents and purposes, a truce that was to be broken on several different occasions. Count Beugnot, who had played such a major role in laying the foundations of the philosophy which inspired the *Charte,* had a clear grasp of the basic problem:

> The Charter will never be, for us, a political gospel where on the one hand, there will be an attempt to kill its spirit by means of the letter, on the other, there will be an attempt to save it from the letter by means of the inferences drawn from its spirit. It has been given in good faith, it must be understood in the same.[76]

[73] 'Traité de paix signé entre les deux partis qui ont divisé les Français, traité où chacun abandonne quelque chose de ses prétentions pour concourir à la gloire de la patrie', F.-R. De Chateaubriand, *Réflexions politiques sur quelques écrits du jour et sur les intérêts de tous les Français* (Le Normant 1814) p. 70.

[74] This thesis is affirmed as 'royal' by J. Barthélemy, *L'introduction du régime parlementaire en France sous Louis XVIII et Charles X* (Giard & Brière 1904) p. 12.

[75] 'Se présenta comme une pure concession royale, au lieu de se proclamer ce qu'elle était réellement, un traité de paix après une longue guerre, une série d'articles nouveaux ajoutés, d'un commun accord, au pacte d'ancienne union entre la nation et le roi', F. Guizot, *Mémoires pour servir à l'histoire de mon temps* (Lévy frères 1858-1867) I, p. 34.

[76] 'La Charte ne sera jamais pour nous un évangile politique où l'on s'efforcera d'un côté, de tuer l'esprit par la lettre et de l'autre, de la sauver de la lettre par les inductions tirées de l'esprit. Elle a été donnée de bonne foi, elle doit être entendue de même…', J.-C. Beugnot, *Mémoires du comte Beugnot, ancien ministre (1783-1815)*, 3rd edn., publiés par le comte Albert Beugnot (Dentu 1889) p. 653.

If the French *Charte constitutionnelle* is undoubtedly the main theoretical/practical reference point of German *Frühkonstitutionalismus,* it is equally true that the first important constitutional experiments in Bayern, Baden, Württemberg and Hessen-Darmstadt (to mention a number of different *landständische Verfassungen* promulgated in 1818-1820)[77] exemplify contexts and developments which, in the first German constitutional wave, although ascribable to common categories, inevitably present their own particular characteristics. From the *Charte,* these first constitutions draw principles and institutions like the discretionary power of the monarchic executive over legislative initiative, and, more generally, over the procedure for drafting legislative acts, as well as over mechanisms of convocation, extension of mandate and dissolution of the 'Parliaments'; the principle of ministerial (criminal) responsibility; bicameralism; the royal prerogative in spheres of international and military politics. Article 13 of the constituent act of the German Confederation institutionalises the semantic and political ambiguity which is a distinctive trait of this phase of European constitutional history. In view of the ambiguity and vagueness of the formulas, the interpretation (and the consequent acts) acquire an indubitable importance as well as a strong 'performative' capacity.

A key role is played by the concept of 'representation'.[78] Faced with the risks entailed by *ständisch* and *repräsentativ* seeming to be equal in status, Metternich, the Austrian chancellor, commissioned Friedrich von Gentz to write the memorial *Über den Unterschied zwischen den landständischen und Repräsentativverfassungen,*[79] addressed in 1819 to the ministers of the member states of the German Confederation, who had been invited to the conference of Karlsbad. Gentz's text was intended to be a kind of 'authentic' interpretation of Article 13, offering an overview of developments since the promulgation of the first constitutions in Germany. The German 'model', Gentz argued, was not compatible with *Repräsentation,*

