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## *Thinking about Federalism(s)*



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# Martin Loughlin

## DROIT POLITIQUE\*

### I. INTRODUCTION

Seeking to justify the forms of government under which we live is of universal interest, but it excites attention only at certain historical moments. One such occasion occurred in eighteenth-century Europe with the flourishing of the Enlightenment movement. Although its ripples were felt across Europe, its epicentre lay in France. It was not just a French concern<sup>1</sup>, and neither was there a simple unity to Enlightenment thought<sup>2</sup>. But it was French scholars who advanced furthest in developing rationalist schemes to justify political order<sup>3</sup>, and in this presentation, I want to examine the impact of the French jurists of the Enlightenment who sought to reveal the « scientific » principles that would reconcile order and liberty in an arrangement of legitimate government. The challenge they faced was, in Rousseau's formulation, to stipulate *les principes du droit politique*. I will first explain what is meant by « *droit politique* » and consider the ways in which Enlightenment scholars made genuine advances in understanding. And I then will assess their legacy: to what extent has the « science of political right » propounded by scholars of the French Enlightenment continued to shape ideas about the legitimacy of the modern French state?

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<sup>1</sup> A. MACINTYRE, *After Virtue. A Study in Moral Theory*, London, Duckworth, 2<sup>nd</sup> ed 1985, p. 37: « One [...] reason why the unity and coherence of Enlightenment sometimes escapes us is that we too often understand it as primarily an episode in *French* cultural history ».

<sup>2</sup> P. GAY, *The Enlightenment: An Interpretation*, New York, Alfred Knopf, 1966, p. 3: « There were many philosophes in the eighteenth century, but there was only one Enlightenment. A loose, informal, wholly unorganized coalition of cultural critics, religious skeptics, and political reformers [...] the philosophes made up a clamorous chorus, and there was some discordant voices among them, but what is striking is their general harmony, not their occasional discord ».

<sup>3</sup> G. HAWTHORN, *Enlightenment and Despair: A History of Social Theory*, Cambridge, Cambridge University Press, 2<sup>nd</sup> ed., 1987, p. 12-13: « it was in France almost exclusively that theories were proposed which attempted to extend the empirical method of the physical sciences to society while retaining the total view made possible by schematic rationalism ».



## II. THE CONCEPT OF *DROIT POLITIQUE*

One distinctive mark of the Enlightenment is to have joined, « to a degree scarcely ever achieved before, the critical with the productive function and converted the one directly into the other<sup>4</sup> ». Challenging the authority of traditional ordering, Enlightenment scholars had to devise new legitimating principles for modern societies. Living through a period of economic, social and technological change, they began to conceive « the political » as a domain of thought and action distinct from the economic and social power networks shaping emerging modern societies. The specification of the political as an autonomous way of viewing the world was the first and most basic assumption of the movement.

The second assumption was that this distinctive worldview could only be formulated in the language of law. Jurists of course presented contrasting accounts of political order and consequently relied on different conceptions of authority, liberty, equality, solidarity, rights and so on. But notwithstanding such differences, agreed that their accounts had to be presented in the language of right and law (*le droit et la loi*). These two basic assumptions combine in a third, derivative, claim: namely, that the autonomy of the political can only be sustained by an autonomous account of legality. This somewhat paradoxical declaration provides the foundation of the concept of *droit politique*.

*Droit politique* flourishes when the intrinsic structural relation between the legal and the political is acknowledged<sup>5</sup>. And although some might think these antagonistic notions, one of the great traits of French thought has been its ability to reconcile opposites. As an autonomous worldview, the political presents itself as a domain without limitation. But the political is also required to operate in accordance with its own fundamental laws, an assertion so often overlooked in modern public law thought that the very idea of *droit politique* has been marginalized. One reason is that politics and law are today seen as belonging to different realms of thought and action: politics, concerned with the struggle over human interests, is a material phenomenon, whereas law is normative. But this is a distortion of recent provenance. When we say that « the political » is a distinct way of looking at the world, that statement is not a claim about the practices of politics.

Politics (*la politique*) refers to a set of practices within an established regime, whereas « the political » (*le politique*), refers to the ground on which the autonomous domain is founded<sup>6</sup>. « If we make a rigid distinction

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<sup>4</sup> E. CASSIRER, *The Philosophy of Enlightenment*, F.C.A. Koelln & J.P. Pettegrove trans., Princeton, Princeton University Press, 1951, p. 278.

<sup>5</sup> See C. GUSY, « Considérations sur le “droit politique” », *Jus Politicum*, 1, 2009, <http://juspoliticum.com/article/Considerations-sur-le-droit-politique-26.html> (though this account remains in the foothills of the concept).

<sup>6</sup> This distinction is recognized in a certain strand of French scholarship: see C. CASTORIADIS, *Philosophy, Politics and Autonomy*, D.A. Curtis ed., New York, Oxford University Press, 1991, esp. p. 156-62; C. LEFORT, *Democracy and Political Theory*, D. Macey trans., Cambridge, Polity Press, 1988; P. LACQUE-LABARTHE & J-L. NANCY, *Re-*

between what belongs to the realm of economics or politics (defined in modern science's sense of the terms), or between what belongs to the juridical or the religious in an attempt to find within them signs of specific systems », notes Claude Lefort, « we forget that we can arrive at that analytical distinction only because we already have a subjective idea of the primal dimensionality of the social, and that this implies an idea of its primal *form*, of its political *form*<sup>7</sup> ». That is, the political emerges through a historical process of human group formation whose mode of association might have no intrinsic value save whatever is needed to maintain the group's existence. In this sense, the autonomy of the political rests on a rudimentary inclusionary/exclusionary distinction<sup>8</sup>.

Even though the origins of the political lie in existential expressions of insecurity, triggered by a breakdown of civil peace or the threat of war, collective association can only preserve its sense of unity by establishing institutions that express a common will. The political forms an autonomous domain only by generating certain common understandings, practices and norms. The political strengthens the authority of its worldview only through the medium of right and law.

The authority of law is similarly bolstered by a political monopoly over the use of force. Consequently, in its modern form law is the product of a monopolization of the use of legitimate physical force in a given territory: law presents itself as an expression of the will of a ruling power. But this refers only to the phenomenon of positive law, conceived as an instrument of the ruling authority. Enlightenment scholars, by contrast, were seeking something different. They sought to stipulate the conditions, precepts, practices and norms that establish and maintain the right ordering of the regime. Their aim was to specify the fundamental laws of the political domain. In this sense, law, meaning *droit politique*, is not the instrument of an extant power: it is the medium through which that power maintains its authority.

### III. ORIGINS

Although *droit politique* comes into its own in Enlightenment thinking, its basis had earlier been laid by the *politique* jurists<sup>9</sup>. Foremost among this group was Jean Bodin, whose monumental study of 1576, *Six livres de la république*, marked a break with the medieval worldview. Bodin's great achievement was to have recognised with singular clarity a fundamental

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*treating the Political*, S. Sparks ed., London, Routledge, 1997; J. RANCIÈRE, *Aux bords du politique*, Paris, La Fabrique, 1998 ; P. ROSANVALLON, *Pour une histoire conceptuelle du politique*, Paris, Éditions du Seuil, 2003.

<sup>7</sup> C. LEFORT, *Democracy and Political Theory*, *op. cit.*, p. 218.

<sup>8</sup> This correlates to the distinction Schmitt made between friend and enemy: C. SCHMITT, *The Concept of the Political*, G. Schwab trans., Chicago, University of Chicago Press, 1996.

<sup>9</sup> See, e.g., W.F. CHURCH, *Constitutional Thought in Sixteenth-Century France: A Study in the Evolution of Ideas*, Cambridge (Mass.), Harvard University Press, 1941.

truth: that a nation becomes a political unity only through the integrative exercise of conceiving itself as a state. The essential criterion of being able to conceive itself as a state, he explained, is the establishment of absolute collective authority. This is what he calls sovereignty. Through his account of the basic concepts of state, sovereignty and constitution, Bodin laid the foundations for the concept of *droit politique*.

There is a range of views about Bodin's originality. Some scholars locate it in his claim that the modern idea of the state depends on recognizing the existence of a supreme centre of authority incorporating all governmental powers<sup>10</sup>, the origin of the modern idea that law is an expression of the will of the sovereign. Some see it in his argument that the sovereign possesses *potestas legibus solutus*, unlimited power to act free from the constraints of law<sup>11</sup>, treating Bodin as a theorist of absolutism<sup>12</sup>. Others suggest that Bodin's rebuttal of the right of resistance to sovereign authority demonstrates his antipathy to constitutional schemes founded on a division of governmental powers<sup>13</sup>. But Bodin's genius rests primarily on the way he conceived collective human existence in politico-legal terms. Drawing on the ancient Greek distinction between the household (*oikos*) and the polity (*polis*), he distinguishes between a « natural » hierarchy based on superior and inferior and a public domain founded on many things held in common and involving a governing arrangement created as an expression of human will<sup>14</sup>. This exercise in imagination provides the basis for conceiving the political as a distinctive worldview.

In 1576, with pressing political circumstances in France in mind, Bodin undoubtedly felt obliged to emphasize the importance of establishing a supreme central office of authority<sup>15</sup>. But his account, which recognizes that the sovereign might be either the prince or the people, is more concerned to explain the nature, significance and function of sovereignty than to specify who exercises the powers of the office of the sovereign. Crucial to his analysis is the distinction between sovereignty and government. Sovereignty is absolute, perpetual and indivisible, while government is conditional, limited and divisible. Sovereignty is conceptual, government empirical. Sovereignty

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<sup>10</sup> J. BODIN, *The Six Bookes of a Commonweale*, R. Knolles trans. [1606], K.D. McRae ed., Cambridge (Mass.), Harvard University Press, 1962, p. 84.

<sup>11</sup> *Ibid.*, p. 14. C. SCHMITT, *Political Theology: Four Chapters on the Concept of Sovereignty*, G. Schwab trans., Chicago, University of Chicago Press, 2005, p. 8-9.

<sup>12</sup> See, e.g., P. ELEFThERIADES, « Law and Sovereignty », *Law and Philosophy*, 29, 2010, p. 535-569.

<sup>13</sup> See, e.g., J.H. FRANKLIN, *Jean Bodin and the Rise of Absolutist Theory*, Cambridge, Cambridge University Press, 1973.

<sup>14</sup> J. BODIN, *The Six Bookes*, *op. cit.*, I. 2.

<sup>15</sup> The reference is to St Bartholomew's Day massacre of 1572. But note also how Bodin explains in the preface to his first edition of the *Six Bookes* that he has written this treatise because the « ship of state, rocked by a violent tempest, is in imminent danger of foundering » owing to the fact that certain writers had displayed ignorance of « laws and of public right » that established and maintained the state (J. BODIN, *The Six Bookes*, *op. cit.*, p. 69).

is constitutive, while the issue of who actually exercises the sovereign powers of rule is merely regulative.

In Books II-VI, Bodin analyses the main forms of government which have emerged, his purpose being to derive empirical conclusions – prudential maxims – about those practices of government that strengthen or weaken the authority of the state. But it is evident that his overall purpose is juridical: it is to specify the « fundamental laws » at work in the public realm. From these books, then, a constitutional thesis can be derived. In Chapter 6 of Book IV, for example, he explains that, whether the state is monarchical or republican, its powers of government should be directly exercised by the sovereign only in the rarest of cases. Nothing has corrupted a state more than the attempt by the sovereign, whether prince or people, to assume the authority of a Senate, the command of magistrates, or to remove the processes of justice from their ordinary course. From this account, Bodin derives the principle that « the less the power of the sovereignty is (the true marks of majesty thereunto still reserved), the more it is assured<sup>16</sup> ». The underlying reason is clearly stated: « hard it is for high and stately buildings long to stand », he explains, « except they be upholden and stayed by most strong shores, and rest upon most sure foundations; all of which consisteth in the Senate or council, and in the good duties of the magistrates<sup>17</sup> ». For Bodin, the political domain is sustained through the establishment of robust institutional arrangements.

Bodin's originality extends beyond an account of the modern concept of sovereignty. Through a series of innovative arguments, he lays the foundations for developing a concept of *droit politique*. He demonstrates: that the political can be asserted as an autonomous domain only through an act of imagination; that this autonomous domain is founded on the concept of the state; that the state possesses the quality of sovereignty; that the sovereign state provides the symbol of political unity that is needed to sustain the authority of its governing institutions; and that these institutions need adequate equilibration – Bodin calls it harmonic proportion<sup>18</sup> – to maintain their authority. In Book I, Bodin gives us a modern definition of law as the will of the sovereign, and through his studies of governmental forms in Books II-VI he provides a blueprint of the fundamental laws of the political domain. These are neither causal laws of the natural sciences nor the divine laws of a revelatory God: they are a distillation of the practices of right ordering of the state, *les principes du droit politique*, the constitutional arrangements that sustain the sovereign authority of the state.

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<sup>16</sup> J. BODIN, *The Six Bookes*, op. cit., p. 517.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, Book VI, ch. 6.



#### IV. DROIT POLITIQUE IN ENLIGHTENMENT THOUGHT

During the seventeenth century, « at the precise moment when the concept of public law was taking shape », William Church notes that French jurists « were abandoning analysis of all things political and governmental ». Although public law continued to develop during the long reign of Louis XIV, it was with « a minimum of direct influence from the jurists, who instead concentrated more and more upon the vast, complex body of private law<sup>19</sup> ». This began to change during the first half of the eighteenth century, when two scholars produced works that would bring the science of political right to maturity. Despite the antithetical character of their views, Montesquieu and Rousseau provide us with the framework of Enlightenment thought on this subject, and their ideas exerted a powerful influence over the leading figures of the late-eighteenth century Revolution<sup>20</sup>.

Lawyers today, especially in the Anglo-American world, commonly invoke Montesquieu as the inventor of the « doctrine » of the separation of powers<sup>21</sup>. But that contribution was not especially original or profound; by the mid-eighteenth century the idea that constitutional government needed to differentiate between governing tasks was well understood. This is not to underestimate Montesquieu's originality, but it is only in the more understated aspects of his work that his real achievement lies. An appraisal of Montesquieu's significance as a political jurist must start with the way he conceptualizes the political and the state.

