

Reconsidering Constitutional Formation. Research challenges of Comparative Constitutional History

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Introduction

The traditional approach in legal history focuses on constitutional documents, believing in a nominalistic autonomy of constitutional semantics. Looking onto the European Constitutionalism of the 19th century, even a written constitution cannot statically fix the administrative-legal relations of power, as they depend on the legal interpretation and the conflict mentality of the political decision-makers. In reference to the 21st British Legal History Conference on *Law and Authority* and to the ERC-Advanced Grant ReConFort¹, constitution is understood as an evolutionary achievement of the interplay of the constitutional text with its contemporary societal context, with the political practice and with the respective constitutional interpretation. Such a functional approach keeps historic constitutions from being simply log-books for political experts². It makes apparent how sovereignty³ as constituted power translates ways of thinking and opinions in the

Burckhardtean sense: sovereignty can only be exercised with the consent of the ruled. Even the constitutional cycle anticipated by Polybius has presupposed that the *politeiai* of monarchy, aristocracy and democracy degenerate, where sovereignty is not accepted or gambled away⁴.

The interest in the interdependencies between constitution and public discourse reaches the key goal legitimation. Thomas Paine's response to *Mr. Burke's attacks on the French Revolution* rests on the argument that legitimacy is not transmitted through tradition or established institutions, but rather solely through the consent and agreement of the citizens⁵. Not the text-body of the constitution, but rather the agreement of those to be ruled by the *pouvoirs constitués* creates sovereignty. For David Hume the discourse-dependency of the state power in his variations of the idea of an equilibrium of power is axiomatic: «it is [...] on opinion only that government is founded» (1758)⁶.

Sovereignty is considered to depend on the belief of the subjects and the political élites in its utility and legitimacy⁷. The 'belief in sovereignty' which went along with the founding act of forming a constitution becomes palpable in the 'religious affinities' of the constitutional preambles in the 18th century. Such an affinity does not mean the recourse of the constituents to divine authority for the written text, but rather the presentation of central constitutional guarantees as philosophical truths with a claim to eternal validity⁸. This is the context why the constitutional debates in the North American colonies are read as «statements of beliefs» («Gaubensbekenntnis der neuen Zeit»)⁹. To the religious affinities also belongs the constitutional precedence, with which the justification for the legal commitment of political power without social contract succeeds¹⁰. The auto-exemption of the Constitution refers to the reduction of the legal validity of Acts of Parliament on their constitutionality, claiming for itself not only validity, but accuracy according to the principles and truths¹¹. Regardless of formal constitutional amendments the precedence over any subsequent legislation amounts to the 'secular eternity'¹² of constitutions long before the polemic of the Hegelian legal philosophy¹³. Precedence as normative claim of a constitution to be a paramount law does not correspond with an increased legal enforceability of the constitutional text, but depends on constitutional communication.

The litmus test of the communication dependency of constitutions is their indecisiveness in crucial points. Interestingly, neither 1776 nor 1789 there is a fixed concept of the 'separation of powers': Montesquieu called for the division of powers

between the crown, nobility and middle class – however not for a functional separation of powers¹⁴. Jean-Jacques Rousseau infers the indivisibility of the state power from the indivisibility of popular sovereignty¹⁵. In the exercise of state power described in *Lettres Ecrites de la Montagne*, Rousseau deems the division of judiciary from government to be necessary, but not the division of executive and legislature¹⁶. Furthermore, the scheme for a representative model of government in the *Vues sur les moyens d'exécution dont les représentants de la France pourront disposer en 1789* (1788) by Emmanuel Joseph Sieyès is based on the Rousseauian «volonté générale unitaire, imprescriptible, possédée par la nation, déléguée et exercée par ses représentants»¹⁷. Correspondingly, Sieyès does not demand the separation of powers in his *Préliminaire de la Constitution: Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen* of July 20/21, 1789¹⁸.

Rather, the relationship between monarch and parliament is left open and exposed to the dynamics of the constitutional practise. The old dualism of monarch and the assembly of the estates is replaced by the balancing between the *pouvoirs constitués*. Their need for consensus can be specified by the necessary approval of the monarch to the laws, resolved by the people's representation or by the monarchical right to veto against legal proposals, be it definite or just dilatory. An acting of the monarch in accordance to the majority of the people's representation could result, particularly since the establishment of a trusting relationship was politically smart due to the budgetary right of the people's representations.

The scope of action for taring the monarchical and parliamentary forces was influenced by the 'renaissance' of the monarchy in the early constitutionalism. Under the impression of the Jacobin reign of virtue and terror and the struggle for resistance of the allied monarchies against the revolutionary army of the *Republique Française*, the republic got into antagonism with monarchy. It is no more the Aristotelian hypernym of aristocracy, monarchy and democracy. The republican connotation of a representational system based on the separation of powers falls prey to the antonymy Republic-Monarchy¹⁹. Therefore, trust in a strong representation of the people, as the French Constitution of 1791 breathes, is hardly found among European Constitutions around 1800. Apart from the Norwegian constitution of Eidsvoll (May 31, 1814), echoes of the French September Constitution are just found in the short-lived Spanish Constitution of Cádiz 1812.

1. *Monarch and parliament in the French September Constitution*

The French September Constitution of 1791 does refer the *pouvoir constituant* neither to the crown nor to the people. Sovereign was the nation (Art. Tit. III, Art. 1)²⁰, from which all state power derived (Art. Tit. III, Art. 2)²¹. Sovereignty of the nation not only manages to integrate monarchical and popular sovereigns, but also joins the constitutional idea with national integration. Symbolizing the revolutionary pathos for equality, the idea of a French nation was expanded from that of a few privileged to all of the citizens, with a corresponding

census. Thus, the French constitution of 1791 created a right of citizenship (Tit. II, Arts. 2-6)²², and announced civil equality (Tit. I)²³, even though three sevenths of the French men because of poverty and French women altogether were excluded from the right to vote (Tit. III, Ch. I, Sec. II, Art. 2)²⁴, and the right to stand for election (Tit. III, Ch. I, Sec. III, Art. 3)²⁵.

The monarchical principle was held compatible with the sovereignty of the nation (Art. Tit. III, Ch. II Sec. I, Art. 2)²⁶. The executive power was vested in the King and his ministers (Tit. III, Art. 4)²⁷. The legislative power was vested in the National Assembly as a single-Chamber legislature, which emphasised the unity of the nation and avoided a conservative upper house (Tit. III, Art. 3, Tit. III, Ch. I)²⁸. The right of legislative initiative was only accorded to the single-Chamber legislature (Tit. III, Ch. III, Sec. 1, Art. 1, No. 1)²⁹. The meeting of the legislative body was regulated in the constitution (Tit. III, Sec. V, Art. 1 & 5)³⁰, and not dependent on the monarch's willingness. The king could not dissolve the National Assembly (Tit. III, Ch. I, Art. 5)³¹. The ministers were appointed and dismissed by the king (Tit. III, Sec. IV, Art. 1)³², and assumed by counter-signature (Tit. III, Sec. IV, Art. 4)³³ the legal responsibility for the legality of the acts of government of the king (Tit. III, Sec. IV, Art. 5)³⁴. Only two particularities modified the strict division between the executive of the king and his ministers from the single Chamber legislature of the National Assembly: the king had a suspensive veto in the legislative procedure (Tit. III, Ch. III, Sec. 3, Art. 1 & 2)³⁵, and the legislature had a right of participating in foreign policy (Tit. III, Ch. III, Sec. 1, Art. 2)³⁶. The unified judiciary

supported by jury courts was independent from the executive and the legislature (Tit. III, Art. 5).

2. *Continuities with the pre-revolutionary class-based state in the Polish May Constitution*

The openness of the sovereignty of nation to continuities with the pre-revolutionary class-based state becomes manifest when considering the Polish May Constitution 1791, which was agreed four months earlier than the French September constitution as a constitutional contract between the assembly of the nobles and «Stanislaus Augustus by God's Mercy and the Will of the People King of Poland» (Introduction to the Polish May Constitution 1791)³⁷. The sovereignty of the nation is claimed to be the origin of all state authority (Article 5), even though since the second and third division of Poland a nation in the sense of a politically mobilised people is lacking³⁸. The Polish nation in the sense of the Preamble is not a sovereign people of free and equal citizens, but rather – in continuity to the old feudal understanding of the aristocracy as the «foremost pillar of the freedom of the present constitution» (Art. 2 May Const. 1791) – it is the nation of the aristocracy. Hence, contrary to the French September document the Polish May constitution did *not* establish a new basis of legitimation for modern statehood after a revolutionary break with inherited power structures. There was no declaration of rights, only religious and cultural freedom was mentioned in the context of the fixing of Catholicism as the state religion in Art. 1.

Significant is the 'indetermination' of the May Constitution in terms of the coexistence of legal and parliamentary accountability for Ministers. The monarchical executive (Art. 7) was opposed to a constant two-Chamber legislature of representatives of the regions and senators (Art. 6). As «father and head of the nation», the monarch was not accountable (Art. 7). For any directives, the ministers appointed by the King assume legal accountability by counter-signature. Alongside this, in allusion to the two-thirds majority of the American impeachment process, Art. 7 provided for a parliamentary vote of no confidence: «In the case however, that both Chambers united in the Imperial Parliament demand, with a majority of two thirds of secret votes, the removal of a minister from the Council of State, or from his position, the king shall be bound to appoint immediately another in his place» (Art. 2 May Const. 1791).

Regardless of the pre-revolutionary continuities the May Constitution has a pioneering role by the adjustment of its constitutional precedence. It is the only constitutional document of the revolutionary era which expressly states the precedence of the constitution: «to this constitution, even all further decisions of the present parliament [shall] correspond in every respect» (Introduction, May Const. 1791). It is a desideratum to explain this progressiveness. Probably, the influence of the American constitutional movement on the Polish constitutional debate during the so-called 'Great Sejm' of 1788-1792 and the nexus between constitution-formation and the fight for national independence produced the factual open nature of the Polish May constitution. It is the argumentation of the American revolutionaries, opposing

the 'unconstitutional' taxation of the colonies by the Westminster Parliament against the constitutionally legitimate resistance of the colonies, which suited for the legitimization of the Polish resistance against the Russian Tsarina, the Prussian king and the Hapsburg Kaiser of the Holy Roman Empire. Fascinatingly, the reception and reflection of the American fight for freedom in contemporary manifests and pamphlets in Poland was the rhetorical arsenal by both the 'patriotic' progressive forces of reform as well as by the 'old republican opponents of the constitution' in the various press organisations to justify their own pretensions in the constitution-formation process. According to the *Gazeta Narodowa i Bocza* and *Pamiętnik Historyczno-Polityczny* reporting on the debates in the *Sejm* about the rights of co-decision of the city population, the idea of the new American society of no class differences played a crucial role. On the other hand, in the defense of the traditional Polish noble republicanism with elected monarchy and *liberum veto* in the pamphlets of *Field Hetman Seweryn Rzewuski* (1789/90), American federalism is also conceived as a central point of referral.

3. The echoes of the French September Constitution in the Spanish Constitution of Cortes

The constitutional process in Spain is connected with the anti-Napoleonic resistance³⁹. The General and Extraordinary Cortes of Cadiz (*Cortes generales y extraordinarias*) have the constituent power (*el poder constituyente*), the monarch becomes the constituted power: «Don Ferdinand the Seventh, by the grace of God, and by

the Constitution of the Spanish Monarchy, King of Spain» reads the preamble of the Constitution of Cádiz of March 19, 1812⁴⁰.