[77] For this stage of the German constitutionalism of the Restoration, *see* L. Gall, *Der Liberalismus als regierende Partei. Das Grossherzogtum Baden zwischen Restauration und Rechtsgründung* (Steiner 1968); M. Stolleis, 'Oktroi, oktroyierte Verfassung', in A. Arler and E. Kaufmann (eds.), *Handwörterbuch zur Deutschen Rechtsgeschichte* (E. Schmidt 1984) III, p. 1230; Stolleis, *supra* n. 57, at p 187 ff.; H. Brandt, *Parlamentarismus in Württemberg 1819-1870: Anatomie eines deutschen Landtags* (Droste 1987); Id., *Von den Verfassungskämpfen der Stände zum modernen Konstitutionalismus. Das Beispiel Württemberg*, in Kirsch and Schiera, *supra* n. 39, at p. 98 at p. 108; D. Götschmann, *Bayerischer Parlamentarismus im Vormärz: die Ständeversammlung des Königreichs Bayern 1819-1848* (Droste 2002); C. Schulze, *Frühkonstitutionalismus in Deutschland* (Nomos 2002); Hummel, *supra* n. 37, at p. 47 ff.; J. Weitzel, '"Von den Rechten der Krone trete ich keinen Zoll ab". Das monarchische Prinzip und die Fortbildung der Verfassung in Bayern von 1818 bis 1848', in Müssig, *supra* n. 60, p. 117, at p. 126.

[78] E.W. Böckenförde, 'Der deutsche Typ der konstitutionnellen Monarchie im 19. Jahrhundert', in Id., *supra* n. 17, at p. 281.

[79] Cf. in H. Brandt (ed.), *Restauration und Frühliberalismus 1814-1840* (Wissenschaftliche Buchgesellschaft 1979).

understood as unitary popular-parliamentary representation, but only with the *landständische Verfassung,* interpreted as a form of *Vertretung* predicated upon a concept of socio-political order immanent in the particularistic caste structure. The following year, in 1820, when the 'Schlußakte der Wiener Ministerkonferenzen' was passed, Metternich ensured that Article 57 was ratified.[80] This article, placed under the tutelage of the Confederation, endorsed the centrality of the monarchic principle within the German area.

> The monarchic principle, sometimes a juridical dogma and sometimes an historico-political postulate, raised to the level of fundamental constitutional norm in Article 57 of the final Act of the Conference of Vienna of 15 May 1820, had thereby consolidated the distinction, fated to survive up until the Weimar constitution, between German constitutionalism and Western European parliamentarianism. The monarchic principle, which was destined to a speedy decline in France, its country of origin, thus became in Germany during a period of over a century, the principle of legitimisation of the political power. Whereas the 1814 French Charter sought to reconcile the return to the principle of royal legitimacy with the social progress that had followed the Revolution, Article 57 of the final Act of the Conference of Vienna constituted something closer to a 'prophylactic' tool … .[81]

This theory of the monarchic principle is designed to assign to the sovereign a general presumption of discretionary power within the constitution. According to this thesis, the monarch alone – and not the 'representatives' – can draw on this 'pre-constitutional' space, which tallies with the conceptual paradox, recalled above, of *das Formlos-Formende*. The ideological, 'restoration' reading of Article 13 and the development of the *monarchische Prinzip*, which enhanced the image of the granted constitution as 'constitution of the sovereign',[82] was opposed by the liberals, who gave it a contractual interpretation. In 1824 Johann Christoph von Aretin wrote that, after all, even a granted constitution was agreed upon, 'because

[80] 'Since the German confederation, with the exception of the free cities, is made up of sovereign princes, then in accordance with the here given fundamental principle all State power must lie in the supreme head of the State, and the sovereign can be bound to co-operate with the estates only in the exercise of specific powers.' ('Da der deutsche Bund, mit Ausnahme der freien Städte, aus souverainen Fürsten besteht, so muß dem hierdurch gegebenen Grundbegriffe zufolge die Gesamte Staats-Gewalt in dem Oberhaupte des Staats vereinigt bleiben, und der Souverain kann durch eine landständische Verfassung nur in der Ausübung bestimmter Rechte an die Mitwirkung der Stände gebunden werden').