Political philosophers of his times commonly built their theories of order from first principles derived from an original social contract. This technique has the benefit of avoiding both theological speculation and complex historical inquiry, but it is not Montesquieu's method. Instead of using the device of some virtual social contract, he derived his conclusions empirically from « the nature of things<sup>22</sup> ». This was more demanding, but it yielded rewards. On the basis of his historical inquiries, he was able to claim that, contrary to Hobbes, the state of nature does not amount to a state of war. War arises only once societies have already been formed; only when people enter into society do they feel the will to power and it is this power-impulse that produces the state of war. Far from being a condition that necessitates

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<sup>19</sup> W.F. CHURCH, « The Decline of the French Jurists as Political Theorists, 1660-1789 », *French Historical Studies*, 5, 1967, p. 5.

<sup>20</sup> N. HAMPSON, *Will and Circumstance: Montesquieu, Rousseau and the French Revolution*, London, Duckworth, 1983; C. BLUM, *Rousseau and the Republic of Virtue: The Language of Politics in the French Revolution*, Ithaca, Cornell University Press, 1986.

<sup>21</sup> Given Montesquieu's influence over the framers of the American Constitution, this is entirely understandable: see only J. MADISON, A. HAMILTON, J. JAY, *The Federalist Papers*, I. Kramnick ed., London, Penguin, 1987, no. 47, p. 303: « The oracle who is always consulted and cited on this subject [the separation of powers] is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it to the attention of mankind ».

<sup>22</sup> Ch. L. de Secondat MONTESQUIEU, *The Spirit of the Laws*, A. Cohler, B. Miller & H. Stone trans. and ed., Cambridge, Cambridge University Press, 1989, Book 1, ch. 1.

the formation of society, war is the product of its formation. He makes this point in order to highlight another: it is the threat of war, both within and between societies, that founds the need for law<sup>23</sup>.

Montesquieu explains that laws exist in order to regulate three main types of social relations: civil right, concerning relations between citizens; political right, concerning relations between governors and governed; and the right of nations, concerning relations between states. These are drawn together through a union of individual wills, and this union is the institution of the state<sup>24</sup>. Having explained the social conditions leading to the formation of the state, he turns to his major task: to specify the character of the laws made through this institution. This was the ambition of his major work on *L'Esprit des Lois*.

The aim of this work was not simply to classify the types of laws made by particular regimes: those, the positive laws, are merely the products of that regime. Rather, the aim is to discover the « laws » that have shaped the formation of those regimes. As he explained in the preface, « I have set down the principles, and I have seen particular cases conform to them as if by themselves, the histories of all nations being but their consequences, and each particular law connecting with another law or dependent on a more general one ». His many years studying the history of government were devoted to discovering the causes that produce the positive laws, « the chain connecting [the principles] with the others<sup>25</sup> ». His ambition, in short, was to reveal the fundamental laws of the political domain.

Montesquieu had set himself the task of finding a new understanding of the concept of law. Before *L'Esprit des Lois*, law was conceived as command, whether as the product of the will of a divine creator or, when Bodin broke with the cosmic imagery of the medieval world, as the command of the sovereign. Montesquieu showed, by contrast, that law is not, in essence, command: it is an expression « of the necessary relations arising from the nature of things<sup>26</sup> ». The significance of this claim is revealed when he argues that each type of order formed in the world operates according to its own fundamental laws.

The laws of the physical world are certainly different from those that regulate human interaction. But even within human conduct, there are different modes of interaction. « Not all political vices are moral vices », he explains, « and not all moral vices are political vices, and those who make

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<sup>23</sup> *Ibid.*, Book 1, ch. 3: « As soon as men are in society, they lose their feelings of weakness; the equality that was among them ceases, and the state of war begins. Each particular society comes to feel its strength, producing a state of war among nations. The individuals within each society begin to feel their strength; they seek to turn their favour the principal advantages of society, which brings about a state of war among them. These two sorts of states of war bring about the establishment of laws among men ».

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, Preface.

<sup>26</sup> *Ibid.*, Book 1, ch. 1.

laws that run counter to the general spirit should not be ignorant of this<sup>27</sup> ». The critical point is that his monumental inquiry is designed with the precise objective of discovering the fundamental laws that maintain the autonomy of the political worldview. Legislation – positive law – is not something isolated, some arbitrary or abstracted will; it is, as Hegel (praising Montesquieu's discovery) noted, « a subordinate moment in a whole, interconnected with all the other features which make up the character of a nation and an epoch<sup>28</sup> ». A study of positive law is important, but it should not be confused with a deeper inquiry: the search for the fundamental laws of the political domain.

Many scholars have shown that Montesquieu's so-called doctrine of the separation of powers entails no strict separation but merely a blending or balancing of governmental powers<sup>29</sup>. But to appreciate why we must move beyond the liberal interpretation that his objective was to show the importance of curtailing political power by operation of law. His true purpose was to demonstrate that, in order to *generate* political power, the political must be framed by the legal. He recognized that the type of authority needed to govern modern societies required that their governmental forms be institutionally complex. Just as Bodin had shown that there could be no universal form of scientific jurisprudence (in his day, one that was derived from Roman law)<sup>30</sup>, so Montesquieu demonstrates that authority cannot be maintained by imposing a strict legal uniformity<sup>31</sup>. Condorcet would later criticize Montesquieu for failing to speak of the justice or injustice of the laws<sup>32</sup>. But the reason is that, although governing must be conducted in a « spirit of moderation<sup>33</sup> », the precepts of *droit politique* are generated contextually through the essential relations of historically-constituted political formations.

Rousseau criticized this method, arguing that, having devoted so much attention to « the positive laws of settled government », Montesquieu could not specify the principles of political right<sup>34</sup>. Historical inquiry, Rousseau

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<sup>27</sup> *Ibid.*, Book 19, ch. 11.

<sup>28</sup> G.W.F. HEGEL, *Philosophy of Right*, T.M. Knox trans., Oxford, Oxford University Press, 1952, § 3.

<sup>29</sup> C. EISENMAN, « L'Esprit des lois et la séparation des pouvoirs », *Cahiers de philosophie politique*, 2, 1984-1985; M. TROPER, *La Séparation des pouvoirs et l'histoire constitutionnelle française*, Paris, LGDJ, 1980; M.J.C. VILE, *Constitutionalism and the Separation of Powers*, Oxford, Clarendon Press, 1967, ch. 4.

<sup>30</sup> J. BODIN, *Method for the Easy Comprehension of History*, B. Reynolds trans., (New York, Columbia University Press, 1945).

<sup>31</sup> Ch. L. de Secondat MONTESQUIEU, *The Spirit of the Laws*, *op. cit.*, Book 29, ch. 18.

<sup>32</sup> See C. LARRÈRE, *Actualité de Montesquieu*, Paris, Presses de Sciences Po, 1999, p. 9; cited in D. W. CARRITHERS *e. a.* (dir.), *Montesquieu's Science of Politics*, Lanham, Rowman & Littlefield, 2001, p. 14.

<sup>33</sup> Ch. L. de Secondat MONTESQUIEU, *The Spirit of the Laws*, *op. cit.*, Book 29, ch. 1.

<sup>34</sup> J.-J. ROUSSEAU, *Émile, or Education* [1762], B. Foxley trans., Indianapolis, Liberty Fund, 2010, p. 377.

maintained, can only replicate historical injustices and legitimate existing power formations<sup>35</sup>. Rather than locating the origins of political order in war and insecurity, Rousseau begins his inquiry into *droit politique* by first seeking the principles of legitimate government. The essence of the political, he suggests, cannot be derived merely from the desire to have order: if law is defined as the will of the sovereign then legal study cannot yield the principles of legitimate political order. The challenge of discovering *les principes du droit politique* is to understand how law can be transformed from an instrument that bolsters the hierarchical relationship of sovereign and subject into a medium by which liberty and equality can be realized.

Some have claimed that Rousseau makes the legal and the political subservient to the social and that, far from providing an account of the political as an autonomous domain, he seeks « the eclipse of political authority » in favour of community<sup>36</sup>. In fact, Rousseau wanted to specify an autonomous conception of the political in rational terms. This is not purely philosophical, but a practical exercise of discovering the principles of political right. These principles might not be extracted from historical experience, but they count as such only if they can be put to work in actually-existing societies<sup>37</sup>.

Like Hobbes before him, Rousseau invokes the idea of a social contract. But he felt that Hobbes erred in treating the foundational pact as a trade-off between liberty (the absence of constraint) and law (the will of the sovereign). For Rousseau, the modern state is legitimate only if at its foundation natural liberty is replaced by political liberty. Liberty for Rousseau is not the mere absence of constraint: liberty entails self-government. This sense of political liberty is not opposed to law: liberty and law are reconciled in a state where people live under laws they themselves have made. This claim, that liberty entails autonomy, makes the concept of political right the key to understanding legitimate government. The question then arises: how can political right reconcile freedom and government?

Rousseau answers this in stages. He explains, first, that the sovereign created as a result of the foundational pact cannot be either a single person or a representative office: it must be « the people » themselves. The sovereign is the public person formed by the union of all (*i.e.*, the state). But how can this public person of the state be said to have a single will? Rousseau answers this question in two further stages. He argues, first, that the foundational pact substitutes a *political equality* for whatever *physical inequality* nature may have established: unequal in nature, individuals become political

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<sup>35</sup> *Id.*, *Discourse on the Origin and the Foundations of Inequality among Men*, in *The Discourses and Other Early Political Writing*, V. Gourevitch ed., Cambridge, Cambridge University Press, 1997, p. 111-88.

<sup>36</sup> S. WOLIN, *Politics and Vision: Continuity and Innovation in Western Political Thought*, Princeton, Princeton University Press, 2008, p. 273, 330-336.

<sup>37</sup> J.-J. ROUSSEAU, *The Social Contract* [1762], in *The Discourses and Other Early Political Writing*, *op. cit.*, p. 41: « I want to inquire whether in the civil order there can be some legitimate and sure principle of government, taking men as they are, and laws as they can be ».

equals by virtue of the pact. Only as equals are they transformed from a multitude into a people. Secondly, this political equality becomes the precondition for the formation of a single will. Each citizen acquires the same rights over the others as are granted over themselves. This means that each is placed under the supreme direction of the « general will ». This notion of the general will expresses the will of the sovereign. But by the sovereign here is meant the will of « the people » understood as free and equal beings<sup>38</sup>. This concept of the general will, expressing the principle of maximum equal liberty, is established as the fundamental law of the modern state<sup>39</sup>.

Once the principle of equal liberty is acknowledged as the fundamental law, the concept of law is transformed. Rather than conceiving law (the command of the sovereign) as imposing a restriction on freedom, it is an expression of freedom. The objective of the foundational political pact, Rousseau suggests, is to transform humans from « stupid and bounded animals » into « intelligent beings ». Since this can be achieved only by acting in accordance with this basic law, whoever refuses to obey it must be constrained to do so. But this means only that he « shall be forced to be free<sup>40</sup> ».

Having identified the basic law, Rousseau specifies its operative principles. He explains that since sovereignty expresses the general will its exercise cannot be transferred, represented or divided. Sovereignty cannot be possessed or represented by any agent; it permeates the entire order and expresses the autonomy of the political. Laws, he emphasizes, are « nothing but the conditions of the civil association », the people who are subject to them are their author, any state ruled by laws is a republic, and « every legitimate government is republican<sup>41</sup> ». The constitution is therefore analogous to the organization of a living body: it becomes a unity only in the synthesis of those individual decisions and actions which encompass the entire complex of institutional order.

Rousseau's analysis does not focus on positive law but on what he calls « political laws » or « fundamental laws ». These are the laws that regulate « the action of the entire body acting upon itself, that is to say the relation [...] of the Sovereign to the State<sup>42</sup> ». His objective is to specify a similar type of law (*droit politique*) to that of Montesquieu. Bodin and Montesquieu tried to identify the principles of political right, but they had both sought to distill them from historical experience. Rousseau disagrees on the method. Yet he does follow Bodin in recognizing the critical distinction between

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<sup>38</sup> J.-J. ROUSSEAU, *The Social Contract*, *op. cit.*, Book. I, ch. 6.

<sup>39</sup> E. CASSIRER, *The Question of Jean-Jacques Rousseau*, P. Gay trans., New Haven, Yale University Press, 1963, p. 63: « Law in its pure and strict sense is not a mere external bond that holds in individual wills and prevents their scattering; rather it is the constituent principle of these wills [...] It wishes to rule subjects only in as much as, in its every act, it also makes and educates them into citizens ».

<sup>40</sup> J.-J. ROUSSEAU, *The Social Contract*, *op. cit.*, p. 53.

<sup>41</sup> *Ibid.*, p. 67-68.

<sup>42</sup> *Ibid.*, p. 80.



sovereignty (the exercise of the law-making power) and government (the office responsible for the execution of the law). Rousseau's specific innovation was to argue that, to prevent the formation of legalized domination, sovereign law-making authority must remain with the people rather than be allocated to the (representative) office of government. The fundamental law of the political domain, he maintained, was the realization of equal liberty in conditions of solidarity.

## V. THE REVOLUTION IN FRANCE

French political jurists might not have agreed on the principles of political right but by the mid-eighteenth century they had made considerable advances in devising a common conceptual framework through which these principles could be expressed. They recognized the autonomous character of the political domain and the need to devise an immanent structure of public law based on the concepts of state, sovereignty and constitution. It remained to show how their principles of political right could be embedded in the framework of modern nation-states. This was a challenge that Rousseau had sought to finesse through his remarkable figure of the Lawgiver (*le législateur*), a « superior intelligence » who was supposed to be able to design an ideal constitution for a new foundation without performing a governmental role within it<sup>43</sup>. With the coming of the Revolution in 1789, this ceased to be a purely philosophical problem and became a test of political reality<sup>44</sup>.

The French Revolution, « the most important single event in the entire history of government », is of universal significance: « it razed and effaced all the ancient institutions of France, undermined the foundations of all other European states, and is still sending its shock-waves throughout the rest of the world<sup>45</sup> ». Although Rousseau had in 1762 predicted that « the crisis is approaching and we are on the edge of a revolution<sup>46</sup> », none of the political jurists before 1789 had advocated revolution; their various schemes

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<sup>43</sup> *Ibid.*, p. 68-72.