The reference to the sovereignty of the nation in Title 1, Art. 2⁴¹ is no rejection of monarchy, but is rather just directed against the usurpation claims of the French imperial family Bonaparte⁴². Thus, only one day after the festive inauguration of the Cortes on September 24, 1812⁴³, the order followed that the proper title of Charles IV and Ferdinand VII was 'Majesty'⁴⁴. Thanks to its sovereignty, the nation is able to annul the declaration of abdication given in Bayonne in favour of Napoleon, and to lay down «the laws and conditions, under which its kings accede to the throne»⁴⁵. The deduction of monarchical power from the sovereignty of the nation represented by the Cortes alone was considered revolutionary by contemporaries⁴⁶. Popular sovereignty in the sense of Rousseau's *volonté générale*, and the unlimited sovereignty of the people embodied in the French National Convention 1792-1795, however, is not what the Cortes had in mind: they did not act as representatives of their voters, but rather as sovereign representatives of the nation⁴⁷.

The centrepiece of the constitution of Cádiz is the legislative power of the Cortes⁴⁸, as the extent of its third title shows with its 140 articles. The parliamentary power is expanded far beyond the French role model of 1791⁴⁹. This resulted not only from the circumstantial weakness of the transitional government (*regencia*) during the War of Independence⁵⁰, but is rather, above all, due to the constituents' admiration for the English parliamentary sovereignty⁵¹. The fascination for the English parliament is not singular, the constitutional movement

in Sicily 1812 and the Ionian Islands 1816 also evolved estates-based parliamentary structures oriented towards English constitutional practice⁵².

The primacy of the parliament has various manifestations in the constitution of Cádiz. The *Cortes* are, together with the monarch, entitled to legislation (Art. 15, 142). Every representative and every member of the government has the right of legislative initiative⁵³.

The monarch only has a suspensive right to veto, limited to two years (Art. 147). If he denies his approval to a statute, the bill can be put forward a second time in the following session (Art. 147). A second refusal has suspensive effect, until the *Cortes* can override the monarchical veto with a two-thirds majority in the third year (Art. 148, 149)⁵⁴. The exclusion of the executive from participation in parliamentary sessions also strengthens the superiority of the *Cortes*. Although the sessions were public, neither the King nor the ministers were allowed to attend them (Art. 124 et seq.)⁵⁵. Furthermore, Art. 131, N° 26 stipulates a provisional presumption of the *Cortes'* competence in constitutional issues⁵⁶.

The precedence of the parliament over the monarchical executive (Art. 16, 170) is evident: The monarchical powers are regulated enumeratively in Art. 171 and bound to detailed participation rights of the *Cortes* (Art. 172). For instance, the catalogue of Art. 172 forbade the suspension of the *Cortes*. Secondly, the King could appoint his state ministers (Art. 171 N° 16), who in turn were parliamentary accountable to the *Cortes* (Art. 226). Thirdly, the *Cortes'* authority to recognise the Prince of Asturias as the legitimate heir to the throne (Art. 210), their right of recommendation for the

appointment of members of the Council of State (*Consejo de Estado*) according to Art. 235⁵⁷ and the obligatory accession oath of the King before the plenum (Art. 173) document the derived monarchical power⁵⁸.

3.1. *Power politics of the Congress of Vienna and role modelling of the French Charte Constitutionnelle*

3.1.1. *Monarchism of the Congress of Vienna*

The equation of monarch and nation was the credo of the Congress of Vienna. For the United Kingdom of the Netherlands and Congress Poland, both newly designed by the ambassadors of European states chaired by Prince von Metternich. Both in the *Grondwet voor het Koninkrijk der Nederlanden* of August 24, 1815 and in the constitution for Congress Poland of November 27, 1815, the crown symbolized state unity in a newly construct state, regardless of a national sense of solidarity among the population⁵⁹.

3.2. *Restoration of the Bourbonian monarchy*

The role model of the monarchical restoration after the Wars of Liberation and the defeat of the Napoleonic France was the *Charte Constitutionnelle* of June 4, 1814, combining monarchy with constitutionalism after the return of the Bourbons⁶⁰. The monarch by the Grace of God⁶¹ Louis XVIII⁶² appears as constituent sovereign⁶³. The *Charte Constitutionnelle* was one-sidedly imposed by the

king, and its label as charter (*charte*) tried to create the impression of a royal privilege. The *Charte* avoids the term sovereignty, the reference to authority (*l'autorité tout entière*)⁶⁴ in the preamble permits the subsumption of pre-revolutionary positions of power of the doctrine of divine right⁶⁵. Due to his absolute power⁶⁶, the monarch is the sole bearer of executive power (Art. 13), of the exclusive right of legislative initiative (Art. 45, 46)⁶⁷, and of jurisdiction (Art. 57)⁶⁸.

Nevertheless, the restoration of the French monarchy in 1814 was, despite the objectives of the *Charte* to «preserve the rights and amenities of our crown in its entire purity»⁶⁹, not able to whisk off the outcomes of the revolution. Above all, the renewed monarchy held on to the Napoleonic administrative system with the appointment of all office bearers by the centre. Furthermore, the *Charte* seeks the support of the previous political elite. The new (Napoleonic) nobility is assured of the renunciation of the sale of the national property, of the guarantee of national debt and retention of its titles (Art. 9, 70, 71). Legislation and sovereignty in budgetary matters rested with a bicameral legislative after English models with a Chamber of pairs and a Chamber of deputies.

A part of the basic rights of the Constitutions of 1791, 1795, 1799 was guaranteed. Being 'political rights of the French' however, they do not seem to be expressing a natural freedom, antecedent to and to be recognised by the state, as the Declaration of the Rights of Man and the Citizen of 1789 proclaimed, but rather rights, which the monarch grants his subjects.

3.3. German Constitutionalism in-between the German Federal Act and Final Act of the Congress of Vienna

Paradigmatic for the role modelling of the *Charte Constitutionnelle* are the German estate constitutions⁷⁰, enacted according to Art. 13 of the German Federal Act (*Deutsche Bundesakte*)⁷¹ of June 8, 1815. «Since the German Confederation (*Deutscher Bund*), except for the free cities, is constituted of sovereign princes, all state authority has to, according to the hereby given basic concept, stay united within the head of state, and the sovereign can be bound by an estate constitution only regarding the exertion of certain rights to the participation of the estates», as Art. 57 of the Final Act of the Congress of Vienna (*Wiener Schlussakte*) of May 15, 1820 formulates the monarchical principle⁷². In the monarch alone rests the state authority⁷³. The constitutional self-commitment of the exertion of power⁷⁴ by constitutional imposition or agreement could no longer be one-sidedly repealed by the monarch⁷⁵.

The untouched, rather, according to Art. 57 Final Act of the Congress of Vienna (*Wiener Schlussakte*), even affirmed sovereign plenitude of power indicates a continuity of Early German Constitutionalism with the absolutist territorial sovereignties of the 18th century⁷⁶. Here and there the bottom line is the orientation of the monarch towards the law, the rational *ratio legis*. Just as the enlightened absolutist granting of laws, the early constitutional guarantees are legal positions awarded by the state⁷⁷. The early constitutional guarantees are ensured in the sections on rights and duties of the citizens. The Nassau patent 1814, the Bavarian constitution 1818, the constitu-

tion of the Grand Duchy of Baden 1818 and the constitution of Wuerttemberg 1819 all avoid the term 'fundamental rights' or 'human rights'. Guaranties are not justified through natural law, but just through positive law as stately awarding of the sovereign by virtue of monarchical jurisdiction. Thus, the latter do not entail civil rights and liberties antecedent to the state, but rather the self-commitment of the monarch, not to randomly deprive the litigants of the guarantees, however without determining the borders of arbitrariness for sovereign jurisdiction.

Thus, the early constitutional guarantees manifest as ineffective against the arbitrariness of Metternich's system according to the appraisal of Heinrich Albert Zachariä:

However, the seemingly meaningful guarantees of the inviolability of the freedom of a person and of property, the freedom of conscience et cetera were, most often due to their indefinite wording, not able to have a substantial importance in reality and they were nearly totally annulled in their practical importance due to the lack of other crucial guarantees of a legal freedom, under the pressure of censorship, by virtue of the rule of the inquisitory process and the pauperization of legal protection⁷⁸.

The tyrannical justice of the 'demagogues pursuits' revealed the weakness of the early constitutional guarantees, which were not recognized as human rights and could thus be restrained by law any time. The constitutional self-commitment of the monarch to abandon arbitrariness was not sufficient to ensure freedom and safety of the citizens.

4. *From the French double trust-parliamentarianism to the concurrency of popular and monarchical sovereignty in the Belgium constitution*

4.1. *Constitutional movement between monarchical influence and parliamentary majorities after the Paris July revolution*

The appointment of Martignac 1828 constituted a certain concession of Charles X. (1757-1836) to the majority situation in the parliament, but remained an intermezzo in the time of Restoration 1814, 1830. The king only took this step half-heartedly, so that the shift in power in favour of the parliament was not permanently realized⁷⁹. Rather, he ended up in an unconstitutional abuse of emergency regulations and dissolved⁸⁰ the newly elected Chamber of representatives because of their liberal majority, even before it could convoke. The liberty of the press was virtually abandoned and the election census was raised in favour of the conservative big landowners. The population of Paris stood up against these July *ordonnances* and achieved the overthrow of Charles X⁸¹.

In the revision of the *Charte* of 1814 by the Chamber of representatives in cooperation with the Chamber of Pairs, substantial changes compared to 1814 had taken place under the revolutionary pressure, even before the July revolution: Both Chambers received the right of legislative initiative (Art. 15). The Chamber of Pairs was no longer a privy Chamber of nobles with hereditary seats, but rather an assembly of notables, to which also wealthy citizens could be appointed for life (Art. 23). The right to make regulations was subject to the primacy of law (Art. 13). There was no longer a general

authorisation for ordinances 'for national security' (Art. 14 in the end of the 1814 Charte: «et fait les règlements et ordonnances nécessaires pour l' exécution des lois et la sûreté de l'État»⁸²). Apart from that, the strong monarchical executive persisted (Art. 12). The ministers were appointed and dismissed by the monarch and took over legal responsibility for the lawfulness of monarchical acts of government by contra-signature (Art. 12). This legal responsibility was sanctioned by ministerial impeachment. A political responsibility of the ministers was not envisaged.

A shift of power in favour of the parliament did not happen, because a firmly structured party system lacked in the France of the July monarchy. There were only the two big movements of the liberal conservative '*résistance*' (*Centre droit* and *Doctrinaires*) and the reform-liberal '*mouvement*' (*Centre gauche* and *Gauche dynastique*). Republican groups, whose followers mostly belonged to the middle and lower classes were not represented in the Chamber of Deputies because of the high electoral census. Further, many civil servants (*députés fonctionnaires*)⁸³ were among the deputies. Thus, the influence of Louis-Philippe on the formation of government remained uncontested⁸⁴. Just four of overall ten prime ministers between 1830 and 1840 could provide the office next to the crown with a personal profile (Perier, de Broglie, Thiers, Guizot). The monarch never appointed a government that was contrary to cameral majority, so that his appointments actually showed the monarchical influence, but did not contravene parliamentary policies.

However, Louis-Philippe acted explicitly against the parliamentary majority when he dismissed the government of Thiers twice

in 1836 and 1840, which had to resign not because they lacked support in the Chamber of deputies but because of the quarrel with the King about questions of foreign policy⁸⁵.