[81] Hummel, *supra* n. 37, at p. 71. On this point, *see* P. Schiera, 'Dahlmann e il primo costituzionalismo tedesco', 13 *Quaderni fiorentini per la storia del pensiero giuridico moderno* (1984), p. 397, at p. 400; G. Goderbauer, *Theoretiker des deutschen Vormärz als Vordenker moderner Volksvertretungen* (Tuduv Verlag 1989).

[82] Böckenförde, *supra* n. 58, p. 36 ff. *See* Id., *supra* n. 78, at p. 277.

only with the acceptance of the people does it become a real Constitution.'[83] Karl Theodor Welcker was likewise to claim, a decade later, that granted constitutions were not 'genuine' constitutions[84] and would only become such when the people accepted them with good will on the basis of a contract. The moment the sovereign had granted the constitutional law, as representative of the constituent power, it could no longer be revoked.[85]

If we consider another context, this time in the Italian peninsula, we can see that the Piedmontese liberals had adopted a similar stance, immediately after the *Statuto del Regno*, the constitution granted by King Charles-Albert in March 1848. Here too, the late rehabilitation of the model of the 1814 *Charte* – defined as the 'most monarchic'[86] – did not preclude rejection of the theory of the sovereign's right of repeal. The Statute as fundamental law, which is 'perpetual' and 'irrevocable', undoubtedly had its origins in the will of the sovereign, but did not impede the initial signs of institutional 'dialogue'. By having recourse to the category of parliamentary omnipotence, Count Cavour, in a famous article in 'Il Risorgimento' of the 10th of March, said that once the path to 'self-limitation' has been chosen, 'the King is no longer in possession [of the unilateral power]. A minister who advised him to make use of it, without consulting the nation, would violate constitutional principles, and would incur the most grave responsibility.'[87] In a text such as the *Statuto*, drafted in the aftermath of Orleanist constitutionalism and the Belgian charter, the dualistic reading of the *King in Parliament* proposed

[83] Quotation from D. Grimm, in H. Mohnhaupt and D. Grimm (eds.), *Verfassung: Zur Geschichte des Begriffs von der Antike bis zur Gegenwart. Zwei Studien* (Duncker & Humblot 2002).

[84] Welcker, *supra* n. 58.

[85] von Rotteck, Welcker, *supra* n. 28.

[86] *See* H. Ullrich, 'The Statuto Albertino', in H. Dippel (ed.), *Executive and Legislative Powers in the Constitutions of 1848-49* (Duncker & Humblot 1999) p. 137; E. Rotelli, *Le Costituzioni di democrazia. Testi 1689-1850* (Il Mulino 2008) p. 114.

[87] 'Il Re non [lo] possiede più. Un ministro che gli consigliasse di farne uso, senza consultare la nazione, violerebbe i principii costituzionali, incorrerebbe nella più grave responsabilità.' 'The word *irrevocable*, as used in the preamble to the Statute, can only be applied literally to the new and great principles proclaimed by the same, to the great fact of a pact which is destined to unite in an indissoluble union both the people and the King. However, this does not mean that the particular conditions of the pact are not susceptible to gradual improvements, put into action by the common accord between the contracting parties. The King, together with the contribution of the nation, will always in the future be able to add to it all necessary modifications which will be indicated by the experience and reason of the times' ('La parola *irrevocabile*, come è impiegata nel preambolo dello Statuto, è solo applicabile letteralmente ai nuovi e grandi principi proclamati da esso, ed al gran fatto di un patto destinato a stringere in nodo indissolubile il popolo e il Re. Ma ciò non vuol dire che le condizioni particolari del patto non siano suscettibili di progressivi miglioramenti operati di comune accordo tra le parti contraenti. Il Re, col concorso della nazione, potrà sempre nell'avvenire introdurre in esso tutti i cambiamenti, che saranno indicati dall'esperienza e dalla ragione dei tempi', C.B. di Cavour, *Il Risorgimento*, 10 March 1848).