<sup>44</sup> F. FURET, *Interpreting the French Revolution*, Cambridge, Cambridge University Press, 1981, p. 31: « Rousseau may well have been the most far-sighted genius ever to appear in intellectual history, for he invented, or sensed, so many of the problems that were to obsess the nineteenth and twentieth centuries. His political thought set up well in advance the conceptual framework of what was to become Jacobinism and the language of the Revolution, both in his philosophical premises (the fulfilment of the individual through politics) and because the radical character of the new consciousness of historical action is in keeping with his rigorous theoretical analysis of the conditions necessary for the exercise of popular sovereignty. Rousseau was hardly “responsible” for the French Revolution, yet he unwittingly assembled the cultural materials that went into revolutionary consciousness and practice ».

<sup>45</sup> S.E. FINER, *The History of Government*, vol. 3: *Empires, Monarchies and the Modern State*, Oxford, Oxford University Press, 1997-1999, p. 1517; E. BURKE, *Reflections on the Revolution in France*, C.C. O'Brien ed., London, Penguin, 1986, referred to the 1789 Revolution as « the most astonishing [event] that has hitherto happened in the world ».

<sup>46</sup> J.-J. ROUSSEAU, *Émile*, *op. cit.*, p. 145.

« were designed to stave off rather than promote revolution<sup>47</sup> ». But when the Revolution came the basics of the conceptual framework, and not just the elements of political right, were subjected to intense debate. It seems impossible to examine this period of upheaval and conflict without getting entangled in continuing ideological battles, not least over the question of whether 1789 marks « the year zero of a new world founded on equality<sup>48</sup> ». But my objective here is only to consider the degree to which, during the revolutionary period, sound principles of political right had the prospect of being institutionalized in a new constitutional arrangement.

For this purpose, the Revolution began on 17 June 1789, the moment when the meeting of the third estate transformed itself through declaration into the national assembly. The decisive motion had been drafted by Emmanuel-Joseph Sieyès, and it was Sieyès who in *Qu'est-ce que le tiers-état ?* most concisely explained its significance<sup>49</sup>. Faced with the imminent bankruptcy of the state, the king had convened a meeting of the Estates-General. Sieyès argued that this moment of fiscal crisis was symptomatic of a deeper bankruptcy of the entire political order and that, rather than convene the Estates-General, a constituent assembly should have been established to consider fundamental constitutional reform. Prime responsibility for the dire state of affairs, he suggested, lay with the nobility. By virtue of their entrenched feudal privileges, the nobility had in effect seceded from the nation. Far from being active producers of the nation's resources, they had become its most avaricious consumers. Far from being a vital part of the nation, they had become in effect its enemies. As Tocqueville later put it, « the nobility ceased to be an aristocracy » charged with the affairs of governing and had become « a caste<sup>50</sup> ».

In *Qu'est-ce que le tiers-état ?*, Sieyès captured the sentiment of the assembly and proclaimed the third estate as the nation<sup>51</sup>. Their declaration demanded that sovereign authority be transferred from the king to the nation. The meeting of the third estate, comprising the legitimate representatives of the sovereign people, must be transformed into the national assembly. These dramatic claims initiated what became a political and legal revolution. The newly-established National (Constituent) Assembly on 4 August 1789 removed the privileges of the aristocracy and the clergy,

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<sup>47</sup> R. WOKLER, « The Enlightenment Science of Politics », in C. FOX, R. PORTER, R. WOKLER (DIR.), *Inventing Human Science: Eighteenth Century Domains*, Berkeley, University of California Press, 1995, p. 326.

<sup>48</sup> F. FURET, *Interpreting the French Revolution*, 2.

<sup>49</sup> E.-J. SIEYÈS, « What is the Third Estate? », in *Political Writings*, M. Sonenscher trans., Indianapolis, Hackett, 2003, p. 92-162.

<sup>50</sup> A. DE TOCQUEVILLE, *The Old Regime and the Revolution* [1856], J. Bonner trans., London, Dent, 1988, p. 69.

<sup>51</sup> M. FORSYTH, *Reason and Revolution: The Political Thought of the Abbé Sieyès*, Leicester: Leicester University Press, 1987, p. 3: « he [Sieyès] is, more than any other, the man who articulates the political theory of the French Revolution ». See also J.-D. BREDIN, *Sieyès: Le clé de la Révolution française*, Paris, Éditions de Fallois, 1988.

resulting in the abolition of feudalism and the establishment of the principle of equality before the law. The Assembly then established a committee to prepare a draft constitution and, as an intended preamble to that constitution, on 26 August a *Declaration of the Rights of Man and the Citizen* was adopted. This proclaimed that « men are born and remain free and equal in rights » (art. 1), that the aim of « political association is the preservation of the natural and imprescriptible rights of man » (art. 2), that « sovereignty resides essentially in the nation » (art. 3), that law is « the expression of the general will » (art. 6) and that, without a defined separation of powers, a society « has no constitution at all » (art. 16).

These overarching principles of legitimate constitutional ordering owe much to the influence of Rousseau, though Sieyès, their principal architect, does not mention him by name. He argues, contrary to Bodin and Montesquieu, that a nation is not some cultural artefact defined by laws and customs and sanctioned by history. The nation (the state) has its origin in a social contract that transforms an aggregate of isolated individuals into a unified body politic possessed of a single general will. The nation comprises the entire body of citizens and its will is sovereign. « The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself<sup>52</sup> ». The nation exists prior to the constitution, and its government serves only at the pleasure of the national will. It follows from Sieyès' argument that the nation is not bound by any prior constitutional order. « A nation cannot alienate or prohibit its right to will and, whatever its will might be, it cannot lose the right to change it as soon as its interest requires it<sup>53</sup> ». The nation determines the constitutional form of the state by a pure exercise of sovereign will.

In these matters, Sieyès closely followed Rousseau. Where he departed from him was over the formation of this national will. Rousseau had maintained that « sovereignty cannot be represented » and that « the moment a people gives itself representatives it is no longer free<sup>54</sup> ». Sieyès, by contrast, argued that a constitution can only be made by representatives. This was generated by the need for a political division of labour in an advanced modern state, in contrast with the constitutions of the ancient republics Rousseau extolled<sup>55</sup>. For Sieyès, the basic law – the general will – is not some ideal collective will: it is formulated by representatives as a « common will<sup>56</sup> ». A representative body must take the place of an assembly of the en-

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<sup>52</sup> E.-J. SIEYÈS, « What is the Third Estate? », *op. cit.*, p. 136.

<sup>53</sup> *Ibid.*, p. 137.

<sup>54</sup> J.-J. ROUSSEAU, *The Social Contract*, *op. cit.*, ch.15.

<sup>55</sup> For discussion of Sieyès on representation see M. SONENSCHER, *Introduction to Sieyès*, in his edition of E.-J. SIEYÈS, « What is the Third Estate? », *op. cit.*, p. VII-XXII; W.H. SEWELL JR, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyès and What is the Third Estate?*, Durham, Duke University Press, 1994, ch. 3.

<sup>56</sup> E.-J. SIEYÈS, « What is the Third Estate? », *op. cit.*, p. 138. Sonenscher argues that Sieyès' system of representative government is strongly influenced by Montesquieu's argument about the importance of intermediary powers: see M. SONENSCHER, *Before the Del-*

tire nation and be charged with making a constitution. That body's common will is as valid as that of the nation itself<sup>57</sup>. The national assembly – and its constitution committee, of which Sieyès was a member – becomes the sole and rightful bearers of the nation's sovereign will.

But the Revolution soon veered out of control. A Constitution was drafted in 1791, with many of its provisions bearing the marks of Sieyès' influence. This was a bourgeois constitution whose general purpose was to put distance between the legislature and the sovereign people, not least by dividing between an active and passive citizenry<sup>58</sup>. The 1791 Constitution was replaced in 1793 but an implicit alliance between Jacobins and the Parisian sans-culottes, who campaigned for direct democracy and controls on the economy<sup>59</sup>, ensured that the 1793 Constitution was suspended soon after it was eventually ratified. And thereafter came the Terror, the Constitution of Year III, Napoleon's *coup d'état* in 1799 and a Constitution of Year VII, again mainly written by Sieyès. But this last Constitution proved irrelevant as Napoleon was named First Consul, then in 1802 First Consul for life, and finally in 1804 a plebiscitary monarchy was created when Napoleon was proclaimed Emperor.

My concern here is not so much with the Revolution's unfolding as with the influence of principles of *droit politique* on the key political actors. In this respect, I follow Alexis de Tocqueville and François Furet, each of whom move the debate about the significance of the Revolution away from social and economic factors towards the political. Their recognition of the importance of political culture as a set of symbolic practices throws into relief the juristic implications of the revolutionary debates. Tocqueville had argued that, although the Revolution had initially advanced the people's interests, it soon promoted the idea of a « pure democracy ». « In the beginning they quoted and commented on Montesquieu », he wrote, but « in the end they talked of no one but Rousseau<sup>60</sup> ». Furet similarly has suggested that « Rousseau is hardly “responsible” for the French Revolution, yet he unwittingly assembled the cultural materials that went into revolutionary consciousness and practice<sup>61</sup> ». Although often based on a misunderstanding

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uge: *Public Debt, Inequality, and the Intellectual Origins of the French Revolution*, Princeton, Princeton University Press, 2007, p. 94-97.

<sup>57</sup> E.-J. SIEYÈS, « What is the Third Estate? », *op. cit.*, p. 139: « A body of extraordinary representatives is a surrogate for an assembly of that nation [...] it is a surrogate for the Nation in its *independence* from all constitutional forms ».

<sup>58</sup> Of 24 million citizens, only 4.3 million were designated as active, and only active citizens could vote for the Legislative Assembly. Sieyès attacked the exclusion of women, but he had no compunction about excluding, alongside the nobility, vagabonds, beggars, and servants (W.H. SEWELL JR, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyès and What is the Third Estate?*, *op. cit.*, p. 148).

<sup>59</sup> See M. SONENSCHER, *Sans-Culottes: An Eighteenth-Century Emblem in the French Revolution*, Princeton, Princeton University Press, 2008.

<sup>60</sup> A. DE TOCQUEVILLE, *The Old Regime and the Revolution*, vol. 2, book 1, ch. 5, cited in F. FURET, *Interpreting the French Revolution*, *op. cit.*, p. 45.

<sup>61</sup> *Ibid.*, p. 31.

of Rousseau's thought, much revolutionary discourse offered « an unlimited promise of equality », a « matrix of universal history », and signified that society « was ridding itself of the symbolic powers of the State, along with the rules that it imposed<sup>62</sup> ». To these aspects, and especially to the failure of the Revolution to establish a stable constitutional form, I now turn.

## VI. THE JACOBIN DISCOURSE OF NATURAL RIGHT

Constitutional deliberations after 1789 had established the principle of civil equality but had been unable to settle on a system of government. A monarchical constitution drafted in 1791 proved short-lived and was replaced by a republican constitution in 1793. However, this constitution, which had been ratified in a referendum on universal male suffrage in August, was suspended two months later and, in response to war and the insurrection in the Vendée, a series of emergency measures was instituted. These included the formation of the Committee of Public Safety and the establishment of the Revolutionary Tribunal to judge suspects as « enemies of the people ». These emergency responses were quickly extended into a system of government<sup>63</sup>, which subsequently descended into a dictatorial regime of violence and fear known as the Terror. Over a period of 10 months from September 1793 to 9 Thermidor (27 July 1794), an estimated 500,000 arrests and 16,600 executions took place<sup>64</sup>.

As the Revolution unfolded it became the theatre for many of the unresolved issues over the principles of political right. Rousseau's construction of « the general will » had highlighted a tension between the fundamental principles of popular sovereignty and the need to establish a system of government. Although Sieyès had sought to resolve that tension through the principle of representation, no solution had been found to the question of how to prevent the political leadership from usurping the people's sovereign authority. Was Burke then right in predicting that the attempt to establish a political regime on a set of abstract principles divorced from social and political realities could lead only to violence and dictatorship<sup>65</sup>? Was the Terror an inevitable stage in the transition from the old feudal order of servitude to a modern regime based on equal liberty? Was a phase of violent dictatorship necessary in order to make a new people receptive to the precepts of

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<sup>62</sup> *Ibid.*, p. 5, 24.

<sup>63</sup> See B. MIRKINE-GUETZÉVITCH, « Le gouvernement parlementaire sous la Convention », in J. BARTHÉLEMY & B. MIRKINE-GUETZÉVITCH, *Le droit public de la Révolution*, Paris, Sirey, 1937, p. 45-91 (arguing that a new regime of government was established during the Terror founded on the idea of the Committee of Public Safety as the prototype of a system of cabinet government).

<sup>64</sup> S. DE LUCA, « Benjamin Constant and the Terror », in H. ROSENBLATT (dir.), *The Cambridge Companion to Constant*, Cambridge, Cambridge University Press, 2009, p. 93.

<sup>65</sup> E. BURKE, *Reflections on the Revolution in France*, *op. cit.* Note also Joseph de Maistre, who argued that the Terror was the punishment inflicted on France for abandoning Christianity: J. DE MAISTRE, « Considerations on France », in J. LIVELY (dir.), *The Works of Joseph de Maistre*, London, Allen & Unwin, 1965.



true liberty? Is this what Rousseau had in mind when he said that the people may have « to be forced to be free »? These questions, which continue to provoke intense controversy, set the context within which the juristic foundation of the Jacobin dictatorship must be assessed.

The emergency had permitted the Jacobins to retain power without having gained popular support<sup>66</sup>. But it would not be accurate to say that during the Terror they simply suspended the law. Their objective was to supplant principles of political right. Drawing on the authority of the « solemn declaration » of 1789 with its reference to « the natural, unalienable, and sacred rights of man », they went about instituting a new type of governing regime founded on *natural* right.

The main architect of this framework of natural jurisprudence was Antoine Louis de Saint-Just, who maintained that « since there is no society if it is not founded on nature, the state cannot recognize laws other than those of nature ». Law, he proclaimed, is « not the expression of will but of nature<sup>67</sup> ». Saint-Just questioned whether France even needed a formal constitution. The 1793 Constitution may have been suspended, he explained, but the Declaration of Rights had not and this provided an eternal code which amounted to a true constitution. No further documentary authority was required. In a speech to the Convention in May 1793, Robespierre reaffirmed this contention: « The Declaration of Rights is the Constitution of all peoples, all other laws being variable by nature, and subordinated to this one<sup>68</sup> ».