However, the parliament did not react to these dismissals with a challenge against the King as in England 1835 and 1841, but it rather tolerated the newly formed cabinet⁸⁶. Even though the government Soult-Guizot could have practiced a policy independent from the King with the help of parliamentary majority after the electoral victory of 1846, the relationship of trust to the monarch remained strong. Thus, research agrees that Guizot's powerful position in the cabinet and his long term of government 1840-1848 can be explained directly with the good relationship to Louis-Philippe and the mutual agreement of important political landmark decisions⁸⁷. The necessity of balancing the monarchical government and the other constitutional powers was formulated by François Guizot, Prime Minister of the July monarchy 1840-1848: «Le devoir de cette personne royale... c'est de ne gouverner que d'accord avec les autres grands pouvoirs publics...»⁸⁸. Consequently, an ongoing need for negotiation about the limitations of the monarchical competencies about the responsibility of the ministers and about the treatment of the Chambers in order to obtain the majority, originates according to Guizot's argumentation:

Quelque limitées que soient les attributions de la royauté, quelque complète que soit la responsabilité de ses ministres, ils auront toujours à discuter et à traiter avec la personne royale pour lui faire accepter leurs idées et leurs résolutions, comme ils ont à discuter et à traiter avec les chambres pour y obtenir la majorité⁸⁹.

Thus, a fluent passage from the constitutional to the parliamentary system can be observed. Evident for this is the understanding of the constitutional practice after 1830/1831 as shaped in French research as '*parlementarisme à double confiance*'⁹⁰: the government of the monarch is admittedly formally not bound to the parliamentary majorities, however, their consideration is political normality. Thus, a substantial boost in parliamentarisation took place in France, the fluent passage from the constitutional to the parliamentary system was accelerated.

The *Charte Constitutionnelle* 1830 is not imposed, but rather agreed upon between the *chambres assemblées* and the monarch⁹¹. The appointment of Louis-Philippe as king by the *chambres assemblées*, who took an oath on the *Charte* at August 9, 1830, makes the monarchy a *pouvoir constitué*. This also shows the changed imperial title: The Duke of Orleans, who descended from a branch line of the Bourbonian Royal House, could have been coronated as Philippe VII, 'King of France'⁹². Contrary to that he calls himself Louis-Philippe and reigns as 'King of the French' a people that appoints their 'Citizen King' in its own right. The Bourbonian *fleur-de-lys* gives way to the revolutionary tricolour. Louis-Philippe takes his coronation oath no longer on the Bible, but rather on the Constitution, and no longer in the coronation cathedrals of Reims or Notre Dame de Paris, but rather before the Chamber.

Because of the relatively high electoral census, the Chamber remained in the hands of the propertied bourgeoisie and the property-owning nobility (*juste milieu*). The July revolutionaries, coming from the middle and lower classes were not repre-

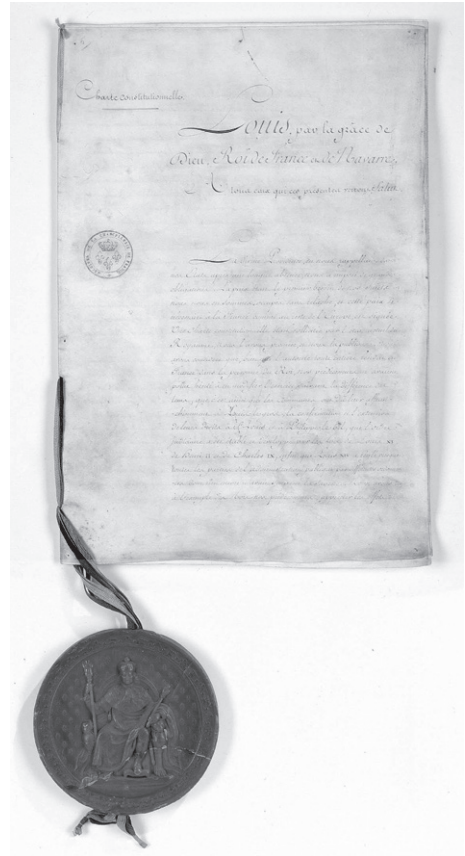
sented⁹³. Just as the civil reform movement attends to the extension of the right to vote since 1847⁹⁴, the February revolution of 1848 takes place under the impression of the incipient economic crisis. The civil-liberal modified constitutional monarchy is replaced with a radical-democratic (second) republic, that is abandoned just like the republic of 1793⁹⁵ by a dictator, who proclaims himself as Emperor Napoleon (reg. 1852-1870) shortly after⁹⁶. Even though the high census is just marginally extended, the first title of the constitution (Public Law of the French) begins with the guarantee of equality (Art. 1). Among the civil liberties, the freedom of opinion and the abolishment of censorship is emphasised (Art. 7).

4.2. *Openness of the Belgium constitution for parliamentary accountability beyond the text*

The French *Charte* 1830 led to a Europe-wide constitutional movement, whereas due to the connection of the constitutional movement with national struggles for freedom, the people and its representation were invigorated as constitutional factors. Like in France, a parliament took over the task of drafting a constitution in Belgium after the Revolution of 1830: The constituent assembly, dominated by the liberal-catholic union, is *pouvoir constituant*, the newly-to-be-appointed King is just taking on the role as '*pouvoir constitué*'. Contrary to the French model, the Belgian Constitution is not negotiated with the monarch, but freely proclaimed by a national congress in its own right⁹⁷.

Since the United Kingdom of the Netherlands was recreated at the Congress of Vienna in 1814/15 there were differences between the former territory of the Austrian Netherlands, later French territory since 1795, and the Northern part of the country. The new King William I did not manage to take the Belgian interests into account, or at least to permanently commit individual social or professional groups. The King scared the francophone liberal bourgeoisie away with his language policy of 'Netherlandisation', and his laicist school policy provoked the Catholic clergy. In this gap, a political union of Belgian liberals and Catholics was formed since 1827, which was suspiciously termed 'Monster-verbond' by the Dutchmen. Calls for freedom of language and teaching arose next to calls for freedom of the press, expansion of the right to vote and a liberalisation of the constitution. The heated political situation, which even sharpened due to the socio-economic crisis (Unemployment, harvest losses, price rise) 1829/30, vented under the impression of the French July revolution in August/September 1830 in a riot⁹⁸. All parts of the population voiced their approval, whereas the so-called '*classe moyenne*' played a pivotal role.

Against the paternalism of the Dutch part of the United Kingdom, the provisional government, formed by liberals and clericals declared the Independence of Belgium in Brussels at October 4, 1830. They scheduled the elections for a constituent body for November 3⁹⁹. Two days after the Declaration of Independence, the provisional government already assembled a committee at October 6, 1830, which was entrusted with the draft of a constitution¹⁰⁰. These constitutional consultations



La Charte del 4 giugno 1814

were motivated by the pursuit of autonomy against the Dutch royal house and the constitutional structures from 1815. The constitutional debates in the Belgian National Congress 1830-1831 are accompanied by the reports of the leading journal *Politique* (Liège), which was the flagship of the independence movement. Its *spiritus rector* Paul Devaux was secretary to the constitutional commission, being constituted by the provisional government at 6th October 1830 for drafting a constitution. Devaux's authorship of the constitutional guarantees together

with Jean Baptiste Baron de Nothomb can be traced by means of sources, which reveal a strong impact of the French examples 1791, 1814/30, of the British constitutional practice and conventions and of the Dutch Grondwet 1815. The national congress, elected by a mixed capital and educational census¹⁰¹, within which the liberal-catholic union with aristocrat big landowners, educated bourgeoisie, and clergy had a strong majority, largely confirmed the draft constitution, revised by Nothomb and Devaux¹⁰² and passed the new constitution at February 7, 1831¹⁰³. Though the Belgian National congress could decide in the constitutional question as *pouvoir constituant* sovereignly, he had to take numerous diplomatic questions into account when looking for a suitable candidate to the throne. The decision for Louis-Philippe's son failed on London's veto, whose support of the Belgian Independence depended on the ensuring of balance of power. Thus, Prince Leopold von Saxony-Coburg-Gotha, an uncle of the later Queen Victoria, who was related to the British royal house by marriage prevailed as candidate, who had earlier rejected the Greek royal crown. The National Congress eventually elected him as 'King of the Belgians' and in July 1831 the Duke proceeded to Brussels as King Leopold I¹⁰⁴.

In the publication formula of Belgian laws, the monarchic title is still called 'King of the Belgians'¹⁰⁵. All powers «are coming from the nation» (Art. 25)¹⁰⁶. They are exercised «as stipulated in the constitution» (Art. 25)¹⁰⁷. «The King has no other power, but the one, which the constitution and other laws made in accordance with the constitution formally attribute» (Art. 78)¹⁰⁸. The concurrency of popular sovereignty (Art. 25) and constitutional monarchy (Art. 78)

was unique and owed to the chance of unconditional freedom of decision-making in the Constitutional Consultations of the national congress after the Belgian War of Independence against the United Kingdom of the Netherlands¹⁰⁹. Within the separation of powers, the legislative power was mutually due to the King and the two Chambers, the House of Representatives, and the Senate. The Senate was an elected regional representation of notables¹¹⁰. Each of the three constitutional institutions had the right of legislative initiative (Art. 27 S. 1). The King had the executive power at his disposal «according to the regulations of the constitution» (Art. 29). The hierarchy of law and regulation, as established in the French July-*Charte* was taken over word by word in their constitution by the Belgian fathers of the constitution (Art. 67)¹¹¹. The Belgian constitution even went a step further in this question and devolved the control of non-legal ordinances and regulations to the Courts (Art. 107)¹¹². The judiciary was exercised by independent courts. A detailed catalogue of fundamental rights, reminiscent of the French role model of 1830 amended the equality of the Belgians before the law. The rights of the Belgians (Second Title of the Constitution) particularly entailed the freedom of assembly and of association (Art. 19, 20).

The monarch dismisses 'his ministers' just like in the France of the July monarchy (Art. 65). According to the French role model (Art. 12 of the 1830 *Charte*), the responsibility of the ministers is undefined in the text of the constitution (Art. 65 at the end). The ministerial responsibility by counter-signature (Art. 64) was normatively just regulated as judicial responsibility, which could lead to ministerial

impeachment (Art. 90). Neither the ministerial responsibility nor the parliamentary exertion of influence on the formation of government were envisaged in the text of the Belgian constitution, but they have developed on this basis in the constitutional practice. Thus, the Belgian constitution of 1831 provides an example for the evolutionary force of constitutional practice. This is proved by the different phases of the stronger and weaker influence of the monarch on the formation of government. Even though the Belgian constitutional system is often termed parliamentary monarchy in the literature since its early days¹¹³, it has to be differentiated with focus on analysing the constitutional practice and its reflection within the *Revue nationale*, which was founded by Paul Devaux 1840 at the taking up of the government Lebeau-Rogier.

In the early years after the revolution, Leopold I held a comprehensive right of political participation also regarding the formation of government, so that the ministers needed 'double trust' in the sense of the French connotation of *parlementarisme à double confiance*. The King also had great influence regarding the organisation of governmental policy. For that, the Union of Liberals and Catholics, already formed in the opposition against the Dutch, which also persisted in the new parliament, presented a good opportunity, because he received his own ample room in this time of loose party structures and an uncertain majority situation. Further, the members of parliament acknowledged the political decision making power of the monarch due to the uncertain situation of foreign policy, who was able to secure the Belgian Independence because of his personal contacts with England, Germany, and France.