from that time on, was useful for delineating a *rigid* structure, the pact, which was designed to limit and temper the opposing causes and interests by offering reciprocal guarantees.[88]

The fate of the monarchic constitution

If the model of a granted constitution is indissolubly linked to 'monarchic constitutionalism', the destiny of the 'constitutional' monarchy within the European context is not univocal. We have seen, not by chance, just how strong the 'argument of ambiguity', as it might be termed, proved to be. This ambiguity is an intrinsic feature of 'granted' constitutionalism. We should not forget that the reference texts are at the same time both archaic and modern, with elements of estates-based *ancien régime* rationalisation called upon to 'integrate', to differing degrees, with post-revolution liberal constitutionalism: the *Verfassung* and the *Constitution* – to use the German terms – are less opposed than one might suppose, and tend rather to contaminate one another.[89] The monarch exists 'before' the constitution and this fact is too deeply rooted to be neutralised by the process of constitutionalisation. The constitutional integration of the institution of the Crown is the dilemma which pervades the history of European constitutionalism.[90] Nineteenth-century constitutional history is, therefore, characterised by a long process of *civilisation constitutionnelle* of the royal prerogative.

The constitutional monarchy is a general formula, a complex political order, a conceptual space which, during the course of the nineteenth century, took on a variety of characteristics and conditions that nonetheless sprang from the same basic assumptions and causes. On the Continent, the granted constitution was its main starting-point. The outcomes, however, are not easily predictable. The dualism between the monarchic and representative principles gave shape to the general terms of a form of government whereby the monarch was the supreme head of state and wherein at least part of the legislative power was exercised by elected representatives. French constitutional history displays a development of the monarchic form which, from the 'limited monarchy' of the 1814 *Charte,* led in 1830 to an act of redistribution of powers. This 1830 *Charte* was a text of constitutional 'revision' stemming from a revolution and was later adroitly watered down

[88] M. Fioravanti, 'Per una storia della legge fondamentale in Italia: dallo Statuto alla Costituzione', in Id. (ed.) *Il valore della Costituzione. L'esperienza della democrazia repubblicana* (Laterza 2009) p. 7.

[89] *See* the observations of M. Meriggi, 'Verfassung/Constitution: la "confusione babilonese" del medio Ottocento', I, 1 *Giornale di storia costituzionale* (2001) p. 63.

[90] P. Colombo, *Il re d'Italia. Prerogative costituzionali e potere politico della Corona (1848-1922)* (F. Angeli 1999) p. 194.

by the moderate liberals and conservatives. It reverted to certain political and ideological presuppositions of a 'democratic' nature, namely the promises contained in Article 69. However, it did not solve the problem of governance and, more particularly, of the relationship between monarchy, government and parliamentary representation. In order to understand the monarchic function in its long and laborious constitutional transformation, the concept of *influence* is of fundamental importance, a key, albeit elusive concept. It is enough to read the thoughts of Prosper Duvergier de Hauranne,[91] or of constitutionalists like Pellegrino Rossi,[92] Charles Hello or François Guizot from the 1840s ('Le trône n'est pas un fauteuil vide') in order to become aware of this aspect.[93] In France, a regime predicated upon a balance of powers and with a monarchic executive[94] emerged, in the conviction that the close relationship between the monarch and the government affirmed by the text of the Charter would conservatively counterbalance the claim of the elective Chamber to 'absorb' the executive power and assume a position of predominance in contradiction of the principle of 'co-operation' and balance of powers. The 'republican' Benjamin Constant, at the time of the Restoration, had lucidly reassessed the constitutional potential of the 'condition monarchique'.[95] In his complex reflection on 'neutral power' (often misunderstood),[96] conceived as both 'pouvoir neutre et préservateur' (neutral and preservative power) and 'pouvoir neutre et intermédiaire' (neutral and intermediary power), the sovereign was the organ of national unity and continuity of the state, an organ which, by deploying its 'majesty' and 'impartiality', embodied the 'puissance publique'.