The Jacobins thus replaced a formal set of rules promulgated by will with a set of principles expressing « right reason ». One consequence of this claim to « right reason » was that their ruling authority did not need legitimation by an expression of the people's will through elections and plebiscites. Ruling authority was legitimated by its adherence to the principles of liberty and equality inscribed in natural right. Nature and not the general will was the originating source of legal and political authority. The goal, explained Robespierre, is « the reign of that eternal justice whose laws are engraved, not on marble or stone, but in the hearts of all men<sup>69</sup> ». And citizens

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<sup>66</sup> Under the 1793 Constitution, new elections had to be held which it was not obvious that the Montagnards/Jacobins would win.

<sup>67</sup> A.-L. DE SAINT-JUST, « De la nature, de l'état civil, de la cité ou les règles de l'indépendance, du gouvernement » [1791-1792], in *Œuvres complètes*, A. Kupiec ed., Paris, Gallimard, 2004, p. 1079.

<sup>68</sup> M. ROBESPIERRE, « Discours à la Convention », May 10, 1793, in *Œuvres*, vol. 9, Paris, PUF, 2011, p. 507, cited in D. EDELSTEIN, *The Terror of Natural Right: Republicanism, the Cult of Nature and the French Revolution*, Chicago, University of Chicago Press, 2009, p. 190.

<sup>69</sup> M. ROBESPIERRE, *Textes choisis*, vol III, Paris, Éditions sociales, 1958, p. 112; cited in W. DOYLE, *The Oxford History of the French Revolution*, Oxford, Oxford University Press, 2<sup>nd</sup> ed., 2002, p. 272.

were to be guided towards these principles of « eternal justice » through the propagation of his cult of the Supreme Being<sup>70</sup>.

In these respects, the Jacobins were hardly faithful followers of Rousseau. Rousseau never claimed that political order rested on natural law: he invoked the social contract, the basic political pact, as a device to transform a world of natural inequality into a civil order of political equality. The civil order established by this pact is dictated by the sovereign people as an expression of the general will, not by a vanguard who consults their own hearts and minds to reveal the dictates of natural right<sup>71</sup>. The natural jurisprudence proclaimed by the Jacobins maintained that « laws are the natural relations between things » and they are « neither relative relations nor the effect of the general will<sup>72</sup> ». Rousseau, Saint-Just felt obliged to explain, « says that the laws are not able to express the general will and concludes by invoking the necessity of a legislator ». But a legislator, Saint-Just contended, « can only express nature and not the general will<sup>73</sup> ». The Jacobins, in short, were sceptical about the value of assertions of popular sovereignty. They had discovered the foundation of law: it was neither in the general will nor in a common will, but in the precepts of natural right.

The implications became clear in the trial of Louis XVI. Constitutional law decreed that the king was inviolable, but this provision was set aside in favour of a discourse of natural right. The Jacobins maintained that since the king had presided over a regime that had destroyed order and put France back into a state of nature, he could be tried as a criminal against humanity<sup>74</sup>. And although the king's subsequent conviction and execution could have counted as an exception to the ordinary course of the law, this did not happen. The Terror became a state of affairs in which the exception was normalized<sup>75</sup>. In the following year, the law of 22 Prairial made anyone in

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<sup>70</sup> See *ibid.*, p. 276-277.

<sup>71</sup> Note, however, that Sieyès had left open the possibility of falling back on natural law as a source higher than national sovereignty. After stating that the nation « exists prior to everything », he states: « Prior to the nation and above the nation there is only natural law ».

<sup>72</sup> A.-L. DE SAINT-JUST, « De la nature, de l'état civil, de la cité ou les règles de l'indépendance, du gouvernement », *op. cit.*, p. 1067.

<sup>73</sup> *Ibid.*

<sup>74</sup> M. WALZER (dir.), *Regicide and Revolution: Speeches at the trial of Louis XVI*, Cambridge, Cambridge University Press, 1974, p. 68. Robespierre had earlier been an opponent of capital punishment, just as Saint-Just had been a proponent of constitutional monarchy: see A.-L. DE SAINT-JUST, « L'Esprit de la Révolution et de la Constitution de France », in *Œuvres complètes*, *op. cit.*, p. 389-93. Cf. *Id.*, « Discours sur le jugement de Louis XVI prononcé à la Convention nationale le 13 novembre 1792 », *Œuvres complètes*, *op. cit.*, p. 475-84.

<sup>75</sup> C. LEFORT, « The Revolutionary Terror », in *Democracy and Political Theory*, *op. cit.*, p. 64: « The basic argument seems clear: the Convention and the nation are one; the Convention's decisions are sovereign, and are made in accordance with the will of the people; the Committees and the Convention are one, because they are merely its emanation. Similarly, the organs of natural justice derive their authority from the Convention, and it follows that any suspicions directed against the Committees and their justice are also directed against the Convention itself, that suspicion of any kind is intended to destroy the Conven-

principle liable for execution and, as the category of outlaw (*hors-la-loi*) was re-interpreted as « enemy of the people » (*ennemi du genre humain*), offenders could lawfully be executed without trial<sup>76</sup>.

The Jacobins used the concept of natural right to bolster the legitimacy of the laws underpinning the Terror. In effect, right triumphed over law. There are, proclaimed Saint-Just, « too many laws, and too few civil institutions » and « where there are too many laws the people are enslaved<sup>77</sup> ». Laws were replaced by a cult and an abstract concept of natural right provided the cloak for violent repression.

## VII. THE CONSTITUTIONAL QUESTION

The rule of natural right came to an abrupt end with the ousting of Robespierre on 9 Thermidor 1794. Realizing at last that a more oppressive government than that of absolute monarchy was possible, the Thermidorians sought to halt the Revolution and re-align the institutions of government with the principles of 1789. Their key task was to provide the Republic with a stable constitution. Previous attempts had failed and their main proponents, most notably Condorcet, had perished<sup>78</sup>. The question remained: how could the supreme principle of popular sovereignty be reconciled with the protection of basic rights? Their deliberations resulted in the Constitution of Year III (1795), which established a two-chamber system and a weak executive indirectly elected by the legislative assembly. The problem was that the Convention, fearing counter-revolutionary movements, sought to preserve

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tion by divorcing itself from its own organs. In short, everything is deduced from the principle that the people, the Convention, the Committees and justice are one and the same; the legitimacy and pertinence of the decisions that have been taken therefore cannot be questioned ».

<sup>76</sup> W. DOYLE, *The Oxford History of the French Revolution*, op. cit., p. 275. The *hors-la-loi* decree had initially been directed primarily against the Vendée insurgents but following Danton's motion all counter-revolutionaries were declared *hors-la-loi*. The execution of « counter-revolutionaries », under the orders of military commissions, accounted for 78% of deaths in the Terror (D. EDELSTEIN, *The Terror of Natural Right: Republicanism, the Cult of Nature and the French Revolution*, op. cit., p. 19).

<sup>77</sup> A.-L. DE SAINT-JUST, « Institutions républicaines », in *Œuvres complètes*, op. cit., p. 1135-36.

<sup>78</sup> Condorcet was the only *philosophe* who performed an active role in the Revolution and the only one to espouse republicanism for France. He had advocated the establishment of a republic on the principle of universal suffrage, was critical of the property qualification in the 1791 Constitution but his key work, on the Girondine constitution of 1793, was rejected by the Jacobins because of its federalism and weak executive power. The Jacobins then took this over, perverted his project, and this became the still-born 1793 Constitution. Condorcet fell from favour because of his association with the Girondine constitution but also because he objected to the trial of the king by the Convention; he voted to find the king guilty but refused to vote for the death penalty. Arrested in April 1794, he died in prison before the guillotine was able to do its work. Condorcet's constitutional ideas, founded on universal suffrage, representative democracy, protection of civil rights remains a model of a modern liberal democratic constitution. See D. WILLIAMS, *Condorcet and Modernity*, Cambridge, Cambridge University Press, 2007, ch. 6-8. The other constitutionalist of note was Sieyès who, when asked what he did during the Terror, commented: « I survived ».

itself through re-election and co-optation but in doing so it « destroyed what had been at the very heart of its plan – a Republic founded on law<sup>79</sup> ». That constitution lasted only until Napoleon's coup of 18 Brumaire (9 November 1799).

Into this febrile atmosphere stepped Benjamin Constant, who had arrived in Paris from his native Switzerland in 1795. Constant, the quintessential Thermidorian jurist, devoted his considerable intellectual energies to the question of how the Republic might draw a line under its revolutionary origins and establish its constitutional authority. He produced the most innovative work on *droit politique* of the period. Constant welcomed the Revolution as marking the end of the old feudal order<sup>80</sup>, but criticized the manner of its unfolding. The Terror, he argued, enacted a parody of liberty: far from purifying citizens to render them ready for « true » political liberty, it made them insecure and fearful<sup>81</sup>. It could lead the people only to slavishness or to insurrection, both of which subverted political authority. And a primary source of this evil had been the revolutionary devotion to a purely abstract conception of right. « There is no despotism in the world, however inept its plans and oppressive its measures », he noted, « which does not know how to plead some abstract purpose of a plausible and desirable kind<sup>82</sup> ».

Constant was a liberal by conviction but, more precisely, he was a political jurist<sup>83</sup>. Situating himself in the tradition of Montesquieu and Rousseau<sup>84</sup>, he built his argument from the elementary concepts of war and

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<sup>79</sup> F. FURET, *The French Revolution, 1770-1814*, A. Nevill trans., Oxford, Blackwell, 1992, p. 166.

<sup>80</sup> B. CONSTANT, « Principles of Politics applied to all Representative Governments » [1815], in *Political Writings*, B. Fontana trans., Cambridge, Cambridge University Press, 1988, p. 173: « Twenty-three years ago [1792] they [the European powers] [...] attacked us because we wanted our own government, because we had liberated the peasant from the tithe, the protestant from intolerance, thought from censorship, the citizen from arbitrary detention and exile, the plebeian from the insults of the privileged ».

<sup>81</sup> B. CONSTANT, *Principles of Politics Applicable to all Governments* [1810], E. Hoffman ed., D. O'Keeffe trans., Indianapolis, Liberty Fund, 2003, p. 20: « It was in the name of freedom that we got prisons, scaffolds, and endless multiplied persecution ». [The Fontana edition is a translation of the only edition published in Constant's lifetime. The Hoffman edition, being less of a manual of applied politics, expresses his political principles in their most extended form].

<sup>82</sup> *Ibid.*, p. 59.

<sup>83</sup> The most subtle liberal account is: S. HOLMES, *Benjamin Constant and the Making of Modern Liberalism*, New Haven, Yale University Press, 1984. Holmes notes: « The influence of this *politique* tradition [deriving from Bodin and Montaigne] on Constant's thinking was decisive » (p. 9).

<sup>84</sup> B. CONSTANT, *Principles of Politics* [1815], *op. cit.*, p. 20: « Research relating to the constitutional organization of government having been, since *The Social Contract* and *The Spirit of the Laws*, the favourite speculative focus of the most enlightened of our writers in France, is now very decidedly out of favour today. I am not examining here at all whether this disfavour is justified; but it is certainly quite understandable. In a few years we have tried some five or six constitutions and found ourselves the worse for it. No argument can prevail against such an experience ».

peace, state and sovereignty. He recognized that war, which is « in man's nature », could help to shape certain fine human faculties, including « heroic devotion », the formation of « sublime friendships », and the forging of a « national spirit of the people<sup>85</sup> ». If the birth of states is traced to their origins, this warlike characteristic – the criterion of friend-enemy – offered a perfectly serviceable account of their formation. But he also recognized that with the modern world is an age of commerce and « the more the commercial tendency prevails, the weaker must the tendency to war become<sup>86</sup> ». Following Montesquieu, Constant argued that in the modern era, war loses « its charm as well as its utility<sup>87</sup> ».

Constant maintained that all governments, whether despotic or liberal, have a repressive and coercive aspect: without such a monopoly on the use of force, governments cannot build their authority to ensure that citizens obey and order is maintained. The critical distinction between liberal and despotic government is not the absence or presence of coercion: it is the existence of institutional arrangements that accord with the customs of a people. The revolutionaries' great failure was that they tried to « build their edifice' by « grinding and reducing to the dust the [inherited] materials that they were to employ ». This removed a « natural source of patriotism », which they then sought to replace by « a factitious passion for an abstract being, a general idea stripped of all that can engage the imagination and speak to the memory<sup>88</sup> ». Only by strengthening institutional arrangements which command the respect of the people could authority be acquired and political power generated. Constant, like Bodin and Montesquieu, advocated institution-building as the key principle of political right<sup>89</sup>.

Constant's great achievement was to have synthesized the principles of Montesquieu and Rousseau<sup>90</sup>. His *Principes de politique*, founding the polit-

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<sup>85</sup> B. CONSTANT, « The Spirit of Conquest and Usurpation and their Relation to European Civilization », in *Political Writings*, *op. cit.*, p. 51.

<sup>86</sup> *Ibid.*, p. 53.

<sup>87</sup> *Ibid.*, p. 55. See Ch. L. de Secondat MONTESQUIEU, *The Spirit of the Laws*, *op. cit.*, esp. Books 20-24. Constant studied at Edinburgh University in 1783-85, when scholars of the Scottish Enlightenment under Montesquieu's were developing their « four stages thesis ». See reports of Adam Smith's lectures at Glasgow during the 1760s: A. SMITH, *Lectures on Jurisprudence*, Oxford, Oxford University Press, 1978, p. 14; R.L. MEEK, *Social Science and the Ignoble Savage*, Cambridge, Cambridge University Press, 1976.

<sup>88</sup> B. CONSTANT, « The Spirit of Conquest and Usurpation and their Relation to European Civilization », *op. cit.*

<sup>89</sup> J. BODIN, *The Six Bookes*, *op. cit.*; Ch. L. de Secondat MONTESQUIEU, *The Spirit of the Laws*, *op. cit.*

<sup>90</sup> T. TODOROV, *A Passion for Democracy: Benjamin Constant*, London, Algora, 1999, p. 35; H. ROSENBLATT, « Why Constant? A Critical Overview of the Constant Revival » *Modern Intellectual History*, 2004-1, p. 444: « Constant's thought was certainly more concerned with advancing democracy than it was with containing it. There is, in fact, little ambivalence about democracy in Constant. He admired Rousseau, was a consistent advocate of popular sovereignty, and looked very favorably upon what he hailed as the "march of equality" throughout history. Constant did not worry so much about the so-called "excess-



ical on the concepts of state and sovereignty, provides an authoritative statement of *droit politique* for the modern world. From Rousseau, he derives the principle that a regime acquires its legitimacy from popular sovereignty: monarchical regimes could be established by popular will, but they are commonly the product of force rather than right<sup>91</sup>. From Montesquieu, he derives the principle that the ruling power acquires its authority not only from its legitimating source as an expression of popular will, but also from the manner in which power is exercised<sup>92</sup>. Modern governments must not only claim a democratic mandate but must also act through accepted constitutional forms.