Thus, the Belgian King projected national independence. Leopold made sure, that the ministers had a majority in the Chambers, but then needed also his trust. The new King naturally led the cabinet himself, and the governmental programme, which had to be realised, had to be discussed with him and possibly changed in his view. He had the '*cabinet du roi*' at his disposal for his personal policy planning, an own brain trust, independent of the parliament and not envisaged in the constitution¹¹⁴.

The government did not obtain a more independent position until the end of Unionism in 1846/57, since now the majority situation in the Chamber permitted the formation of homogenous cabinets, borne by one political belief. But even in this time a great independent scope of action regarding foreign policy remained with the King. His son Leopold II, who succeeded him to the throne in 1865, led the cabinet in fundamental questions himself, and he managed to dismiss a cabinet, entrusted with parliamentary confidence, thrice, even though the parliamentary system was firmly structured, and to enforce his own beliefs thereby. In the year of 1871, the King tried at first to edge individual ministers out of the government, and when he was not successful, he dismissed the whole moderately-clerical cabinet of Anethan. A few years later he brought down the strictly clerical government of Malou, which had altered the radically liberal school law of 1876 after the narrow election victory of 1884. Even though the King sanctioned the auditing law, he achieved the resignation of the government, which was superseded by the moderately-clerical cabinet of Beernaert, so that the aspired moderation was finally achieved by the King. In the year of 1907

a whole government had to step down because of a conflict with the monarch, when the cabinet of Smet de Naeyer was not any longer able to prevail against the stubborn old monarch in the conflict on the drafting of the annexation treaty of Congo by the Belgian state¹¹⁵. The revocations under Leopold II indicate, that the dualistic character partially continued and was regarded as fundamental principle in the field of foreign policy and the military.

5. *Improvised parliamentarianism in the Frankfurt National Assembly*

The ideologisation of a western kind of constitutional monarchy¹¹⁶ in Friedrich Julius Stahl's work *Das monarchische Prinzip* (*The Monarchical Principle*, 1845)¹¹⁷ seems to be still manifest in the cemented state of the art¹¹⁸ perceiving the Frankfurt draft constitution as a specifically German form of constitutionalism, whose dualism between monarch and popular representation is said to have precluded a parliamentary governmental practice. Such an ex post-explanation of the Paulskirche constitution 1848/49 separates the constitutional text from societal context, political practice and constitutional interpretation and tends to misunderstand German constitutionalism after 1849 as irreversible one-way road via the Prussian constitutional conflict to the exaggeration of the executive after 1933. Having in mind both the 'improvised parliamentarianism' in the National Assembly as well as the debates about ministerial accountability in June 1848, such a static opposition between constitutionalism and parliamentarianism is not plausible, espe-

cially in consideration of the fundamental politicisation due to the March Revolution.

The constitutional text carefully regulated the relationship between government and parliament by several provisions: The imperial right to convene and postpone the Reichstag (§§ 79, 104, 106, 109) is precisely fixed. It is only the *Volkshaus* (§§ 79, 106) that could be dissolved. The Emperor's veto concerning ordinary laws (§ 101 Abs. 2) and those altering the constitution (§ 196 Abs. 3) was only suspensive in nature and could be overcome by the *Reichstag*. Interior matters (Executive Committee, Membership, Standing Orders) could be regulated by the first and second Chamber without any need for participation of the executive (§§ 110-116). Beyond this, the text of the constitution left open many questions, in particular the question of the political-parliamentary accountability of the imperial government. The analysis of the public debate provides profound arguments that the consensus between the monarchical government and the parliamentary majority dominated political thinking in the National Assembly¹¹⁹. This can be even confirmed by the constitutional deliberations on ministerial accountability in June 1848. They reveal a consensus between left, 'old' and constitutional liberals about a political ministerial accountability, even if the text of the constitution framed it merely judicially. So for the representative Friedrich, of the Casino faction, an accountable Ministry could «not govern one day long without the majority of the National Assembly»¹²⁰. Accountability to parliament was thought of not as a problem to be clearly regulated by law, but as a question of political style. So in the explanatory statement of the draft for the law «Concerning the Accountability of the Imperial

Ministers», the expectation was expressed, that a minister «against whom a vote of no confidence is pronounced, or whose behaviour becomes the object of constant complaint from sides of the house, will as a man of honour, resign»¹²¹. The political practice in the National Assembly corresponded to this. As long as the parliament was capable of functioning, the composition of the Imperial Ministry would be adapted to fit the changing majorities in the Frankfurt Parliament. The establishment of a minority cabinet in June 1849 provoked protest. The political linking of the government to the parliamentary majority was ultimately fostered by the compatibility between a mandate from the representative house and the assumption of ministerial office (§ 123)¹²². Together with the role modelling of the Belgian constitution in the Frankfurt consultations all this pleads for the possibility of a parliamentary governmental practice on the basis of the Imperial Constitution¹²³, had it come into force.

The possibility for a de facto parliamentary system of government on the basis of a 'constitutionalist' constitution corresponds with the openness of the 'Sovereignty of the Nation'¹²⁴, which Heinrich von Gagern addressed to inaugurate the Paulskirchen-assembly. Such a formula implies the unique and unlimited *pouvoir constituant* of the National Assembly and the claim of the nation to self-government. This avowal to the singular and unlimited *pouvoir constituant* of a not existing German nation does not make sense as a programmatic claim to self-government, but reflects the indecisiveness of the post-kantian liberalism between monarchical and popular sovereignty. It avoided the open commitment to popular sovereignty and thus the conflict with the monarchy,

enabling a consensual framework between imperial government and parliamentary majority.

6. *Italian costituzione flessibile*

The national unification of the Italian Peninsula and the 'Kingdom of the Two Sicilies' was modelled under the kingdom of Piedmont-Sardinia which was converted to the Italian cause as the best means of dislodging the Austrians. King Victor Emmanuel II of Piedmont-Sardinia 1861 assembled the deputies of the first all-Italian Parliament (*Parlamento Subalpino*) in Turin which proclaimed the Kingdom of Italy and declared the Savoy to be King of Italy. Even though the Statuto Albertino, 1848 decreed for Piedmont-Sardinia, is no product of a constitutional assembly but of royal counselors (*Consiglio di conferenza*), its extension 1860 to the kingdom of Italy should be relieved from stereotype comparisons with the Prussian Constitution 1850: The parliament act 1861, complementing the monarchical legitimacy by God's grace with the nation's consent¹²⁵, is a remarkable example for constitutionalisation by constitutional practice: *costituzione flessibile*.

In addition to this evolutionary constitution-drafting, the monarchical appointment of Cavour as Sardinian Prime Minister in 1852 stands for parliamentarianism by constitutional practice. Victor Emmanuel had to appoint him due to the parliamentary majority of his *destra storica*. This constitutional practice within the monarchical framework of the *Statuto* was named *connubio* in the public discourse and legitimated the government-driven consti-

tutionalisation using the plebiscites in Tuscany, Sicily, Emilia-Romagna and Naples to get around the claimed convention of a constitutional assembly.

Another challenge is the controversy on the monarchical constitutionalism in the Italian state of art. Already Umberto Allegretti¹²⁶ and recently Giorgio Rebuffa¹²⁷ have questioned the transition to parliamentarianism within the monarchical framework of the *Statuto* at all. Only the comparative analysis with the 'improvised parliamentarianism' in the Frankfurt National Assembly and the Belgian '*parliamentarisme à double confiance*' will solve the established dispute about the manner of government and the assessment of the political impact of the monarchy. The ReConFort-approach on constitutional realities will reveal conformities in parliamentarian forming of government continuing a side by side of monarch and parliament in foreign policy and military affairs in Belgium after 1865 and Italy 1876. Thereby, the national history of the '*anomalia italiana*'¹²⁸, of the 'German singularity'¹²⁹ or the '*singularité belge*'¹³⁰ will be reassessed.

7. Reconsidering Constitutional Formation: Basic patterns of constitutional communication as *tertia*

Summing up the outlined research challenges, the evolutionary understanding of forming constitutions by text, societal context, political practice and respective constitutional interpretation allows and enables to elaborate appropriate *tertia comparationis* for comparative constitutional history. Taking into account the 'inde-

termination' of constitutional semantics and their interference with practice and interpretation leads to the basic patterns of constitutional communication as *tertia comparationis*. The basic patterns of constitutional communication Communication by constitutionalisation – Communication by constitutional practice – Communication by constitutional interpretation can serve as points of comparison both in a synchronic comparison and in a diachronic projection of constitutional paradigms. Given the hermeneutic circle of each comparison, such abstract categories evade the identification patterns of national historiography by institutions.

The above mentioned examples of constitutional formation, predominantly, happened in the stress field of external hegemonic powers (Polish Partitions, French occupation of Spain during the Napoleonic wars, Belgian secession from the United Kingdom of the Netherlands, German Restoration under the big four of the Vienna Congress, Franco-Austrian rivalry over Italian territories) or can be seen in the light of internal rivalries between ethnic-cultural or language factions (competing models for citizenship in post-1815 German territories and the Habsburg Empire, conflicts between Flames and Walloons). Starting with the Polish May Constitution and the French September Constitution 1791 the 'European' atmosphere of departure created a cross-border publicistic interest. Especially where constitutional formation has a key role for 'national' self-determination under external encroachments, publicistic debates on constitutional matters do not represent technical items for specialized elites, but were the mouthpiece of a general 'politi-

cised' public. In a general atmosphere of upheaval the reports of constitutional affairs are at the core of a fundamental politicisation of the broader population.

Constitutional formation itself is communication: messages are the 'national' self-determination, the parenthesis beyond ethnic-cultural or language factions, the openness for prerevolutionary continuities and the indecisiveness between monarchical or popular sovereignty. Political practice communicates the protagonists' understanding of governing. This is not only true in constitutional conflicts, but also in normal business. Constitutional interpretation communicates thinking and believes of the juridical elite and has formative effects.

With the constitutional communication as point of comparison it can be handled, that even identical constitutional semantic has different meanings in the different national constitutions. The most prominent example is the 'national sovereignty', which is addressed to in the Polish May Constitution 1791 (Art. 5), in the Cádiz Constitution of 1812 (Title 1, Art. 2) and in the Belgian Constitution of 1831 (Art. 25), all following the exemplary character of the French September Constitution 1791 (Title III, Art. 1). Comparing these avouls to national sovereignty fails because of the different notions of nation in the different national constitutions: The aristocratic nuances in Poland, the independence-loving nuances in Spain and Belgium, the unification-longing nuances in Germany and Italy are incompatible with French revolutionary feeling for equality and the subsequent idea of a nation going from a small number of privileged, to citizens of the state, expanded with a corresponding census. The functional approach

to the avocations of national sovereignty reveals the communication of a compromise between popular and princely sovereignty. The nation is sovereign, from which all state power is derived, represented dually by popular representation and monarch. Inconsistently, the monarchical principle was held to be reconcilable with this, though the legislative power attributed to the national assemblies was not derived from the monarchical power. The meeting of the national assembly was governed by the constitution, and was not dependent on convocation by the king, who neither could dissolve the national assembly. The executive power was vested in the king and his ministers, who were appointed and discharged by the monarch. By counter-signature they assumed legal accountability for the legality of acts of government by the monarch. The programmatic compromise by national sovereignty becomes even clearer, as national sovereignty does not only integrate two sovereigns; it also joins constitutional thought with national integration.