It was therefore the historical task of the nineteenth century to mediate between these two great forms of independent legitimacy, the sovereign and the 'representatives of the moderns'. The failure of the French experiment in limited monarchy did not, as we have seen, lead to the problem of the granted constitution being shelved. One misguided approach, which has long influenced the interpretation of European nineteenth-century constitutional systems, has been to consider them

[91] L. Lacchè, 'Governo rappresentativo e principio parlamentare: le *Chartes* francesi del 1814 e 1830', 8 *Il Giornale di storia costituzionale* (2004) p. 99, at p. 120.

[92] L. Lacchè, 'Pellegrino Rossi e la Monarchia di Luglio', in Id. (ed.) *Un liberale europeo: Pellegrino Rossi (1787-1848)* (Giuffrè 2001) p. 69, at p. 108.

[93] Lacchè, *supra* n. 70, at p. 188 ff.

[94] Laquièze, *supra* n. 8.

[95] B. Constant, 'Observations sur le discours prononcé par S.E. le ministre de l'Intérieur en faveur du projet de loi sur la liberté de la presse' (1814), in A. Roulin (ed.), *Oeuvres* (Gallimard 1957), p. 1248, at p. 1249; Id., 'De l'état constitutionnel de la France', 1, mardi 15 juin *La Renommée* (1819), in E. Harpaz (ed.) *Recueil d'articles. Le Mercure, la Minerve et la Renommée*, II (Droz 1972) p. 1233.

[96] L. Lacchè, 'Coppet et la percée de l'Etat libéral constitutionnel', in L. Jaume (ed.), *Coppet, creuset de l'esprit libéral. Les idées politiques et constitutionnelles du groupe de Madame de Staël* (Economica-Puam 1999) p. 135, at p. 155.

only from the standpoint of 'parliamentarisation'. This led to a progressive, linear and inexorably determinist interpretation of such systems, and one that did indeed rely upon the parliamentary paradigm.[97] The nineteenth century did not turn its back upon the conflagration of the French Revolution. If anything, it was the century in which the two great unresolved problems of constitutional history, the question of the head of state in the person of a hereditary monarch and that of the form and structure of the government, occupied a central position.

More recent historiography has advanced a more careful and nuanced analysis of this complex, hybrid and fiercely contested constitutional constellation. Representative government is a battlefield and the outcome seemingly always in doubt.

In Germany, the modernisation of the *monarchische Prinzip*[98] proposed in 1845 by Friedrich Julius Stahl postulated the definitive abandonment of its class-territorial[99] nature, which had influenced the vagueness of the organising formulas of what the liberals of the *Vörmarz* derogatorily termed *Scheinkonstitutionalismus*. The idea of state (*Rechtsstaat)* had, as a principle, to be constructed around the legitimate monarch and no longer around an 'absolutist' vision. The political-ideological character that pervaded this reinterpretation tended, in its later variants, to give rise to a monarchic-constitutional synthesis[100] which in practice was able to discipline and govern the antagonisms and conflicts occasioned by socio-economic dynamics.[101] Even amongst liberals, 'parliamentarianism', feared as a political-constitutional evolution liable to reflect the 'democratic' development of the wider society, caused apprehension and hesitation. 'A true monarchy exists – wrote Stahl in 1848 – only where the Prince possesses a power, albeit limited, but autonomous, where his personality and his personal will have a meaning for public order.'[102] To call to mind a theory dear to Donoso Cortès, the unity of powers in

[97] Regarding this profile, for a more detailed discussion, *see* Lacchè, *supra* n. 91.

[98] On the constitutive elements, *see* C. De Pascale, 'Sovranità e ceti in Friedrich Julius Stahl', in 13 *Quaderni fiorentini* (1984) p. 431 ff.

[99] Regarding class transformation, in *Reichsstände*, *see* De Pascale, *supra* n. 98, at p. 428.