Many errors of the Revolution, Constant believed, could be traced to Rousseau's teaching<sup>93</sup>, though the Jacobins had often misinterpreted him. They had failed in particular to appreciate the importance of maintaining a clear distinction between sovereignty and government, which Rousseau had adopted from Bodin. Instead, they instituted a regime of political liberty suffused with allusions to the republican virtues of ancient Greece and Rome which even Rousseau had recognized was inappropriate for modern nation states. Under Rousseau's influence, the Jacobins had also conflated two different concepts of liberty, the ancient and the modern<sup>94</sup>. Modern liberty, founded on individual subjective right, protected a zone of privacy, independence, and protection from the exercise of arbitrary power. It was a concept unknown to the ancient world. The ancient idea of liberty, by contrast, expressed collective independence from rule by foreigners and required the active participation of citizens in collective self-government. This could only be achieved in small, culturally homogeneous city-states that promoted a politics of virtue founded on a martial spirit<sup>95</sup>. It was also invariably a slaveholding, warriors' republic of male citizens, which upheld a form of liberty incompatible with general equality: for some to be free, others had to be slaves.

Constant accepted the contemporary value of both concepts but advocated the need for balance. The prevalence of the modern conception, he suggested, was just as distortive as the dominance of the ancient, since the

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es" of democracy as he did about political hypocrisy – the abuse of words and concepts by despots with the aim of masking self-serving and oppressive regimes ».

<sup>91</sup> B. CONSTANT, *Principles of Politics Applicable to all Governments* [1810], *op. cit.*, p. 22.

<sup>92</sup> *Ibid.*, p. 38: « The legitimacy of government depends on its purpose as well as upon its source. When the government is extended to purposes outside its competence, it becomes illegitimate ».

<sup>93</sup> B. CONSTANT, *Principles of Politics* [1815] *op. cit.*, p. 177: « ... his *Social Contract*, so often invoked in favour of liberty, [made] the most formidable support for all kinds of despotism ».

<sup>94</sup> B. CONSTANT, « The Freedom of the Ancients Compared with that of the Moderns » [1819], in *Political Writings*, *op. cit.*, p. 307-28.

<sup>95</sup> S. HOLMES, « The Liberty to Denounce: Ancient and Modern », in H. ROSENBLATT (dir.), *The Cambridge Companion to Constant*, *op. cit.*, p. 52: « The brutally violent, competitive and dangerous world outside each city's walls goes a long way to explaining the kind of liberty cherished by inhabitants of ancient republics ».

atrophy of the political could be as dangerous as a total politicization of society. The Jacobin error stemmed from their adherence to an ancient idea of liberty in an emerging modern world founded on equality and the abhorrence of slavery. Liberty in the modern world of the political had to recognize the distinctions between public and private, political and social, participation and independence. Political liberty presupposes civil liberty; modern constitutional ordering involves a complicated interlocking arrangement in which these two distinct forms of freedom reinforce one another.

The serious limitation in Rousseau's concept of political right that Constant's work highlights is that it did not incorporate a sufficiently robust theory of government. Sovereignty might have been transferred from the king to the people but under Rousseau's influence the revolutionary leaders could not establish any stable system of government. Constant argued that a system of government whose source rests entirely on the will of the people through election will struggle to maintain its authority. Authority could be enhanced only by establishing institutional arrangements which acquire the same degree of permanence and independence as kingship. His objective, then, was to discover the principles of modern constitutional ordering that could meet such tests.

The modern political world finds itself on the division between public and private. Differentiation between state and society is created by the emergence of a distinct sphere of civil society. But this does not diminish the domain of the political; rather, the autonomy of the political and the autonomy of the social form a collective self-division that is a distinctive feature of modernity. In an assessment of Constant's achievements, Marcel Gauchet notes that « it is misleading to speak as if there was a certain sum of power and authority to be divided, so that increase on one side leads to decrease on other<sup>96</sup> ». The domain of the political, underpinned by an absolute concept of sovereignty, remains but sovereignty now expresses the autonomy of the political. Modernity leads to a growth in both social and political power, with each drawing on the other in a reflexive process. The democratic impetus releases social power at the same time as it extends the nature, scale and range of governmental power. In modern regimes, hierarchical ordering, characteristic of regal authority, diminishes, but « the political » continues « to serve as society's symbolic underpinning, the source of its collective identity and cohesiveness<sup>97</sup> ». This « symbolic underpinning » is found in the constitutional form of modern states. But this is a constitution arranged not on the principle of command and obedience but on that of organization.

This was Constant's brilliant insight. In order to maintain its authority and legitimacy, modern governments must fulfil the crucial function of representing society. Their primary goal was not the promotion of virtue but the maintenance of peace and for this an impartial rule structure – a constitu-

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<sup>96</sup> M. GAUCHET, « Liberalism's Lucid Illusion », in H. ROSENBLATT (dir.), *The Cambridge Companion to Constant*, op. cit., p. 34.

<sup>97</sup> *Ibid.*, p. 36.

tional arrangement of considerable institutional complexity – is required<sup>98</sup>. He acknowledged the principle of legislative supremacy – « it is representative assemblies alone that can infuse life into the political body<sup>99</sup> » – but also emphasized the importance of maintaining a division of powers. This is not to limit the power of government, as classical liberals demand. It is to build the power and authority of government by enhancing its capacity for collective action. A constitution is « more than an instrument for protecting citizens from misuses of state power: it creates a mechanism for public learning and governmental self-correction<sup>100</sup> ».

Constant here touches on the central issue of how a constitution establishes its authority. He recognizes that the political power generated through a constitution contains an element that is not derived from delegation and mandate. In this respect, « the political order is in some respects prior to the will of citizens<sup>101</sup> ». This is what political jurists had in mind when they conceived « the state' as an omnipotent and impersonal power<sup>102</sup>. Expressed in constitutional language, authority is established only if the constitution is recognized as autonomous. Constant underscores this point by invoking the need to establish a « neutral » or « preservative » power<sup>103</sup>. Such power maintains the principle of unity in government: its purpose is « to defend government against division among the governing and to defend the governed against oppression by the government<sup>104</sup> ». And for this an authority independent of both the people and the executive is needed<sup>105</sup>. This is the constitution's monarchical element<sup>106</sup>. But it does not express a form of

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<sup>98</sup> B. CONSTANT, *Principles of Politics* [1810], *op. cit.*, p. 418: « The ancients, having less need of individual freedom than we, attached the highest importance to laws about social mores. We give a comparable importance to constitutional mechanisms ».

<sup>99</sup> B. CONSTANT, *Principles of Politics* [1815], *op. cit.*, p. 197.

<sup>100</sup> *Benjamin Constant and the Making of Modern Liberalism*, *op. cit.*, p. 144.

<sup>101</sup> M. GAUCHET, « Liberalism's Lucid Illusion », *op. cit.*, p. 41.

<sup>102</sup> See M. LOUGHLIN, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, ch. 7. For its significance in the French tradition see: A. GUÉRY, « The State », in P. NORA (dir.), *Rethinking France: Les Lieux de Mémoire*, Vol. 1, M. Trouille trans., Chicago, University of Chicago Press, 2001, ch. 1.

<sup>103</sup> See B. CONSTANT, *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays*, Paris, Aubier, 1991, Book 8: « D'un pouvoir neutre ou préservateur, nécessaire dans toutes les constitutions ».

<sup>104</sup> *Ibid*, p. 387: « Le but du pouvoir préservateur est de défendre le gouvernement de la division des gouvernants, et de défendre les gouvernés de l'oppression du gouvernement ».

<sup>105</sup> *Ibid*, p. 375: « Il faudrait en conséquence créer un pouvoir dont l'intérêt fût distinct à la fois et de celui du pouvoir législatif et de celui du pouvoir exécutif » [It would consequently be necessary to create a power whose interest was at the same time distinct from both the legislative and the executive power].

<sup>106</sup> Constant noted that this neutral power incorporates a monarchical dimension with two elements: the executive, with positive prerogatives, and the royal, which is based on illusions derived from religion and tradition (action and representation). Constitutional monarchy's strength is that it involved a separation not into three branches but five: royal power, executive, power that represents permanence (hereditary), power that represents opinion

government; it merely, in Holmes's words, operates « as a cog in the constitutional division of functions<sup>107</sup> ». Its function is to ensure that society and government operate in harmony<sup>108</sup>.

Constant's objective was to demonstrate the central importance of the constitution in the construction of modern political authority. Constitutions are more than mere declarations of principles. « All the constitutions which have been given to France guaranteed the liberty of the individual », he noted, « and yet, under the rule of these constitutions, it had been constantly violated<sup>109</sup> ». In order to establish their authority, they must be in accordance with the social mores of their subjects<sup>110</sup>. Constant presents a profound analysis of the constitution's foundational role in the concept of political right.

### VIII. THE IMPACT OF POSITIVISM AND THE GROWTH OF SOCIAL SCIENCE

The philosophers of the Enlightenment maintained that reason and experience were the sole sources of authority. Relying heavily on the power of reason, their revolutionary disciples had destroyed the old political order without successfully fashioning a new one. The solution, some argued, must be to start from a different premise and anchor political ideas in experiential reality. Most prominent was Henri, Comte de Saint-Simon, who contended that the reason the Revolution had failed was that it had been directed by lawyers and their abstract theories. Instead of metaphysical doctrines, which led to the Terror and an unworkable form of government, modern political leaders must be guided by scientific principles. « The philosophy of the eighteenth century was critical and revolutionary », Saint-Simon noted, whereas that of the nineteenth century will have to be « inventive and constructive<sup>111</sup> ». Political authority is acquired, he suggested, not through abstract reasoning founded on metaphysical beliefs but according to the mate-

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(elected) and judicial power. Royal power is neutral power: B. CONSTANT, *Principles of Politics* [1815], *op. cit.*, ch. 2, p. 184-185.

<sup>107</sup> S. HOLMES, *Benjamin Constant and the Making of Modern Liberalism*, *op. cit.*, p. 145.

<sup>108</sup> « This marks the beginning of an effort to explore the ultimate nature of power, its true *raison d'être* and authentic functions » (M. GAUCHET, « Liberalism's Lucid Illusion », *op. cit.*, p. 40).

<sup>109</sup> B. CONSTANT, *Principles of Politics* [1815], *op. cit.*, p. 289.

<sup>110</sup> B. CONSTANT, *Political Writings*, *op. cit.*, p. 172: « Constitutions are seldom made by the will of men. Time makes them. They are introduced gradually and in an almost imperceptible way. Yet there are circumstances in which it becomes indispensable to make a constitution. But then do only what is indispensable. Leave room for time and experience, so that these two reforming powers may direct your already constituted powers in the improvement of what has been done and the completion of what is still to be done ». See further H. ROSENBLATT, « Why Constant? A Critical Overview of the Constant Revival », *op. cit.*, p. 444: « one of the great innovations of French liberals like Constant was their sociological approach to both history and political theory. It was they who first emphasized socio-economic change and invented the concept of a social revolution ».

<sup>111</sup> Cited in J. JENNINGS, *Revolution and Republic: A History of Political Thought in France since the Eighteenth Century*, Oxford, Oxford University Press, 2011, p. 347.

rial benefits government confers. Authority is generated through the supply of collective goods – defence, law and order, and physical and social infrastructure – that enhance the security, wellbeing and happiness of subjects.

During the nineteenth century, the growth in technical knowledge about the functions of government brought about a shift in its sources of legitimacy. This shift was driven by pioneering scholars of the nascent social sciences. Innovators such as Saint-Simon, Comte and Durkheim situated themselves in a Cartesian tradition of thought defined as: « providing a fixed and unvarying meaning to concepts; expressing truth in clear and distinct ideas; arguing with precision and elegance; moving from simple to complex forms; cultivating a sense of moral autonomy and intellectual audacity; and overcoming one's passions<sup>112</sup> ». They drew on the work of the *philosophes*, especially Montesquieu and Condorcet, in their attempts to trace the trajectory of human progress, but were critical of their methods. Science, not metaphysics, was needed.

A functional orientation had not been altogether absent from revolutionary discourse. In the opening pages of *Qu'est-ce que le tiers-état ?*, Sieyès had adopted a modern classification, arguing that the nation consists not of three hierarchical feudal estates, but of four distinct classes: landed labour, industrialists, merchants, and professional and scientific occupations. In similar vein, Saint-Simon argued that by 1789 the feudal order had already lost its authority and that the true revolutionary challenge was that of « organizing the industrial and scientific system summoned by the level of civilization to replace it [the feudal order] ». The underlying problem, he suggested, was that revolutionary leaders had only placed power into a different set of hands, whereas the real challenge was to recognize the changing nature of power in modern society. Modern governments, Saint-Simon maintained, « will no longer command men: their function will be limited to ensuring that all useful work is not hindered<sup>113</sup> ». Command will be replaced by co-ordination.

It fell to Auguste Comte, Saint-Simon's faithful pupil, to put his ideas into a methodical form. In his *Système de politique positive* of 1824, he presented a systematic exposition of the main branches of social inquiry. Comte argued that human knowledge passes sequentially through three developmental stages: the theological (or fictional), the metaphysical (or abstract), and the scientific (or positive). Only in the scientific era, he argued, can we, through observation and inductive reason, discover the laws that govern phenomena. In so doing, the disorder and uncertainties of the Revolution would be resolved. The abstractions of metaphysics, Comte was suggesting, must be replaced by the science of social physics, when the government of men could be replaced by the administration of things. In this new type of order, the word « right » – being a theological-metaphysical

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<sup>112</sup> S. HAZAREESINGH, *How the French Think: An Affectionate Portrait of an Intellectual People*, London, Allen Lane, 2015, p. 33.