Communication by constitutional practice and Communication by constitutional interpretation enable the comparative constitutional history to reflect constitutional conflicts not only by a static ex post view: Understanding the conflict management of the political protagonists as constitutional communication opens up the perspective for incompatibilities within the constitutional framework. This is true for the inbuilt incompatibility of the monarch's prerogative and the Chamber's legislative or budget rights in the constitutions throughout the 18th and 19th century. There seems to be invisible coincidence of the functionalisation of the monarchs as *pouvoirs constitués* by the

constitutionalism and their functionalisation as legitimacy 'ambassadors' for the international law of the Vienna Congress. Retrospectively, the successes of the Vienna Congress confirming the Paris peace treaty were communicated as implementation of the legal throne succession. This Metternich terminology of unalloyed monarchic sovereignty (Art. 57 Vienna Treaty) emerged from the 1830 challenge unaltered. Therefore, the constitutionalism of the 19th century was characterized by the incompatibility of the undivided monarchical prerogative and the Chambers' legislative or budget rights. Constitutional conflicts by the denial of budget and the dissolution of parliament paralysed the *pouvoirs constitués* and reached no solution within the constitutional framework. Not only can this be seen by Prussian monarch's recourse to the military, but also by Victor Emmanuel II dissolutions of the piedmontian parliament and forced new elections. His proclamation of Moncalieri 1849 also seems to be outside the constitutional framework.

The abstract categories Communication by constitutionalisation – Communication

by constitutional practice – Communication by constitutional interpretation allows the synchronic analysis of the transnational exchange of ideas and interplay of constitutional protagonists, delivering sustainable basics in the inner-European history of transfer. The analysis of the transnational reception of constitution by communication is innovative for legal science and legal history, as both are stuck to juridical notion of 'reception', banning the concept of transfer in the literature sciences or the socio-cultural comparison. The Advanced Grant ReConFort is among the first to combine comparative constitutional history and transfer history. This tie opens up substantial possibilities in the current changes in North Africa (Tunisia, Egypt) and Middle East (Syria). To establish European constitutional models as attractive for Arabic and Asiatic neighbours requires sustainable basics in the inner-European history of transfer.

¹ Keynote speech at the Twenty-First British Legal History Conference, held at the University of Glasgow from Wednesday 10 July 2013 to Saturday 13 July 2013, coinciding with the tercentenary of the foundation in 1713 of the Regius Chair of Law at Glasgow. 7th Framework Programme, "Ideas", ERC, Advanced Grant ReConFort, Reconsidering Constitutional Formation. Constitutional Communication by Drafting, Practice and Interpretation in 18th and 19th century Europe.

² Compare also U. Müßig, *Forschungsaufgaben. Probleme und Methoden einer europäischen Verfassungsgeschichte (Research tasks, problems and methods of a European constitutional history)*, in «Der Staat», n. 18, 2010, pp. 175-216.

³ According to the Max Weber's classical definition, 'power' means, within a social relationship, every chance (no matter whereon this chance is based) to carry through the own will (even against resistance). 'Sovereignty' on the contrary, is «the chance to

find obedience for a command of certain content from specifiable persons» (M. Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, edited by J. Winckelmann, 5th ed., Tübingen, Mohr, 1980, 1. part, Chapter I § 16, p. 28). The difference between the two concepts can also be recognized by the etymological basis (F. Kluge, *Etymologisches Wörterbuch der deutschen Sprache*, 24th ed., Berlin, De Gruyter, 2002, p. 537). While power is value-neutral first, sovereignty requires

- always a legitimation (H. Popitz, *Prozesse der Machtbildung*, 3rd ed., Tübingen, Mohr, 1976, pp. 255 ff.).
- ⁴ Cited by K. von Fritz, *The Theory of Mixed Constitution in Antiquity: A Critical Analysis of Polybius' Political Idea*, New York, Columbia University Press, 1954, pp. 10 ff.
- ⁵ Th. Paine, *Die Rechte des Menschen, Eine Antwort auf Herrn Burke's Angriff gegen die französische Revolution*, Berlin, Vossische Buchhandlung, 1792, p. 238.
- ⁶ D. Hume, *Essays and Treatises on Several Subjects* (1758), in *Political Essays*, Cambridge, Cambridge University Press, 1994, p. 127.
- ⁷ See also N. Luhmann, *Macht*, 3rd ed., Stuttgart, Lucius & Lucius, 2003, pp. 4 ff., who describes state authority as a «symbolically generalized communication medium».
- ⁸ The «natural, inalienable and sacred rights of man» (Preface to the French *Declaration of the Rights of Men*), are laid down catechistically as the basis of «all political society» (Art. 2, also Art. 16).
- ⁹ H. Dreier, *Gilt das Grundgesetz ewig? Fünf Kapitel zum modernen Verfassungsstaat*, München, Carl Friedrich von Siemens Stiftung, 2008, p. 14.
- ¹⁰ F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2. Aufl., Göttingen, Vandenhoeck & Ruprecht, 1967, p. 267.
- ¹¹ The time exception from the functional context of the legislation arises out of the deviation from the rule *lex posterior derogat legi priori*.
- ¹² S. Kirste, *Die Zeitlichkeit des positiven Rechts und die Geschichtlichkeit des Rechtsbewußtseins*, Berlin, Duncker & Humblot, 1998, p. 227.
- ¹³ G.W.F. Hegel, *Grundlinien der Philosophie des Rechts, Naturrecht und Staatswissenschaft im Grundrisse*, § 273, in *Gesamtausgabe*, Frankfurt am Main, Suhrkamp, 1986, p. 439: «dass die Verfassung, obgleich in der Zeit hervorgegangen, nicht als ein Gemachtes angesehen werde. [Sie sei] ... vielmehr das schlechthin an und für sich Seiende, das darum als das Göttliche und Beharrende und als über der Sphäre dessen, was gemacht wird, zu betrachten ist».
- ¹⁴ Montesquieu, *De l'Esprit des Lois*, Genève, Barillot et Filles, 1748, XI, p. 6.
- ¹⁵ J.-J. Rousseau: «Par la même raison que la souveraineté est inaliénable, elle est indivisible. Car la volonté est générale, ou elle ne l'est pas; elle est celle du corps du peuple, ou seulement d'une partie», *Du Contrat Social ou Principe du Droit Politique*, II, p. 2, in *Œuvres complètes*, edited by R. Derathé, Paris, Pléiade, 1964, p. 369. Compare F. Neumann, *Die Herrschaft des Gesetzes*, Frankfurt am Main, Suhrkamp, 1980, pp. 149 ff. However, contradictory Rousseau, III, 7 (p. 414): «Le Government simple est le meilleur en soi, par cela seul qu'il est simple. Mais quand la Puissance exécutive ne dépend pas assez de la législative, c'est-à-dire, quand il y a plus de rapport du Prince au Souverain que du Peuple au Prince, il faut remédier à ce défaut de proportion en divisant le Gouvernement; car alors toutes ses parties n'ont pas moins d'autorité sur les sujets, et leur division les rend toutes ensemble moins fortes contre le Souverain».
- ¹⁶ VII Lettre: «D'abord la puissance Législative et la puissance exécutive qui constituent la souveraineté n'en sont pas distinctes». Rousseau, *Œuvres complètes* cit., p. 815. Rousseau knew Locke's Treatises and claimed his agreement in the VIth letter of the *Lettres écrites de la Montagne*, which is dedicated to the defense of the *Contract Social* (ivi, p. 812).
- ¹⁷ E.-J. Sieyès, *Vues sur les moyens d'exécution, dont les Représentants de la France pourront disposer en 1789*, in *Écrits politiques*, edited by R. Zapperi, Paris, Archives contemporaines, 1985, p. 54.
- ¹⁸ Cited in F. Furet, R. Halévi (edd.), *Orateurs de la Révolution française*, vol. I, *Les Constituants*, Paris, Galimard, 1989, p. 1016.
- ¹⁹ Compare J.C. Schuhr, *Kants Meta-physik der Sitten im Kontext der Naturrechtslehre des 18. Jahrhunderts*, in «JuristenZeitung», 2008, pp. 186-187.
- ²⁰ Cited by D. Willoweit, U. Seif (Müßig), *Europäische Verfassungsgeschichte*, Munich, Beck, 2003, p. 299. According to the radicalization of the war, the overthrow of the monarchy in 1793 and the terror of the committee of welfare of 1793/94, the Directorial Constitution in 1795 evoked the sovereignty of Article 17 more intensively: «La souveraineté réside essentiellement dans l'universalité des citoyens». (Cited ivi, p. 353). The Consulate Constitution in 1799 gilded the Napoleonic military dictatorship and avoided a statement.
- ²¹ Cited ivi, p. 299.
- ²² Cited ivi, pp. 297 ff.
- ²³ Cited ivi, pp. 294 ff.
- ²⁴ Cited ivi, p. 302.
- ²⁵ Cited ivi, p. 305. The 1795 directorial constitution regulated in Title II the civil rights and a vote tied to census. In Title I, the Consulate Constitution of 1799 had also regulations of civil rights as a content.
- ²⁶ Cited ivi, p. 310.
- ²⁷ Cited ivi, p. 300.
- ²⁸ Cited ivi, p. 299 ff.
- ²⁹ Cited ivi, p. 321.
- ³⁰ Cited ivi, p. 308.
- ³¹ Cited ivi, p. 300.
- ³² Cited ivi, p. 319.
- ³³ Cited *ibidem*.
- ³⁴ Cited ivi, p. 320.
- ³⁵ Cited ivi, p. 326.
- ³⁶ Cited ivi, p. 322 ff.
- ³⁷ Ivi, p. 281.
- ³⁸ Only the Polish nobility was inhibited by liberal reform ideas. Accordingly, the Polish Constitution of 1791 regulated no Polish civil rights.
- ³⁹ In detail A. Timmermann, *Die „gemäßigte Monarchie“ in der Verfassung von Cadix und das frühe liberale Verfassungsdenken in Spanien*, Münster, Aschendorff, 2007, pp. 25 ff.
- ⁴⁰ Cited in Willoweit, Seif, *Europäische Verfassungsgeschichte*, cit., p. 429.