[100] On this concept, *see* Hintze, *supra* n. 44; O. Brunner, 'Vom Gottesgnadentum zum monarchischen Prinzip', in *Das Königtum* (Lindau 1957) p. 279 ff.

[101] Cf. especially H. Brandt, *Landständische Repräsentation im deutschen Vormärz. Politisches Denken im Einflusssfeld des monarchischen Prinzips* (Luchterhand 1968); H. Boldt, 'Zwischen Patrimonialismus und Parlamentarismus. Zur Entwicklung vor-parlamentarischer Theorien in der deutschen Staatslehre des Vormärz', in G. Ritter (ed.) *Gesellschaft, Parlament und Regierung. Zur Geschichte des Parlamentarismus in Deutschland* (Droste 1974) p. 77, at p. 100; Id., *Deutsche Staatslehre im Vormärz* (Droste 1975); H. Brandt, *Der lange Weg in die demokratische Moderne. Deutsche Verfassungsgeschichte von 1800 bis 1945* (Wissenschaftliche Buchgesellschaft 1998); R. Wahl, 'Die Bewegung im labilen Dualismus des Konstitutionalismus in Deutschland. Möglichkeiten und Grenzen einer Entwicklung zugunsten des Parlaments', in Lacché and Manca, *supra* n. 48, p. 95, at p. 126.

[102] F.J. Stahl, *Die Revolution und die constitutionnelle Monarchie, eine Reihe ineinandergreifender Abhandlungen* (Hertz 1848) p. 66, at p. 67.

pure monarchy is a way of weakening what is manifold and contradictory and inevitably postulates the theme of conflict and constitutional pluralism.

The constitutional profile of the Belgian monarchy is significant in this regard also, serving as it does as a counter-example. After the Belgian Revolution of 1831, the new constitution, destined to become an important 'model' for later constitutions,[103] unambiguously affirmed the principle of national sovereignty. Article 25 established that 'All power emanates from the nation. They are exercised in the manner established by the Constitution.'[104] The political-constitutional centrality of parliament was confirmed in the exclusive and wide-ranging competence of the legislature even with regard to matters which had previously come within the scope of administration. By assigning executive power to the monarchy, the constitution led to the establishment of a 'representative constitutional monarchy, under a hereditary head.' It has been observed that the monarchy in Belgium became 'an organising element in the balance of the powers of the liberal State.'[105] The limitation of royal power is seen as one of the fundamental conditions of the Belgian constitutional monarchy, and in particular as the feature that guarantees it an 'essentially tempering' character.[106] The king may, therefore, exercise those prerogatives[107] formally attributed to him by the constitution and by special laws (Article 78).

Yet, notwithstanding these and other institutional characteristics of the Belgian monarchy, at the dawn of the twentieth century, Oscar Orban wrote that

> in limited monarchy, everything for which provision has not been made pertains to the government; in constitutional monarchy, everything which is not regulated pertains to the legislature, but everything that is deemed to depend on the executive authority is or should be enough to render it a plenitude of power, a sum of deter-

[103] Lacchè, *supra* n. 1.

[104] 'Tous les pouvoirs émanent de la nation. Ils sont exercés de la manière établie par la Constitution.' On Art. 25, *see*, J. Gilissen, 'La constitution belge de 1831: ses sources, son influence', X *Res publica* (1968), p. 126, at p. 127.

[105] Following F.J. Stahl, *see* Schmitt, *supra* n. 49, at p. 289. On the type of constitutional monarchy created in Belgium in 1831, especially in relation to the *monarchische Prinzip* of the Prussian tradition, cf. the dissertation of R. Smend, *Die Preussische Verfassungsurkunde im Vergleich mit der Belgischen* (Dieterich 1904); Hintze, *supra* n. 44; W. Conze (ed.), *Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert* (Klett 1967); Böckenförde, *supra* n. 78, p 278, at p. 279; Lacchè, *supra* n. 26; Lacchè, *supra* n. 1.