<sup>113</sup> SAINT-SIMON, *Oeuvres*, vol. 2, cited in J. JENNINGS, *Revolution and Republic*, *op. cit.*, p. 349.



concept – must be « excluded from the proper language of politics »; it should be replaced by the language of duty<sup>114</sup>.

Comte's innovation in establishing a « social physics » – what he later called « sociology »<sup>115</sup> – was taken a step further by Émile Durkheim, holder of the first chair of social science in France. Analysing the methodology of Rousseau and Montesquieu in his doctoral dissertation, Durkheim explained that, in seeking to discover the nature of the laws, Montesquieu had been « obliged to investigate religion, morality and the family, with the result that he has actually written a treatise dealing with social phenomena as a whole<sup>116</sup> ». It was society as an integrated unity rather than the state as the source of political unity that should now come under scrutiny. His pioneering studies of such phenomena as religion were intended to show, not the truth or falsity of religious belief, but of the significance of religion's social function in reinforcing the bonds that hold society together<sup>117</sup>. So, what impact did this positivist, scientific turn have on the concept of *droit politique*?

The processes of nineteenth century industrialization and urbanization had eroded traditional means of social cohesion (including religion) and opened up deep divisions in society. To address them, governmental action on an unprecedented scale was needed. These developments raised profound questions about the state, political unity, and the relationship between legality and legitimacy, issues which underpinned the most contentious jurisprudential issues of the Third Republic. The orthodox response from both the profession and the academy to the growing influence of positivist ideas was to confine their discipline to the study of positive law. The consequence was that the state came to be conceived as a functional institution that acquired its legitimacy merely through the delivery of collective services. The abstract concept of the state served no useful purpose and should be replaced by the concrete expression, « government<sup>118</sup> ». A parallel line of argument led jurists to redefine the state as a political fact of little legal significance. This reached its apogee in the work of Raymond Carré de Malberg, who placed the state at the centre of inquiry but then excised any consideration of the sources of power on which its authority was established. By virtue of

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<sup>114</sup> A. COMTE, *Discours sur l'ensemble du positivisme* [1848], cited in J. JENNINGS, *Revolution and Republic*, op. cit., p. 359.

<sup>115</sup> See A. COMTE, *Cours de philosophie positive*, Paris, Ballière, 2<sup>nd</sup> ed., 1864; *Auguste Comte and Positivism: The Essential Writings*, G. Lenzer ed., New York, Harper, 1975, p. 254-255.

<sup>116</sup> É. DURKHEIM, *Montesquieu and Rousseau as Forerunners of Sociology*, R. Mannheim trans., Ann Arbor, Michigan University Press, 1960, p. 2.

<sup>117</sup> *Id.*, *The Elementary Forms of Religious Life* [1912], C. Cosman trans., Oxford, Oxford University Press, 2001.

<sup>118</sup> See, e.g., Henri Berthélemy, Professor of Administrative Law in the University of Paris, who wrote that he wanted to avoid, so far as possible, the use of the word « state »: « par lequel, presque toujours, on veut designer les gouvernants » (H. BERTHÉLEMY, *Libres entretiens*, Paris, Union pour la Vérité, 4<sup>th</sup> series, 1907-08, cited in H.S. JONES, *The French State in Question: Public law and political argument in the Third Republic*, Cambridge, Cambridge University Press, 1993, p. 44).

this type of argument, Carré de Malberg converted the issue of the state's legitimacy from a juridical question into one of fact<sup>119</sup>. In place of *droit politique* – how do adherence to principles of right enhance the authority of the state? – he presented a functional logic: can the state in fact serve its purpose of maintaining order and protecting the nation?

Evidence of the attempt to bring closure to the revolutionary rhetoric of *droit politique* appears in the Third Republic's Constitution of 1875, which established the basic organizational arrangements of government but contained no declaration of basic rights. In the views of leading legal positivist public lawyers, such as Esmein and Carré de Malberg, the 1789 Declaration of Rights possessed no legal status whatsoever<sup>120</sup>. Nevertheless, the question of how to express some sense of political unity remained. The *doctrinaires* – liberals such as Royer-Collard and Guizot who were highly influential in the first half of the nineteenth century – sought a resolution by incorporating the authority to express the general will entirely into the legislative power<sup>121</sup>. But with the rapid growth in the administrative tasks of government, this answer was unconvincing. The 1875 Constitution had « passed over the subject of the administration in silence<sup>122</sup> », but it remained a major source of contention. The answer offered by Joseph Barthélemy was that, although the legislature enacted the laws (*lois*), the fundamental law (*droit*) could be articulated and enforced only by the executive. The role of the executive, he asserted, was « to assure through spontaneous and continuous intervention the very life of the state<sup>123</sup> ». This question of how political unity could be maintained in the administrative state preoccupied two of the Third Republic's most innovative public lawyers: Léon Duguit and Maurice Hauriou.

Closely following the trajectory of the works of Comte and Durkheim, Duguit presents a sociological positivist account of law which discards *droit politique* due to its metaphysical foundation. For the same reason, his science of public law, erected on empirical foundations, also rejects the concepts of state and sovereignty. The state, he explained, cannot possess a will: what exists are the « individual wills of those governing », a fact that

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<sup>119</sup> R. CARRÉ DE MALBERG, *Contribution à la théorie générale de l'État*, Paris, Sirey, 1920, vol. 1, p. 65-66: « The birth of the state coincides with the establishment of its first constitution, written or not. [...] This originary constitution is, like the very state to which it gives birth, only a pure fact, unaffected by all juridical qualifications: its establishment in effect does not derive from a juridical order anterior to this state ».

<sup>120</sup> A. ESMEIN, *Éléments de droit constitutionnel français et comparé*, Paris, Sirey, 1921, vol 1, p. 559; R. CARRÉ DE MALBERG, *Contribution à la théorie générale de l'État*, *op. cit.*, vol. 1, p. 579.

<sup>121</sup> A. CRAIUTU, *Liberalism under Siege: The Political Thought of the French Doctrinaires*, Lanham, Rowman & Littlefield, 2003.

<sup>122</sup> H.S. JONES, *The French State in Question*, *op. cit.*, p. 70.

<sup>123</sup> J. BARTHÉLEMY, *Le rôle du pouvoir exécutif dans les républiques modernes*, Paris, Giard & Brière, 1906, cited in D. BATES, « Political Unity and the Spirit of the Laws: Juridical Concepts of the State in the Late Third Republic », *French Historical Studies*, 28, 2005, p. 74.

cannot be avoided by postulating a legal personality for the state<sup>124</sup>. Duguit also rejected the idea of there being a particular form of power - political power – generated through « rightful authority ». Political power is simply a fact. Power is vested in those who govern and since this power can never in its origins be legitimate, it cannot yield a right to govern. Those in power govern legitimately only by conforming to what he called « the jural principle » (*la règle de droit*)<sup>125</sup>.

Duguit's « jural principle » or « rule of law » derives from the principle of social solidarity. It is a collectivist reworking of the categorical imperative: « Do nothing which can possibly infringe upon social interdependence [...] [and] do all that is within your power [...] to insure and increase social interdependence<sup>126</sup> ». This is an objective law, a fact established through scientific observation. It confers no rights: rulers possess no right to command and individuals possess no rights of liberty or property. The jural principle establishes a regime of duties: everyone subject to this objective law is being required to promote social solidarity. Power thus derives from its function as government, which is to promote social solidarity. And as a consequence, the notion of public service supersedes the general will as the foundational concept.

*Droit politique*, a concept founded on a system of subjective rights, is thus overthrown, to be replaced with a regime of objective law. *Droit politique*, Duguit suggests, is merely a scholarly invention that confers legitimacy on the exercise of force. Following Saint-Simon, he contends that the true basis of public law is not command: it is organization<sup>127</sup>.

Duguit's realist analysis did not go unchallenged. Some argued that in criticizing theories founded on abstract principles, he had himself used the abstractions of solidarity, service, and government<sup>128</sup>. His analysis was also challenged by Hauriou, who accepted that theories founded on subjective right were skewed, but argued that so too was Duguit's objective law<sup>129</sup>. Writing at the end of the nineteenth century, Hauriou maintained that the foundations of authority in France had still not been settled after the violent upheavals of 1789<sup>130</sup>. The Revolution, he explained, had been driven by

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<sup>124</sup> L. DUGUIT, « The Law and the State », *Harvard Law Review*, 31, 1917, p. 162.

<sup>125</sup> *Ibid.*, p. 163.

<sup>126</sup> *Ibid.*, p. 178.

<sup>127</sup> L. DUGUIT, *Law in the Modern State*, F. & H. Laski trans., London, Allen & Unwin, 1921, p. 49.

<sup>128</sup> L. MICHOU, *La théorie de la personnalité morale et son application au droit français*, Paris, LGDJ, 1906, Pt. I, p. 44-53.

<sup>129</sup> M. HAURIOU, « Les idées de M. Duguit », *Recueil de législation de Toulouse*, 7, 1911 4-49; *id.*, « The Two Realisms » [1912], in A. BRODERICK (dir.), *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos*, Cambridge, Harvard University Press, 1970, p. 45-51.

<sup>130</sup> M. HAURIOU, *La science sociale traditionnelle*, Paris, Larose, 1896, p. 192: « Nous n'avons pas retrouvé notre équilibre depuis la violente refonte révolutionnaire de 1789 »,

three main ideological themes. First, despite the rhetoric of liberty, it had in fact been driven by egalitarianism. Secondly, egalitarianism in the name of a mystical *demos* had resulted in legislative will being equated with the general will, creating an overbearing centralization of power. Thirdly, the revolutionary spirit had imbibed a Rationalist mentality marked by a profound distrust of customary ways<sup>131</sup>. These three revolutionary themes were the source of problems with which France was still living. They determined Hauriou's agenda for political reform<sup>132</sup>, and also shaped his legal method. He was evidently opposed to the Jacobin's abstract conception of *droit politique*, but did he seek to rework the concept or to supplant it?

Hauriou's most innovative contribution to jurisprudence was his institutional theory of law. This holds that institutions, which express « duration, continuity and reality », provide the juridical basis of state and society<sup>133</sup>. Rousseau had deployed the device of the social contract because the institutions of his time were corrupt, but in the process he confused force with power. Society, Hauriou asserted, is not founded on violence but on power, a power that builds its authority through gradual social acceptance over time. He acknowledged the importance of power as *potestas*, a central concept of political right. Contrary to the received legal positivist view that law makes institutions, Hauriou maintained that institutions make law<sup>134</sup>. In this respect, his theory is situated within the frame of Montesquieu's spirit of the laws. Adopting Montesquieu's argument that order founds itself on a balance of governmental powers, Hauriou argues that it is by virtue of this arrangement that « governmental power is not just a simple force but a rightful power capable of creating law<sup>135</sup> ».

The juridical basis for Hauriou's institutionalism is less clear. His institutional theory maintains that « the foundation of institutions has a juridical character and that [...] the bases of juridical duration are juridical themselves<sup>136</sup> ». In those institutions that are constituted bodies, such as states, trades unions, and other incorporated associations, « organized power » is an expression of the « directing idea » (*idée directrice*) of that body. These two concepts – « directing idea » and « organized power » – form the core of his theory. The directing idea is an ideal manifestation of the tasks to be

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cited in C.B. GRAY, *The Methodology of Maurice Hauriou*, Amsterdam, Rodopi, 2010, p. 3.

<sup>131</sup> *Ibid.*, p. 20-25.

<sup>132</sup> Hauriou's most basic reform argument, expressed throughout his studies, is that the revolutionary pursuit of equality through centralization had destroyed the authority of those intermediate associations that operated between citizens and central government and which provided the bedrock of order and equilibrium in the state.

<sup>133</sup> M. HAURIOU, « The Theory of the Institution and the Foundation: A Study in Social Vitalism », in A. BRODERICK (dir.), *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos, op. cit.*, 1970, p. 93. [trans. of « La théorie de l'institution et de la fondation », *Cahiers de la nouvelle journée*, 4, 1925].

<sup>134</sup> *Ibid.*, p. 123.

<sup>135</sup> *Ibid.*, p. 105.

<sup>136</sup> *Ibid.*, p. 99

realized by that body. This is not the same as its function: « The idea of the state, for example, is quite a different thing from the end of the state or the function of the state<sup>137</sup> ». This is because the directing idea is not exterior but intrinsic. This leads to the second concept: « the idea of the state has at its service an autonomous power of government that is imposed on the citizens themselves and in which they only participate<sup>138</sup> ». That is, the organized power of government, which must conform to the principles of representation and separation of powers, exists in order to realize the directing idea. Governors may at times distort the task, but « surely and progressively » they end up by « submitting to its service<sup>139</sup> ». Constitutional mechanisms assist but they « would have been useless if they had not been supported by a public spirit imbued with the idea of the state<sup>140</sup> ». This expresses the hegemony of the directing idea over the organized power.

Hauriou then asks: « what laws of the state [...] precisely express the idea of the state<sup>141</sup> ? ». Since most legal rules impose limits, « the highest forms under which the directing ideas of an institution tends to express itself subjectively are not properly juridical »: they are primarily « moral or intellectual<sup>142</sup> ». Nevertheless, they are capable of becoming juridical. They achieve this status as « higher principles of law<sup>143</sup> ». Examples of these « higher principles » include the declarations of rights produced during the American and French revolutions which « express the heart of the idea of the modern state<sup>144</sup> ». These higher principles, exemplifications of what he calls « superlegality », are expressions of a « constituent power » which keeps the laws and formal constitution in tune with the evolving character of the directing idea<sup>145</sup>.

Despite its ambiguities and complexities<sup>146</sup>, Hauriou's theory is evidently a species of *droit politique*. He notes that corporate bodies, such as the

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<sup>137</sup> *Ibid.*, p. 101.

<sup>138</sup> *Ibid.*, p. 104.

<sup>139</sup> *Ibid.*, p. 106.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*, p. 114.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*, p. 115.

<sup>145</sup> *Ibid.*, p. 120.