- ⁴¹ Cited in *ivi*, p. 430.
- ⁴² The French claimed that the sovereignty vested in the Spanish Crown, was transferred to them in Bayonne in 1808 due to the abdication of Karl IV and his son Ferdinand VII. Compare A. de Argüelles, *Discurso preliminar a la Constitución de 1812* (1811), Madrid, CEC, 1989, Part I, p. 78; also related to this topic: L. Sánchez Agesta, *Introducción*, in *ivi*, p. 44; J. Ferrando Badia, *Vicisitudes e influencias de la Constitución de 1812*, in «Revista de Estudios Políticos», n. 126, 1962, p. 187.
- ⁴³ *Colección de los Decretos y Órdenes que han expedido las Cortes generales y extraordinarias desde su instalación en 24 de setiembre de 1810 hasta igual fecha de 1811*, Madrid, s.e., 1813, vol. I, pp. 1 ff.; D. Gallardo y de Font, *Apertura de las Cortes de Cádiz en 24 de Septiembre de 1810*, Segovia, s.e., 1910, vol. I, pp. 30 ff.: «[...] y declaran nula, de ningún valor ni efecto la cesión de la corona que se dice hecha en favor de Napoleón, no solo por la violencia que intervino en aquellos actos, injustos é ilegales, sino principalmente por falterle el consentimiento de la Nación», almost literally reinforced in the decree of January 1, 1811: «Declárense nullos todos los actos y convenios del Rey durante su opresión fuera ó dentro de España», in *Cortes generales y extraordinarias*, cit., p. 41.
- ⁴⁴ Decree of September 25, 1810: *Tratamiento que deben tener los tres poderes*, in *Cortes generales y extraordinarias*, cit., pp. 3 ff.
- ⁴⁵ Meeting of the Cortes on December 29, 1810 in De Argüelles, *Diario de las Cortes*, cit., II. vol., p. 155; furthermore A. Florez Estrada, *Representación hecha a S.M.C. el señor Don Fernando VII* (1820), Madrid, Atlas, 1996, pp. 15, 17 ff.
- ⁴⁶ Instead of many: F. Soldevilla, *Las Cortes de Cádiz. Orígenes de la Revolución española*, Madrid, Ricardo Rojas, 1910; E. Valle Iberlucea, *Las Cortes de Cádiz. La Revolución de España y la Democracia de América*, Buenos Aires, Martín García, 1912; A. Gil Novales, *La revolución burguesa en España*, Madrid, Universidad Complutense, 1985, especially *Id.*, *Las contradicciones de la revolución burguesa española*, Madrid, Universidad Complutense, 1985, pp. 50 ff.; M. Artola Callego, *Antiguo Régimen y revolución liberal*, Barcelona, Ariel, 1991, among others pp. 161, 163; M. Morán Ortí, *Revolución y reforma religiosa en las Cortes de Cádiz*, Madrid, Actas, 1994; J.M. Portillo Valdés, *Revolución de nación. Orígenes de la cultura constitucional en España, 1780-1812*, Madrid, CEC, 2000.
- ⁴⁷ Timmermann, *Die „gemäßigte Monarchie“* cit., p. 39; and K. Löwenstein, *Volk und Parlament nach der Staatstheorie der französischen Nationalversammlung von 1789. Studien zur Dogmengeschichte der unmittelbaren Volksgesetzgebung* (München, Drei Masken, 1922), Aalen, Scientia, 1964, pp. 18, 20. Also compare the voting instruction of January 1, 1810 issued by the central junta (*Instrucción que deberá observarse para la elección de Diputados de Cortes* of January 1, 1810); the order was divided up into four voting instructions (*convocatorias*) with different addressees (among others the regional committees and the cities with a right to vote in the Cortes) and it may be referred to as the first actual Spanish electoral law, see E. Ull Pont, *Derecho electoral de las Cortes de Cádiz*, Madrid, CEC, 1972, p. 11; M. Estrada Sánchez, *El enfrentamiento entre doceañistas y moderados*, in «Revista de Estudios Políticos», n. 100, 1998, pp. 244 ff. Also compare Art. 27, Art. 99, Art. 100 Section 2 of the Cádiz-Constitution.
- ⁴⁸ De Argüelles, *Discurso preliminar* cit., part I, p. 77. Accordingly, the third title (*De las Cortes*) – alone comprising 140 articles – is also the most comprehensive of the whole text. Among other things, it comprises a complete electoral law; Ull Pont, *Derecho electoral de las Cortes de Cádiz* cit.
- ⁴⁹ Cortes, Spanish: House of Representatives, Parliament of the Estates.
- ⁵⁰ Sánchez Agesta, *Introducción*, in De Argüelles, *Discurso preliminar* cit., part I, p. 55.
- ⁵¹ The comprehensive correspondence of the Cortes generales y extraordinarias with London is stored in the Spanish archives and will be investigated by ReConFort.
- ⁵² Under the influence of the British commissioner Lord Bentinck; explicitly dealt with by K.H.L. Pöhlitz, *Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit. Mit geschichtlichen Erläuterungen und Einleitungen*, second, restructured, corrected and completed edition, Leipzig, Brockhaus, 1833, vol. II, pp. 443 ff.
- ⁵³ In practice, the usage of the legislative initiative by the monarch remained the exception. For instance, 92% of the adopted drafts during the so-called Trienio Liberal (1820-1823) were based on the Cortes' initiative, J.I. Marcuello Benedicto, *División de poderes y proceso legislativo en el sistema constitucional de 1812*, in «Revista de Estudios Políticos», n. 93, 1996, pp. 225 ff.
- ⁵⁴ Cited in accordance with Willoweit, Seif, *Europäische Verfassungsgeschichte*, cit., p. 451.
- ⁵⁵ Cited in accordance with *ivi*, pp. 445 ff.
- ⁵⁶ Cited in accordance with *ivi*, p. 448.
- ⁵⁷ Cited in accordance with *ivi*, p. 463.
- ⁵⁸ Cited in accordance with *ivi*, p. 461.
- ⁵⁹ Suspiciously eyeballed by Metternich, the *Grondwet voor het Koninkrijk der Nederlanden* of August 24, 1815 does not show whether it has been formed by pact or imposition. The *Grondwet* is published by royal decree of the same day as constitution «agreed upon by the lawful representatives of the people and sanctioned by the monarch» (*Staatblad van het Koninkrijk der Nederlanden over*

- de jaren 1813-1840 met algemeen register, number 45, pp. 103 ff., paraphr. translation of the author). The *Grondwet*, which was drafted by the constitutional convention was adopted by the convention of notables on March 29, 1814 and accepted by the Prince (*Staatblad van het Koninkrijk der Nederlanden over de jaren 1813-1840 met algemeen register*, number 44, p. 27). The annexation of the Belgian Netherlands and Holland required a revision. This revised draft by a commission of representatives coming from the Northern and Southern provinces was adopted on August 24, 1815 and accepted by the King. The draft was adopted unanimously by the representatives of the Northern provinces and rejected by a majority of the convention of notables from the Southern provinces.
- ⁶⁰ The claim for a kingship, that has legally never perished, stands behind the count of Louis being the XVIIIth. This sequence presumes, that Louis XVI was followed in 1792 by his yet under-age son under the name Louis XVII as legitimate pretender. The same is true for the count of the years of reign of Louis XVIII from 1795 on, the year of Louis XVI's death and label of the year 1814 as his 19th year of reign that has ensued from this.
- ⁶¹ The opening words of the preamble of the *Charte Constitutionnelle*: *Louis, par la grâce de Dieu, roi de France et de Navarre, à tous ceux qui ces présentes verront, salut.* (cited in F.-A. Hélie, *Les Constitutions de la France, ouvrage contenant outre les constitutions, les principales lois relatives au culte, à la liberté de la presse, de réunion et d'association, à l'organisation des départements et des communes, avec un commentaire*, 3. fascicule: *Le premier empire et la restauration*, Paris, A. Marescq aîné, 1878, p. 885).
- ⁶² Governing 1814-1824.
- ⁶³ Preamble of the *Charte Constitutionnelle*: «En même temps que nous reconnaissons qu'une constitution libre et monarchique devait remplir l'attente de l'Europe éclairée, nous avons dû nous souvenir aussi que notre premier devoir envers nos peuples était de conserver, pour leur propre intérêt, les droits et les prérogatives de notre couronne [...] qu'ainsi, lorsque la sagesse des rois s'accorde librement avec le vœu des peuples, une charte constitutionnelle peut être de longue durée», cited in Hélie, *Les Constitutions de la France* cit., 3. fascicule, p. 885.
- ⁶⁴ Preamble: «Nous avons considéré que, bien que l'autorité tout entière résidât en France dans la personne du Roi, nos prédécesseurs n'avaient point hésité à en modifier l'exercice, suivant la différence des temps» (cited accordingly to L. Tripier, *Constitutions qui ont régi la France depuis 1789 jusqu'à l'élection de M. Grévy comme Président de la République*, Paris, Larose, 1879, p. 232).
- ⁶⁵ For detailed references compare Seif, *Einleitung*, in Willoweit, Seif, *Europäische Verfassungsgeschichte*, cit., p. XXVI.
- ⁶⁶ Preamble of the *Charte Constitutionnelle*: «Nous avons considéré que, bien que l'autorité tout entière résidât en France dans la personne du Roi...», cited in Hélie, *Les Constitutions de la France* cit., 3. fasc., p. 885.
- ⁶⁷ «La personne du roi est inviolable et sacrée. Ses ministres sont responsables. Au roi seul appartient la puissance exécutive» (cited in *ivi*, p. 887).
- ⁶⁸ Art. 45: «La Chambre se partage en bureaux pour discuter les projets qui lui ont été présentés de la part du Roi». Art. 46: «Aucun amendement ne peut être fait à une loi, s'il n'a été proposé ou consenti par le Roi, et s'il n'a été renvoyé et discuté dans les bureaux», cited in *ivi*, p. 888.
- ⁶⁹ Cited in accordance to Willoweit, Seif, *Europäische Verfassungsgeschichte*, cit., p. 483.
- ⁷⁰ Compare Ch.A. Scheffer, *Darstellung des politischen Zustandes von Deutschland*, Paris, Plancher et Daulaunay, 1816; Leipzig, In der Gräffschen Buchhandlung, 1817, p. 79.
- ⁷¹ «In allen Bundesstaaten wird eine landesständige Verfassung Statt finden» (An estate constitution is to be installed in all federal states), cited in Ph.A.G. von Meyer (ed.), *Corpus Iuris Confoederationis Germanicae oder Staatsacten für Geschichte und öffentliches Recht des Deutschen Bundes*, Band 2, *Vollständige Sammlung der Grundgesetze des Deutschen Bundes und der normativen Beschlüsse der hohen deutschen Bundesversammlung von der Stiftung des Deutschen Bundes bis zum 9. September 1858* (Frankfurt am Main 1859-1861), reproduction of the 3rd edition Aalen, Scientia, 1978, I vol., pp. 1, 5. The promise of estate constitutions in Art. 13 of the German Federal Act remained an unfulfilled promise both in Austria and Prussia.
- ⁷² Cited in G. Dürig, W. Rudolf, *Texte zur deutschen Verfassungsgeschichte vornehmlich für den Studiengebrauch*, 3rd expanded ed., Munich, Beck, 1996, pp. 65, 75.
- ⁷³ For instance compare: § 1 Tit. VIII Bavarian Constitution of May 26, 1818: «Alle Gerichtsbarkeit geht vom König aus» (All judicial power emanates from the king). § 5 Constitution of Baden of August 22, 1818: «Der Großherzog vereinigt in sich alle Rechte der Staatsgewalt» (All rights of sovereignty are vested in the Grand Duke).
- ⁷⁴ Regarding the relation between state sovereignty and the sovereignty of the princes compare H. Quaritsch, *Staat und Souveränität*, Bd. 1, *Die Grundlagen*, Frankfurt am Main, Athenäum, 1970, pp. 489 ff.
- ⁷⁵ Even if the monarch imposed the constitution by virtue of his sovereign authority, it is transformed from a law, which was subject to the prince's negotiation, into a regulation of the state as a legal person.
- ⁷⁶ Instead of many: E.-W. Böcken-

förde, *Der Verfassungstyp der deutschen konstitutionellen Monarchie im 19. Jahrhundert*, in E.-W. Böckenförde, R. Wahl (edd.), *Moderne deutsche Verfassungsgeschichte (1815-1918)*, Köln, Kiepenheuer & Witsch, 1972, pp. 146, 149 ff.; G. Dilcher, *Zum Verhältnis von Verfassung und Verfassungstheorie im frühen Konstitutionalismus*, in G. Keinheyer, P. Mikat (edd.), *Beiträge zur Rechtsgeschichte, Gedächtnisschrift für Hermann Conrad*, Paderborn, Schöningh, 1979, pp. 65 ff.