[106] Th. Juste, *Le Congrès National de Belgique, 1830-1831 précédé de quelques considérations sur la constitution belge* (C. Mucquardt 1880) p. 394.

[107] On the concept of power and prerogative in Belgian public law, *see* J. Velu, *La dissolution du Parlement* (Bruylant 1966) p. 54.

> minate powers, certainly, but a whole, a sufficiently broad generality to be opposed to the special powers of judging and legislating.[108]

This was because the Belgian kings did not hesitate to 'bend' the logic of parliamentary government to the advantage of the monarchy:

> He [Leopold] went as far as replacing the republican interpretation which the Parliament gave to the constitution, with his monarchic interpretation and, respecting scrupulously the fundamental pact which he had sworn to observe, he managed to endow the government with indispensable prerogatives to maintain the State.[109]

The concept of the *influence* of the Crown is at the basis of the prevailing interpretation. Not even in Belgium can the evolution of the form of government be portrayed as a smooth, straightforward process of parliamentarisation of the system. If such a process represents an intrinsic line of development, the logic of the balance between the 'sphere of autonomy' of the monarch and the 'juridical primacy of legislative power' continued to produce, throughout the nineteenth century (and beyond), swings from one side to the other, in line with shifting political circumstances and the diverse personalities of the individual monarchs.

The granted constitution, understood as a monarchic constitution, was, for a century, common ground for developments and applications which were far from being predictable. The deliberate vagueness and flexibility of the constitutional formula, which was an intrinsic feature of the constitutionalism of the Restoration, was in fact a *programme,* to interpret and flesh out at will.[110] The political theology elaborated by the reactionary writers of the Restoration was undoubtedly a powerful tool in the analysis of the *undecided* constitution, a constitution shaped by the contradictions of a liberal constitutionalism which accepted the *octroi* and the idea of the autonomous will of the monarch and, at the same time, sought to limit, if not annul, the originally personal dimension.[111] As a consequence the

[108] 'Dans la monarchie limitée, tout ce qui n'est pas prévu appartient au gouvernement; dans la monarchie constitutionnelle, tout ce qui n'est pas réglé appartient au législatif, mais ce qui est prévu comme dépendant de l'autorité exécutive est ou doit être suffisant pour faire d'elle encore une plénitude de puissance, une somme de pouvoirs déterminés sans doute, mais un ensemble, une généralité assez vaste pour être opposée aux pouvoirs spéciaux de juger et de légiférer', O. Orban, *Le droit constitutionnel de la Belgique* (Dessain, Giard & Brière 1906-1911) II p. 245, at p. 246.

[109] 'A l'interprétation républicaine que le Parlement donnait à la constitution, il [Leopold] est arrivé à substituer son interprétation monarchique et, tout en respectant scrupuleusement le pacte fondamental qu'il avait juré d'observer, a réussi à doter le gouvernement des prérogatives indispensables au mantien de l'Etat', H. Pirenne, *Histoire de Belgique des origines à nos jours* (1974) IV p. 387, at p. 388.

[110] L. Lacchè, 'Responsabilità ministeriale', 40 *Scienza & Politica* (2009) p. 13, at p. 23.

[111] C. Schmitt, *Zur Staatsphilosophie der Gegenrevolution (De Maistre, Bonald, Donoso Cortés)*, in Schmitt, *supra* n. 9, p. 75, at p. 77.

difficult separation of *régner* from *gouverner* was destined to be one of the greatest political-constitutional problems of the nineteenth century.[112]

[112] Regarding this theme, *see* L. Lacchè, '"Gouverner n'est point administrer. Régner est encore autre chose que gouverner." Le rétour d'un vieillard: P.-L. Roederer et le problème du "gouvernement" pendant la monarchie de Juillet', in *Etudes à la mémoire de François Burdeau* (Litec 2008) p. 125, at p. 145.