<sup>146</sup> Hauriou claimed to be a (sociological) positivist: « I was a positivist to the second power, in the style of Comte[...] », cited in C.B. GRAY, *The Methodology of Maurice Hauriou*, *op. cit.*, p. 9. Cf. O. BEAUD, « Hauriou et le droit naturel », *Revue d'histoire des facultés de droit*, 8, 1989, p. 123-138 (arguing that Hauriou is deeply immersed in Thomist natural law); W.I. JENNINGS, « The Institutional Theory », in JENNINGS (dir.), *Modern Theories of Law*, London, Oxford University Press, 1933, p. 69: « I do not believe that Hauriou consciously adopted any Thomistic philosophy when he began to formulate the institutional theory ».



state, « sustain around themselves by their power<sup>147</sup> », he recognizes the critical importance of maintaining balances across governing institutions as a means of building authority, and he presents the « directing idea » as an institutional variant of Rousseau's general will. He also accepts that « every positive law or order of the government is conformed to right order of some kind until it is proven contradictory to “the rule of law” which is another kind of law<sup>148</sup> ». Hauriou argues that Duguit's error was to have built everything on a principle of objective law. This is limiting because it does not contain a « subjective seed »: a constituent power<sup>149</sup>. The objective element, he contends, does not subsist in a juridical rule, but in the institution with its directing idea and organized power. This comparative assessment led Carl Schmitt to note with some asperity that the « juristic positivism of Duguit is thoroughly of the metaphysical kind, and the alleged mystic Hauriou is “more real”, more down-to-earth and in this sense by far “more positive” than a doctrinaire of principles and pure “scientific” positivism<sup>150</sup> ».

## IX. POST-WAR LEGACIES

Hauriou and Duguit were jurists of the first rank. Each recognized that the rapid growth of governmental powers was having an impact on legal form, to which they responded with innovative accounts of the way modern legal order should be conceptualized. However, neither Hauriou's institutionalism nor Duguit's realism was able to found a strong school of French jurisprudence in twentieth century. The dominant tradition of French scholarship in public law throughout the twentieth century has been built on a relatively orthodox acceptance of legal positivism. This has sought to preserve the purity of legal science by severing issues of history and politics from juristic inquiry. Public law scholarship continued to be based on the concept of the state but, in accordance with positivist orthodoxy, the state was conceived to be a legal person and its authority simply a political fact. Some jurists have resisted this reductive manoeuvre<sup>151</sup>, and some continue

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<sup>147</sup> M. HAURIOU, « The Theory of the Institution and the Foundation », *op. cit.*, p. 122.

<sup>148</sup> *Id.*, « Les idées de M. Duguit », *op. cit.*, p. 14: « toute loi positive ou tout ordre de gouvernement sont présumés conformes à espèce de droit jusqu'à ce qu'ils sont en contradiction avec “le règle de droit” qui est une espèce de droit ».

<sup>149</sup> *Ibid.*, p. 123.

<sup>150</sup> C. SCHMITT, *On the Three Types of Juristic Thought* [1934], J.W. Bendersky trans., Westport, Conn, Praeger, 2004, p. 87.

<sup>151</sup> See, e.g., G. BURDEAU, *L'État*, Paris, Éditions du Seuil, 1970, p. 14: « The state is an idea, not a tangible phenomenon; it is a product of thought. There is no land, no people, no body of mandatory rules. Certainly, all these sensitive data are not foreign to it, but it transcends them. Its existence does not belong to the tangible phenomenology; it is of the order of the spirit. The state is in the full sense of the word, an idea. Having no other conceptual reality it exists only because it is thought ». [« Il n'est ni territoire, ni population, ni corps de règles obligatoires. Certes, toutes ces données sensibles ne lui sont pas étrangères, mais il les transcende. Son existence n'appartient pas à la phénoménologie tangible ; elle est de l'ordre de l'esprit. L'État est, au sens plein du terme, une idée. N'ayant d'autre réalité que conceptuelle il n'existe que parce qu'il est pensé »].

to adopt a concept of public law that operates within the broader concept of *droit politique*<sup>152</sup>. But such works are not typical.

*Droit politique* was therefore in danger of disappearing from French thought. But during the last 50 years it has been revived, though this came from an unusual source. *Droit politique* has been rejuvenated by political theorists working in a Marxist, or post-Marxist, tradition. As the Fourth Republic morphed into the Fifth in 1958, many on the left had expressed concern that the growth of presidential powers marked the end of republicanism. Consequently, when Furet proclaimed that « the Revolution is over », he intended to signal an end to the « unlimited promise of equality », to the Revolution as « a matrix of universal history », and to the belief that representative democracy was only « a historical stage of social organization that was destined to be superseded<sup>153</sup> ». After the events of 1968, however, the French revolutionary catechism was amended, and some strands of this revision led to a restoration of *droit politique* – in thought at least if not in practice.

This reappraisal should be placed in context. French pioneers of sociology saw the evolution of modernity as positive, material progress based on advancements in scientific knowledge. They had little to say about its darker side. They recognized that continuing material progress would lead to the growth of administrative power, but did not see that this expansion of bureaucracy might lead to a loss of individual autonomy and creativity. Tocqueville had issued an early warning in the mid-nineteenth century. Questioning the assumption that equality and liberty were complementary principles (and therefore that *droit politique* involved a simple reconciliation), he predicted that the emergence of an equality of conditions, far from providing the foundation for liberty, might actually threaten its realization<sup>154</sup>. He foresaw that one of the dangers posed by the growth of democracy was that it could lead to a new variety of « tutelary power ». This type of power would be quite different from that exercised by the old regime since, far from being arbitrary, it will be « regular, provident and mild » as well as « absolute and minute ». And it would come about not through the whims of rulers but precisely because of government's need in an egalitarian democracy to be seen to promote the happiness of its subjects<sup>155</sup>.

This darker side of modernity became a more prominent theme in the radical thought of the postwar period, best illustrated in the work of Michel Foucault. Foucault argues that with the growth of the administrative state and the emergence of « the social question » (what he calls « the problem of popu-

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<sup>152</sup> See, e.g., O. BEAUD, *La Puissance de l'État*, Paris, PUF, 1994, presenting a historically-orientated account of the development of public law from Bodin to present day, organized on the themes of *souveraineté* and *le pouvoir constituant*. See also, O. BEAUD, *Théorie de la Fédération*, Paris, PUF, 2007.

<sup>153</sup> F. FURET, « The Revolution is over », in *Interpreting the Revolution*, *op. cit.*, p. 5.

<sup>154</sup> A. DE TOCQUEVILLE, *Democracy in America* [1835], H. Reeve trans., New York, Vintage Books, 1990.

<sup>155</sup> *Ibid.*, vol. 2 [1840], p. 318-319.

lation »), the activity of governing takes on an entirely new form. Like Duguit, he recognizes that governmental authority can no longer be explained within the juridical frame of sovereignty. But whereas Duguit reconceptualized public law positively as being founded on public service and the promotion of solidarity, Foucault emphasizes the darker side of the emergence of a new science of governmental reason. This new science, which he calls *gouvernementalité*, means that governing becomes a method « of employing tactics rather than laws » or of « using laws themselves as tactics », and with this instrumentalization of law the modern representation of « rightful authority » through the concepts of state, sovereignty and constitution is displaced<sup>156</sup>. *Droit politique*, Foucault suggests, is the anachronistic leftover from an earlier metaphysical period, and with the extension of what he calls « bio-power », involving the regulation of population, has now been (mostly) overcome<sup>157</sup>.

Foucault's analysis has been highly influential in radical circles, but some of his post-Marxist contemporaries have sought to rework the concept of *droit politique* to provide an intellectual basis for realizing its latent emancipatory potential.

## X. JACOBINISM REVIVED?

The French came late to Marxism, and even then, it was primarily an intellectual movement<sup>158</sup>. Louis Althusser, who had produced a « scientific » account of Marxism of considerable philosophical abstraction, became a pivotal figure. Although now split into various factions, many contemporary scholars who have revived Jacobin thought to offer novel reworkings of *droit politique* came under his influence. If Foucault's thesis on the emergence of *gouvernementalité* were reinterpreted in Althusserian terms, it might be said that the discourse of *droit politique* had become an element of what Althusser called the « ideological state apparatus<sup>159</sup> ». This is the supposition underpinning the work of two of Althusser's quarrelsome offspring: Alain Badiou and Jacques Rancière.

Both reject the standard account of politics as « the set of procedures whereby the aggregation and consent of collectivities is achieved, the organization of powers, the distribution of places and roles, and the systems for

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<sup>156</sup> See M. FOUCAULT, *Society must be defended: Lectures at the Collège de France, 1975-76*, D. Macey trans., London, Penguin, 2003.

<sup>157</sup> Cf. J. RANCIÈRE, « Who is the Subject of the Rights of Man? » in *Dissensus: On Politics and Aesthetics*, S. Corcoran trans., London, Continuum, 2010, p. 62-75 (following Agamben, Rancière argues that rather than contrasting sovereign power and biopower, they have converged since sovereign power now operates in a permanent state of exception and can be equated with « control of life »).

<sup>158</sup> S. HAZAREESINGH, *How the French Think*, op. cit., p. 194: « Marxism [...] was a relatively unknown quantity in France before 1940 ».

<sup>159</sup> L. ALTHUSSER, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses*, G.M. Goshgarian trans., London, Verso, 2014.

legitimizing this distribution<sup>160</sup> ». Each maintains that this set of practices, whether conceived in the terms of Hauriou, Duguit or Carré de Malberg, constitutes a rigid disciplinary apparatus. Politics, says Badiou, is not concerned with governing, it « cannot be governed by the State », and it cannot have anything to do with opinion, even the common opinion manifest as democratic consent<sup>161</sup>. This is because politics is not at all concerned with the « common will »: it is specific, momentous and concerned only with truth<sup>162</sup>. For Badiou, the authentic domain of the political is that of « freedom » and « justice ». In a similar vein, Rancière argues that the correct name for the conventional exercise of politics in modern society is « the police » *tout court*. Properly understood, politics (*la politique*) is antagonistic to the activity of policing. Politics, he argues, is a term that should be reserved for challenges to the established regime in the name of justice and freedom, a type of action which commonly arises only when the gulf between inequality and equality, or between « empty freedom » and « true freedom », comes to social consciousness<sup>163</sup>. Since Rancière's concept of « the police » includes the « system for legitimating this distribution », it is evident that most of the conceptions of *droit politique* we have been considering are incorporated within that disciplinary regime.

Badiou and Rancière are speaking the authentic language of the Jacobin natural right: when reading their critiques, we hear Saint-Just echoing down the ages. This resonance is even more explicit in Miguel Abensour's *Democracy Against the State*<sup>164</sup>. Some of Abensour's analysis follows in the steps of Badiou and Rancière, but in place of their concepts of politics he posits « insurgent democracy ». This « is not a variant of conflictual democracy, but its exact opposite »: whereas conflictual democracy operates « within the State », insurgent democracy « situates conflict in another space, outside the State, against it<sup>165</sup> ». By virtue of its workings, Abensour argues, the state must be forced « to avow that "democracy is the enigma of all constitutions solved", to confess that whatever its form may be, its origin is the sovereignty of the people, the people as an acting power<sup>166</sup> ». Insurgent democracy is a way for politics to bring about « a transformation of the power in potential to act in concert: it signifies the passage from power *over*

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<sup>160</sup> J. RANCIÈRE, *Disagreement: Politics and Philosophy*, J. Rose trans., Minneapolis, University of Minnesota Press, 1999, p. 28.

<sup>161</sup> A. BADIOU, *Metapolitics*, J. Barker trans., London, Verso, 2005, p. 87.

<sup>162</sup> *Ibid.*, ch. 1: « Against "Political Philosophy" », p. 10-25.

<sup>163</sup> J. RANCIÈRE, *Disagreement: Politics and Philosophy*, *op. cit.*, p. 18-19.

<sup>164</sup> M. ABENSOUR, *Democracy Against the State: Marx and the Machiavellian Moment*, M. Blechman & M. Breaugh trans., Cambridge, Polity, 2011 [*La démocratie contre l'État*, Paris, PUF, 1997].

<sup>165</sup> *Ibid.*, Foreword to the 2<sup>nd</sup> French edition, p. XL.

<sup>166</sup> *Ibid.*, p. 94.

human beings to power *with* and *between* human beings, the *between* being the place where the possibility of a common world is won<sup>167</sup> ».

With this radical conception of the constituent power of the people, Abensour contends that a fundamental conflict exists between *l'État de droit* and the true democratic institution of society. Liberty and equality can flourish only in a political movement that affirms « the possibility of annihilating the division between governors and governed, or reducing it to almost nothing, inventing a public space and political space under the banner of isonomy<sup>168</sup> ». These principles cannot be realized through « the rule of law ». The rule of law, he concludes, « generates a new concentration of power, one that holds all forms of independence in contempt » and one that has in fact « transformed itself into a new absolutism against democracy<sup>169</sup> ».

In common with Badiou and Rancière, Abensour sees the state as a machine that oppresses by transforming the power *between* humans into a power *over* them. Since « democracy is not a political regime but an action characterised by the irruption of the demos or the people onto the political stage in their struggle against the *grande*s », the idea of a democratic state is oxymoronic<sup>170</sup>. With this claim, Abensour makes a direct connection with Jacobinism. The « potential for compatibility between insurgent democracy and institution exists », he suggests, only « so long as the constitutional act, the fundamental norm, recognizes the people's right to insurrection, as did the Constitution of 1793<sup>171</sup> ». And he argues explicitly that we should « follow the trail that Saint-Just blazed in *Institutions républicaines*, i.e. of opposing institutions and laws, with institutions being granted primacy while laws are mistrusted ». The concept of institution being invoked here bears little similarity to Hauriou's: it may be the foundation of both government and law, but for Abensour it must be taken to express « the essence of the [ideal] republic<sup>172</sup> ».

Scholars such as Abensour, Badiou and Rancière directly oppose those who claim that « the Revolution is over » and they do so by seeking to restore the power of Jacobin thought. They reject the idea of law as a set of rules promulgated by a common will in favour of Saint-Just's conception of « right reason » founded on « true freedom » and « real equality ». *L'État de droit* is set in opposition to Robespierre's « reign of that eternal justice whose laws are engraved [...] in the hearts of all men ». Their arguments respond to the criticism that Jacobinism promotes « universal natural right » over « political right » with a radical re-interpretation of *droit politique* as a set of principles of liberty and equality that must be set to work in the material world. But the logic of their argument suggests that politics is that

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<sup>167</sup> *Ibid.*, p. 96-97.

<sup>168</sup> *Ibid.*, p. 96.

<sup>169</sup> *Ibid.*, p. 97,98.