⁷⁷ H.-J. Böhme, *Politische Rechte des einzelnen in der Naturrechtslehre des 18. Jahrhunderts und in der Staatsphilosophie des Frühkonstitutionalismus*, Berlin, Duncker & Humblot, 1993, pp. 27 ff. Ch. Link, *Naturrechtliche Grundlagen des Grundrechtsdenkens in der deutschen Staatsrechtslehre des 17. und 18. Jahrhunderts*, in G. Birtsch (ed.), *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft*, Göttingen, Vandenhoeck & Ruprecht, 1987, pp. 215 ff.; W. Schulze, *Ständische Gesellschaft und Individualrechte*, in ivi, pp. 161, 162 ff.; R. Wahl, *Rechtliche Wirkungen und Funktionen der Grundrechte im deutschen Konstitutionalismus des 19. Jahrhunderts*, in «Der Staat», n. 18, 1979, pp. 321 ff.

⁷⁸ H.A. Zachariä, *Deutsches Staats- und Bundesrecht, Erster Theil: Allgemeine Lehren und Verfassungsrecht der Bundesstaaten*, Göttingen, Vandenhoeck & Ruprecht, 1841, § 15, p. 201.

⁷⁹ F. Ponteil, *Les institutions de la France de 1814 à 1870*, Paris, Puf, 1966, p. 26; M. Deslandres, *Histoire constitutionnelle de la France de 1789 à 1870*, Paris, A. Colin, 1932-1937; P. Bastid, *Les institutions politiques de la monarchie parlementaire française (1814-1848)*, Paris, Recueil Sirey, 1954, pp. 333 ff.; M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, 3rd ed., Paris, Montchrestien, 1993, pp. 195 ff.

⁸⁰ Together with his unpopular government under the counter-revolutionary Prince Jules de Polignac.

⁸¹ As already in 1789, in 1830 social discontentedness coupled with political protest (R. Magraw, *France 1815-1914. The Bourgeois Century*, Oxford, Blackwell, 1992, pp. 41 ff.; the three July ordinances of July 25, 1830, in «Archives parlementaires», second series 61, pp. 639-641, respectively in P. Rosanvallon, *La monarchie impossible. Les Chartes de 1814 et de 1830*, Paris, Fayard, 1994, pp. 290-296; about the social basis of government and opposition: H.-G. Haupt, *Nationalismus und Demokratie. Zur Geschichte der Bourgeoisie im Frankreich der Restauration*, Frankfurt am Main, Europäische Verlagsanstalt, 1980, pp. 106 ff.

⁸² Cited in accordance to Willoweit, Seif, *Europäische Verfassungsgeschichte*, cit., p. 486.

⁸³ Of the 459 representatives 188 were part of the 'députés fonctionnaires', 78 were part of the liberal professions (out of these 62 lawyers), 308 were part of the 'propriétaires sans activité professionnelle', about 40 representatives come from the world of the bourgeoisie of industries, trade and finance, among them renowned names such as Joseph Perier or the 'maitre de forges' Schneider. Comparing these pieces of information with the statistics from 1834, during these 12 years a clear shift in favour of the 'propriétaires', and an increase of the 'députés fonctionnaires' happened, while the proportion of the business world even decreased slightly; 1834: 23% lawyers and judges, 18% civil servants, 22% 'propriétaires', 17% leading members of the business community, 14% military and 7% liberal professions (without lawyers). Statistics for 1834: Th.D. Beck, *French Legislators, 1800-1834. A Study in Quantitative History*, Berkeley, University of California Press, 1974, pp.

148, 184; the reasons for the long-term changes of political participation between 1789 and 1848 are controversial: P. McPhee, *Electoral Democracy and Direct Democracy in France 1789-1851*, in «European History Quarterly», n. 16, 1986, pp. 77 ff., 86 ff.; with a different accentuation: M. Edelstein, *Aux urnes citoyens! The Transformation of French Electoral Participation (1789-1870)*, in G.M. Schwab, J.R. Jeanneney (edd.), *The French Revolution of 1789 and Its Impact*, Westport, Greenwood Press, 1995, pp. 199 ff., 203 ff.

⁸⁴ J.-J. Chevallier, G. Conac, *Histoire des institutions et des régimes politiques de la France de 1789 à nos jours*, 8th ed., Paris, Dalloz, 1991, pp. 177 ff.

⁸⁵ In the light of this great influence of the king on the government, it appears reasonable not to talk about a parliamentary monarchy when referring to the constitutional system of the French July Kingdom, which is correctly emphasized by Michael Erbe against the prevailing contrary opinion in French literature (M. Erbe, *Geschichte Frankreichs von der Großen Revolution bis zur Dritten Republik 1789-1884*, Stuttgart, Kohlhammer, 1982, p. 127). Although it is the French literature that emphasizes the important political influence of Louis-Philippe, it does not raise any doubts about the parliamentary character of the system or remains ambivalent in its judgment, as Duverger, who ultimately talks about 'parlementarisme orléaniste', while at the same time dealing with it under the heading "Les monarchies semi-parlementaires" (M. Duverger, *Le système politique français. Droit constitutionnel et systèmes politiques*, 19th ed., Paris, Puf, 1986, pp. 73, 85); more skeptic towards the parliamentary character: R. Hervé, *L'orléanisme*, Paris, Puf, 1992, pp. 18 ff., 39 ff. ("monarchie pré-parlementaire"); tending more towards parliamentarism for instance: Chevallier, Conac, *Histoire*

- toire des institutions et des régimes politiques, cit., pp. 186 ff. ("parlementarisme dualiste"); Bastid, *Les institutions politiques*, cit., pp. 409 ff. («régime parlementaire dualiste»); Y. Guchet, *Histoire constitutionnelle française (1789-1958)*, 2nd ed., Paris, Erasmé, 1990, pp. 168 ff.; W.J. Mommsen, 1848. *Die ungewollte Revolution. Die revolutionären Bewegungen in Europa 1830-1849*, Frankfurt am Main, Fischer, 1998, p. 43; only emphasis on the dualist character: P. Pasquino, *Sur la théorie constitutionnelle de la monarchie de Juillet*, in M. Valensise (ed.), *François Guizot et la culture politique de son temps*, Paris, Gallimard-Seuil, 1991, pp. 111 ff., 120 ff.; clear classification into the category of parliamentarism: Ponteil, *Les institutions de la France*, cit., pp. 150 ff.; Morabito, Bourmaud, *Histoire constitutionnelle et politique de la France* cit., p. 212 («véritable monarchie parlementaire»); R. Szramkiewicz, J. Bouineau, *Histoire des institutions 1750-1914. Droit et société en France de la fin de l'Ancien Régime à la Première Guerre mondiale*, Paris, Litec, 1989, p. 403; Rosanvallon, *La monarchie impossible*, cit., p. 10.
- ⁸⁶ Morabito, Bourmaud, *Histoire constitutionnelle et politique de la France* cit., pp. 208 ff.; Bastid, *Les institutions politiques* cit., pp. 305 ff., 310 ff.; A. Jardin, A.-J. Tudesq, *La France des notables*, vol. 1, *L'évolution générale 1815-1848*, Paris, Seuil, 1973, 142 ff., 151 ff.; G. Antonetti, *Louis-Philippe*, Paris, Fayard, 1994, pp. 750 ff., 763 ff., 819 ff.
- ⁸⁷ Jardin, Tudesq, *La France des notables* cit., pp. 156 ff.; Morabito, Bourmaud, *Histoire constitutionnelle et politique de la France* cit., pp. 209 ff.; G. de Broglie, Guizot, Paris, Perrin, 1990, pp. 271 ff.; M. Erbe, *Louis-Philippe (1830-1848)*, in P.C. Hartmann (ed.), *Französische Könige und Kaiser der Neuzeit. Von Ludwig XII. Bis Napoleon III. 1498-1870*, München, Beck, 1994, pp. 416 ff.
- ⁸⁸ Cited Ponteil, *Les institutions de la France*, cit., p. 151.
- ⁸⁹ Cited *ibidem*.
- ⁹⁰ Duverger refers to a 'parlementarisme orléaniste', marked by parliamentarism 'à double confiance', which he saw realized not only in France in the time of 1830-1848, but also in the Great Britain of the 18th century until 1834. Duverger, *Le système politique français* cit., pp. 24 ff., 85. The idea of 'double trust' is also found in the Italian constitutional commentary of 1909, which states in the context of the characterisation of the «governo parlamentare»: «i Ministri, pur essendo Ministri del Re [...] hanno costante bisogno della duplice fiducia del Re e della Camera»; F. Racioppi, I. Brunelli, *Commento allo Statuto del Regno*, 3 vols., Torino, UTET, 1909, pp. 285 ff. The theory of double confidence already existed in 18th century Great Britain: K. Von Beyme, *Die parlamentarischen Regierungssysteme in Europa*, München, Piper, 1973, p. 728; P. Brandt refers to the constitutional monarchy 'dominated by Parliament' as parliamentarism, however without specifying what dominance substantially means; P. Brandt, *War das Deutsche Kaiserreich reformierbar? Parteien, politisches System und Gesellschaftsordnung vor 1914*, in K. Rudolph (ed.), *Geschichte als Möglichkeit. Über die Chancen von Demokratie. Festschrift für Helga Grebing*, Essen, Wickert, 1995 p. 190 with annotation 1.
- ⁹¹ The proposal made by a representative to submit the amended constitution to a referendum was declined by the other representatives.
- ⁹² Bastid, *Les institutions politiques* cit., pp. 114 ff., 118 ff.; H.A.C. Collingham, *The July Monarchy. A Political History of France 1830-1848*, London, Longman, 1988, pp. 26 ff.; about England: K. Loewenstein, *Der britische Parlamentarismus. Entstehung und Gestalt*, Reinbek bei Hamburg, Rowohlt, 1964, pp. 59 ff.
- ⁹³ The representatives elected before the July revolution managed to push through their favourite candidate as new King by getting the old Lafayette to support his application. Thus, the old revolutionary who even had participated in the American War of Independence and had been chairman of the Paris National Guard in 1789 could no longer stand for election as potential candidate for the Republican presidency with the result, that the revolutionaries were deprived of a popular leader. Henceforth, the nomination of Louis-Philippe also served as defence of claims for participation coming from the middle and lower classes that were participating in the revolution; Jardin, Tudesq, *La France des notables* cit., pp. 115 ff., 119 ff.; Magraw, *France 1815-1914* cit., pp. 41 ff., 46 ff.
- ⁹⁴ Since the rights of assembly and association were drastically aggravated after the numerous Republican labour revolts at the beginning of the July Monarchy 1835, the citizen reform movement organized semi-official banquets since 1847, during which invited politicians held fiery after-dinner speeches in favour of the extension of the right to vote. The beginning economic crisis of the same year created an explosive general mood, with the result of the prohibition of a planned reform banquet for February 22, 1848 providing for the final impetus for the revolution which ended the constitutional monarchy, unable to reform, in very few days and instead installed the Republic and the general right to vote. In 1848, it was for the third time after 1789 and 1830 that the call for just political participation in a time of socio-economic need lead to a revolution.
- ⁹⁵ Constitution of the French Republic from June 24, 1793.
- ⁹⁶ As was the case with Napoleon I, the rule of Napoleon III also ended due to the defeat in war and was

- followed by the Third Republic.
- ⁹⁷ «In the name of the Belgian people», the National Congress concludes the beginning of the Belgian Constitution; D. Gosewinkel, J. Masing (edd.), *Die Verfassungen in Europa 1789-1949*, München, Beck, 2006, p. 1307.
- ⁹⁸ As in Paris, the opera *The mute girl of Portici* lead to upheaval on August 25, 1830. Together with demonstrating workers, the audience stormed the Palace of Justice.
- ⁹⁹ M. Erbe, *Belgien, Niederlande, Luxemburg. Geschichte des niederländischen Raumes*, Stuttgart, Kohlhammer, 1993, pp. 201 ff.; E. Witte, J. Craeybeckx, *La Belgique de 1830 à nos jours. Les tensions d'une démocratie bourgeoise*, 2nd ed., Bruxelles, Labor, 1987, pp. 5 ff.; E.H. Kossmann, *The Low Countries. 1780-1940*, Oxford, Clarendon Press, 1998, pp. 151 ff.
- ¹⁰⁰ All of the 14 members of the constitutional commission with the exception of Brouckère were jurists. Jean Baptiste Baron de Nothomb (1805-1881) and Paul Devaux (1801-1880) formulated the bulk of the provisions themselves as secretaries of the commission while being oriented immensely towards the French constitutions of 1791, 1814/30, the Dutch constitution of 1815, and partially towards the English constitutional practice. Both of them were to play an important role within liberal ranks later on. Nothomb was the architect of the constitutional Belgian monarchy and envoy to the German Bundestag in 1840. Devaux largely shaped the movement for independence in the Belgian public with the journal *Politique* (Liège). At the assumption of office of the government of Lebeau-Rogier, he founded the liberally-oriented *Revue nationale* in 1840.
- ¹⁰¹ Only 46.000 of about 4 Mio. Belgians had the right to vote.
- ¹⁰² 108 of the 131 articles of the constitution were adopted literally – while the newly integrated provisions did not address the fundamental structure of the governmental structure leaving aside the mode of appointment of the senate and the relationship between church and state.
- ¹⁰³ J. Gilissen, *Die belgische Verfassung von 1831 – ihr Ursprung und ihr Einfluß*, in W. Conze (ed.), *Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert*, Stuttgart, Klett, 1967, pp. 42 ff. Gilissen calculated that about 35% of the Belgian provisions can be traced to the *Charte* of 1814/30, about 10% to the constitution of 1791, and about 40% to the Dutch fundamental law of 1815; Witte, Craeybeckx, *La Belgique de 1830 à nos jours*, cit., pp. 9 ff.; about the importance of the French revolution at the discussions of the national congress: M.-R. Thielemanns, *Image de la Révolution française dans les discussions pour l'adoption de la constitution belge du 7 février 1831*, in M. Vovelle (ed.), *L'image de la Révolution française 2*, Paris, Pergamon Press, 1990, pp. 1015 ff.
- ¹⁰⁴ K. Diedrich, *Die Belgier, ihre Könige und die Deutschen. Geschichte zweier Nachbarn seit 1830*, Düsseldorf, Droste, 1989, pp. 36 ff.
- ¹⁰⁵ For references see Gosewinkel, Masing, *Die Verfassungen in Europa* cit., p. 36.
- ¹⁰⁶ Cited in Willoweit, Seif, *Europäische Verfassungsgeschichte*, cit., p. 513.
- ¹⁰⁷ Cited in *ibidem*.
- ¹⁰⁸ Cited in *ivi*, p. 522.
- ¹⁰⁹ Thielemanns, *Image de la Révolution française* cit.; J. Kossmann-Putto, E.H. Kossmann, *Die Niederlande, 1780-1940*, Ons Efdel, Rekkem, 1995.
- ¹¹⁰ As the second chamber, the Senate is also directly elected by the people and thus by the same voters as those for the first chamber, yet with a different amount of time elapsing between elections. The number of inhabitants of the provinces decides the number of seats, the provinces, however, are not distinct bodies of legitimation. According to Gosewinkel, Masing, *Die Verfassungen in Europa* cit., p. 36, the two-chamber system is not based on an estate or federal structure but is organized on the basis of the same body of legitimation for the first time.
- ¹¹¹ Cited in Willoweit, Seif, *Europäische Verfassungsgeschichte*, cit., p. 520.
- ¹¹² Addressing Art. 107 of the Belgian constitution in depth: P. Errera, *Das Staatsrecht des Königreichs Belgien*, Tübingen, Mohr, 1909, pp. 137 ff.
- ¹¹³ D. Langewiesche, *Europa zwischen Restauration und Revolution 1815-1849*, 5th ed., München, Beck, 2007, pp. 41 ff.; B. Mirkin-Guetzévitch, *1830 dans l'évolution constitutionnelle de l'Europe*, in «Revue d'histoire moderne», n. 6, 1931, pp. 248 ff.; R. Fusilier, *Les monarchies parlementaires. Études sur les systèmes de gouvernement (Suède, Norvège, Danemark, Belgique, Pays-Bas, Luxembourg)*, Paris, Les Editions Ouvrières, 1960, pp. 360 ff.; in accordance with the Belgium state of arts, Erbe talks about parliamentary monarchy while at the same time emphasizing the influential role of the King; Erbe, *Belgien, Niederlande, Luxemburg* cit., pp. 211, 213 ff.; J. Stengers, *L'action du Roi en Belgique depuis 1831. Pouvoir et influence. Essai de typologie des modes d'action du Roi*, Paris, Duculot, 1992, pp. 28 ff., 34 ff.; referring to the doctrine of double trust of the ministers which continued to exist after the time of unionism in a differentiating manner: von Beyme, *Die parlamentarischen Regierungssysteme* cit., p. 128; Kaltefleiter on the contrary just talks about a «quasi-parliamentary system», W. Kaltefleiter, *Die Funktionen des Staatsoberhauptes in der parlamentarischen Demokratie*, Köln-Opladen, Westdeutscher Verlag, 1970, pp. 127 ff.
- ¹¹⁴ Kaltefleiter, *Die Funktionen des Staatsoberhauptes* cit., pp. 96 ff.; Witte, Craeybeckx, *La Belgique de 1830 à nos jours*, cit., pp. 24 ff.,

- 44 ff.; Stengers, *L'action du Roi en Belgique* cit., pp. 47 ff.; Id., *Evolution historique de la royauté en Belgique: modèle ou imitation de l'évolution européenne*, in «Res publica», 1991, pp. 88 ff.; S. Noiret, *Political Parties and the Political System in Belgium before Federalism, 1830-1980*, in «European History Quarterly», n. 24, 1994, pp. 87 ff.
- ¹¹⁵ Von Beyme, *Die parlamentarischen Regierungssysteme* cit., pp. 734 ff.; X. Mabilie, *Histoire politique de la Belgique. Facteurs et acteurs de changement*, Bruxelles, Crisp, 1986, pp. 184 ff.; Erbe, *Belgien, Niederlande, Luxemburg* cit., pp. 218, 226; P. Wigny, *Droit constitutionnel. Principes et droit positif*, 2 vols., Bruxelles, Bruylant, 1952, pp. 678 ff.
- ¹¹⁶ J. C. Bluntschli in his *Allgemeines Staatsrecht*, 3. Aufl., Munich, Cotta, 1863, Bd. I, Chap. 21, calls the constitutional monarchy a West-European type of constitution. Paul Laband's *Staatsrecht des Kaiserreichs* then intensifies the polarisation between constitutional and parliamentary constitutions (2. Aufl., Leipzig, Teubner, 1913, Bd. 2, 6. Chapter § 54). In 1911, the historian Otto Hintze hails the constitutional monarchy «das eigenartige preußisch-deutsche System» («the curious Prussian-German system»): *Das monarchische Prinzip und die konstitutionelle Verfassung, in Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte*, 3rd ed., Göttingen, Vandenhoeck & Ruprecht, 1970, p. 359.
- ¹¹⁷ F.J. Stahl, *Das monarchische Prinzip, eine staatsrechtlich-politische Abhandlung*, Heidelberg, Mohr, 1845, p. IV, Reprint Berlin, Weltgeist-Bücher, 1926, p. 5.
- ¹¹⁸ Huber, Böckenförde and Kühne conceive a specific German type of constitutionalism in the draft of the Paulskirchen assembly which rendered impossible parliamentary government politics due to its dualism of monarchy and popular representation (E.R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, Bd. 3, 2. Auflage, Stuttgart-Berlin-Köln, Kohlhammer, 1978, pp. 3 ff.); Id., *Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung*, in J. Isensee, P. Kirchhof (edd.), *Handbuch des Staatsrechts*, 3rd ed., Heidelberg, Müller Juristischer Verlag, 2003, vol. I, § 4 Rdnr. pp. 52 ff.; E.-W. Böckenförde, *Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert*, in Conze (ed.), *Beiträge zur deutschen und belgischen Verfassungsgeschichte* cit., pp. 70 ff. J.-D. Kühne, *Die Reichsverfassung der Paulskirche, Vorbild und Verwirklichung im späteren deutschen Rechtsleben*, 2nd ed., Neuwied, Luchterhand, 1998. Concerning the present state of research compare E. Fehrenbach, *Verfassungsstaat und Nationsbildung 1815-1871*, München, Oldenburg, 1992, pp. 71-75 and 75-85.
- ¹¹⁹ D. Grimm, *Gewaltgefüge, Konfliktpotential und Reichsgericht*, in U. Müßig (ed.), *Konstitutionalismus und Verfassungskonflikt. Symposium für Dietmar Willoweit*, Tübingen, Mohr Siebeck, 2006, pp. 257-267 (261).
- ¹²⁰ J. Wigard, *Stenographischer Bericht über die Verhandlungen der Deutschen constituirenden Nationalversammlung*, Frankfurt am Main, Sauerländer, 1848, Bd. I, pp. 370 ff.
- ¹²¹ K.D. Hassler, *Verhandlungen der deutschen verfassungsgebenden Reichsversammlung zu Frankfurt am Main*, Horstmann, 1848, p. 145.
- ¹²² Such a combination was excluded by the Reichsverfassung 1871 from the very beginning.
- ¹²³ M. Botzenhart, *Die Parlamentarismusmodelle der deutschen Parteien 1848/49*, in G.A. Ritter (ed.), *Gesellschaft, Parlament und Regierung*, Düsseldorf, Droste, 1974, pp. 121 ff.; D. Langewiesche, *Die Anfänge der deutschen Parteien – Partei, Fraktion und Verein in der Revolution 1848/49*, in «Geschichte und Gesellschaft», n. 4, 1978, pp. 324-361.
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- ¹²⁵ C. Ghisalberti, *Storia costituzionale d'Italia 1848-1948*, 8th ed., Roma-Bari, Laterza, 2012; L. Riall, *The Italian Risorgimento. State, society and national unification*, London, Routledge, 1994; Id., *The History of Italy from Napoleon to Nation-State*, Basingstoke-New York, Palgrave Macmillan, 2009.
- ¹²⁶ U. Allegretti, *Profilo di storia costituzionale italiana. Individualismo e assolutismo nello stato liberale*, Bologna, Il Mulino, 1989.
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- ¹²⁸ Riall, *The Italian Risorgimento* cit.
- ¹²⁹ Kühne, *Die Reichsverfassung der Paulskirche* cit.
- ¹³⁰ H. Kaelble, *Vergleichende Sozialgeschichte des 19. und 20. Jahrhunderts*, in «Jahrbuch für Wirtschaftsgeschichte», n. 1, 1993, p. 173.