<sup>170</sup> *Ibid.*, p. XXV. Introduction to Italian edition.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*, p. XXVII.



which disrupts any order of police: politics becomes a purely oppositional activity. This is a form of anarchy which, beyond utopian abstraction, contains no guidance on how a world might be built. And while it remains so, it provides no adequate basis for political jurisprudence.

## XI. DROIT POLITIQUE AS SYMBOLIC ORDER

Neo-Jacobinism has not gone unchallenged. A bridge for scholars seeking more explicitly to renew political jurisprudence is provided by Étienne Balibar, another of Althusser's intellectual children. Having moved further away from structural Marxism than Badiou and Rancière, he provides a bridge between « natural jurisprudence » and « political jurisprudence », between the Saint-Justs and the Constants *de nos jours*. Balibar suggests how « a critical reading of Marx and Marxist theory [...] could be combined with other interpretations of the tradition of political philosophy (Spinoza, Rousseau, Kant, Fichte) and above all with contributions to contemporary debates about universalism, racism, nationalism, and citizenship – more generally, what I called a “politics of the Rights of Man”<sup>173</sup> ». Recognizing the autonomy of the political underpinned by a concept of sovereignty<sup>174</sup>, and accepting that politics is « a determinate practice, not the utopia of an efficient administration of things, nor the eschatological hope of converting humanity to the paths of justice<sup>175</sup> », Balibar places the ideas of Rancière and Foucault in a more conventional dialectical frame of (respectively) emancipation and transformation, to which he adds his own (third) concept of civility<sup>176</sup>.

In fact, there is little left of Marxism in Balibar's political writing. He suggests that just as Marx had urged radicals « to turn away from the “apparent scene” of politics, structured by discourses and ideas/ideals, and unveil the “real scene” of economic processes », this pattern must today be inverted so that « “material” processes are themselves [...] determined by the processes of the imaginary<sup>177</sup> ». This is so, because « all forces which interact in the economico-political realm are also collective groupings, and consequently possess an (ambivalent) imaginary identity<sup>178</sup> ». Since Balibar

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<sup>173</sup> É. BALIBAR, *Politics and the Other Scene*, London, Verso, 2002, p. VIII.

<sup>174</sup> *Ibid.*, ch. 1 (« Three Concepts of Politics: Emancipation, Transformation, Civility »). See also *Id.*, *Spinoza and Politics*, P. Snowden trans., London, Verso, 1998.

<sup>175</sup> *Id.*, *Politics and the Other Scene*, *op. cit.*, p. 11.

<sup>176</sup> *Ibid.*, ch. 1, p. 5-8 (Rancière), p. 8-21 (Foucault). Balibar later writes of Rancière: « we should [...] distinguish ourselves from him (or incorporate his radically egalitarian intentions into a more dialectical framework) by pointing out that the anti-political (which he, playing skillfully with etymology, calls by the name “police”) is not a reality that is foreign to the political (and therefore to democracy) but a counter-tendency that is internal to it, and from which the political is constantly seeing to disassociate and differentiate itself » (É. BALIBAR, *Citizenship*, T. Scott-Railton trans., Cambridge, Polity, 2015, p. 122-123).

<sup>177</sup> *Id.*, *Politics and the Other Scene*, *op. cit.*, p. XIII.

<sup>178</sup> *Ibid.*

calls the imaginary « the infrastructure of the infrastructure<sup>179</sup> », we might wonder – especially given his views on the role of institutions in maintaining civility<sup>180</sup> – how far removed he is from Hauriou’s conception of the state as « the institution of institutions ». But it is the pivotal importance he attaches to the principle of « equaliberty » (*égaliberté*) that demonstrates the extent to which he is working within an Enlightenment conception of *droit politique*<sup>181</sup>. He uses this neologism to mean « the unity (or reciprocity) of the concepts of liberty and equality », which are « two sides of the same “constituent power”<sup>182</sup> ». Expressing the continuous dialectic « of insurrection and constitution », or of the « co-occurrence of inclusions and exclusions<sup>183</sup> », equaliberty simply repackages Rousseau’s concept of the general will.

When Balibar links his argument on citizenship to Claude Lefort’s thesis on the need for democracy to continuously reinvent itself<sup>184</sup>, he directs us to a body of work that explicitly recognizes the contemporary importance of the concept of *droit politique*. Together with his collaborators, Marcel Gauchet and Pierre Rosanvallon, Lefort worked closely on a project with Furet at the *École des Hautes Études en Sciences Sociales* (EHESS) to demonstrate the continuing significance of the political in contemporary society. Praising the Revolution as the moment when modern democracy was invented, they maintain that the overriding political problem ever since has been to determine the Revolution’s continuing significance. For Lefort, the democratic achievement of the Revolution was to have opened up a « space of power » previously occupied by the king. To maintain fidelity to that achievement, he argues, this symbolic space must be forever kept empty. The error of the Jacobins was to have claimed that « the people » occupied that place of power, thereby converting the symbolic into the actual and destroying the space of the political<sup>185</sup>.

Using the abstract philosophical language of phenomenology, Lefort provides us with a sophisticated rendering of the continuing relevance of *droit politique*. He argues that the political is not a distinct sphere within so-

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<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*, p. 29-30.

<sup>181</sup> See É. BALIBAR, « “Rights of Man” and “Rights of the Citizen”: The Modern Dialectic of Equality and Freedom », in *Masses, Classes, Ideas: Studies in Politics and Philosophy before and after Marx*, London, Routledge, 1993, ch. 2; É. BALIBAR, *Citizenship*, *op. cit.*

<sup>182</sup> É. BALIBAR, *Citizenship*, *op. cit.*, p. 31.

<sup>183</sup> *Ibid.*, p. 55, 117, 73.

<sup>184</sup> *Ibid.*, p. 18, 124. See C. LEFORT, *L’invention démocratique: Les limites de la domination totalitaire*, Paris, Fayard, 1981 [for English translations of some of the essays from this work see: *Id.*, *The Political Forms of Modern Society*, Boston, MIT Press, 1986, ch. 7-10].

<sup>185</sup> C. LEFORT, « Interpreting Revolution within the French Revolution », in *Democracy and Political Theory*, *op. cit.*, p. 107: « Revolutionary ideology is constituted by the insane assertion of the unity, or indeed the identity, of the people. The legitimacy, the truth and the creativity of history is assumed to come together in the people ». See also C. LEFORT, « The Revolutionary Terror », in *Democracy and Political Theory*, *op. cit.*

ciety; it refers to « the principles that generate society » and the way in which an entire society maintains order and unity<sup>186</sup>. This is acquired through a series of symbolic representations, such as the nation, the state, and the constitution. For Lefort, political power is a type of symbolic power which maintains the authority of this distinctive worldview. It performs this role by maintaining political unity in the face of social diversity and this « implies a reference to a place from which it can be seen, read and named<sup>187</sup> ». This is what he calls « the *place of power*<sup>188</sup> », the point of orientation from which representations of the « common good » or « the public interest » are made. In democracies, that place is the state, which « remains the agency by virtue of which society apprehends itself in its unity and relates to itself in time and space<sup>189</sup> ». Yet the state is a purely symbolic entity: it may shape understanding and confer meaning on a set of political relations<sup>190</sup>, but as a symbol of unity it remains « an *empty place* » that « cannot be occupied<sup>191</sup> ». The state is a regulative idea, a scheme of intelligibility. Modern democracy's defining characteristic is the existence of a « gap between the symbolic and the real » in which a « notion of a power which no one [...] can seize » is able to do its work<sup>192</sup>.

Lefort's conception of *droit politique* is now clear. Within modern democracies, the symbolic order of the political is structured through such « generative principles » as popular sovereignty, equality and rights. It is because of their abstract character, together with the loss of « the ultimate markers of certainty » within democracies<sup>193</sup>, that these principles of « political right » are able to fulfil the role of maintaining unity while containing social tensions. Human rights, for example, « reduce right to a basis which, despite its name, is without shape » and « eludes all power which could claim to take hold of it ». Since rights are the subject of continuous contestation, then « from the moment when the rights of man are posited as the ul-

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<sup>186</sup> C. LEFORT, « The Permanence of the Theological-Political? », in *Democracy and Political Theory*, *op. cit.*, p. 217.

<sup>187</sup> *Ibid.*, p. 225.

<sup>188</sup> *Ibid.*

<sup>189</sup> C. LEFORT, « The Question of Democracy », in *Democracy and Political Theory*, *op. cit.*, p. 17.

<sup>190</sup> C. LEFORT, « The Permanence of the Theological-Political? » *op. cit.*, p. 218-9: « We can further specify this notion of shaping [*mise en forme*] by pointing out that it implies both the notion of giving meaning [*mise en sens*] to social relations and that of staging them [*mise en scène*]. Alternatively, we can say that the advent of a society capable of organizing social relations can come about only if it can institute the conditions of their intelligibility, and only if it can use a multiplicity of signs to arrive at a quasi-representation of itself ».

<sup>191</sup> C. LEFORT, « The Question of Democracy », *op. cit.*, p. 17.

<sup>192</sup> C. LEFORT, « The Permanence of the Theological-Political? », *op. cit.*, p. 228.

<sup>193</sup> *Ibid.*

timate reference, established right is open to question » and « where right is in question, society – that is, the established order – is in question<sup>194</sup> ».

Similarly, political equality does not entail material equality and the fact that the latter can never be realized is not a sign of the former's hypocritical character. A society founded on political equality can no longer confer special status by virtue of the circumstances of one's birth. Political equality may be a symbolic ideal, but material inequality becomes visible only within its purview. The principles of *droit politique* may be symbolic ideals of ambiguous meaning, but this is what enables citizens to maintain a system of authority at the same time as continuing to question the authority of established institutions.

The implications of this conception of *droit politique* for political order in France is today advanced by Gauchet and Rosanvallon. These scholars question many of the assumptions underpinning the legacy of a Jacobin political culture that tries to erase the authority of institutions mediating between the citizens and the state, that sees symbolic order as a mask that disguises the rule of particular interests, and treats disagreement as a threat to the unity of the people<sup>195</sup>. Not oblivious to the threats posed by bureaucratization, they do not assume that the administrative state must necessarily be a state of servitude. They recognize the decline of the grand narratives of sovereignty, equality, and the unitary conception of democracy, but seek constructively to rework the meaning of those concepts today<sup>196</sup>.

The EHESS scholars work within a frame of *droit politique* that follows in the tradition of Montesquieu, Constant and Hauriou. From Montesquieu, Lefort, their intellectual leader, derives a conception of « political right » as a symbolic order expressing « the necessary relations arising from the nature of things »; from Constant, he recognizes the vital role of government in representing society, and from Hauriou he develops a concept of rights analogous to the latter's principles of « superlegality » which keep the constituted order in tune with the evolving character of the « directing idea ». Their work demonstrates that although *droit politique* no longer provides the organizational framework within which French public lawyers work, the concept remains an active force in French public life.

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<sup>194</sup> C. LEFORT, « Politics and Human Rights », in *The Political Forms of Modern Society*, op. cit., p. 258.

<sup>195</sup> See, e.g., P. ROSANVALLON, *Le Peuple introuvable: Histoire de la représentation démocratique en France*, Paris, Gallimard 1998; id., *Le Modèle politique français: La Société civile contre le jacobinisme de 1789 à nos jours*, Paris, Éditions du Seuil, 2004; M. GAUCHET, *La Démocratie contre elle-même*, Paris, Gallimard, 2002.

<sup>196</sup> See, especially, P. ROSANVALLON, *Counter-Democracy: Politics in an Age of Distrust*, Cambridge, Cambridge University Press, 2008; id., *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, A. Goldhammer trans., Princeton, Princeton University Press, 2011; id., *The Society of Equals*, A. Goldhammer trans., Cambridge, Mass, Harvard University Press, 2013.

## XII. CONCLUSION

Writing in the mid-nineteenth century, Henry Maine noted that « the part played by jurists in French history, and the sphere of jural conceptions in French thought, has always been remarkably large » and that « the theory of Natural Law » has been « the source of almost all the special ideas as to law, politics, and society which France during the last hundred years has been the instrument of diffusing over the western world<sup>197</sup> ». If « natural law theory » can be reformulated as *droit politique*, then Maine highlights the two central themes of my presentation. From Bodin through Montesquieu and on to the lawyers in the vanguard of the Revolution, jurists have played a major role in articulating the principles on which the modern French republic is founded. Under the rubric of *droit politique*, these principles might seem distinctively French but they have also underpinned the efforts of jurists across the world seeking to elucidate the logic of modern constitutional ordering.

Yet it is also the case that since Maine wrote, the position of French jurists in public life has altered. In the course of trading natural law for legal positivism, their role has changed. Since the mid-nineteenth century, French public lawyers mainly worked within a legal positivist philosophy that saw the state as a legal person and presupposed the authority of the state as a fact. This has meant that although lawyers have retained their status as technicians of the working code of the modern French state, they have turned away from considering the conditions under which the authority of the state is established and maintained. A century ago, Duguit and Hauriou, in their different ways, reformulated the basis for public law in the light of modern social, economic and political developments, but today the thinking that inspired their work languishes on the margins of their discipline.

There has, of course, continued to be intense reflection on the nature of the modern republic and the conditions of its flourishing. But although it is still expressed in the jural form of *droit politique*, it is philosophers rather than lawyers who now use this conceptual language, and in certain respects this is regrettable. The French philosophical style has distinctive traits: « abstract in design, systematic in its form and radical in its goals », this style of philosophical thinking is strong on critique and it generates a « utopian way of thinking about politics [that] has been one of France's enduring contributions to modern political thought – and undoubtedly its most controversial<sup>198</sup> ». Yet, the great strength of this tradition of *droit politique* has been its ability to hold in tension the relationship between norm and fact, legal and political, and between abstract and concrete. Political historians have successfully advanced this discourse in recent years. It is unfortunate that public lawyers, with all their knowledge of the practical difficulties of mak-

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<sup>197</sup> H. SUMNER MAINE, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* [1861], London: Murray, 10<sup>th</sup> ed., 1919, p. 70.

<sup>198</sup> S. HAZAREESINGH, *How the French Think*, *op. cit.*, p. 106.



ing an actuality of equal liberty<sup>199</sup>, have so relatively little contribution to make.

**Martin Loughlin**

*Professor of Public Law, London School of Economics & Political Science;  
EURIAS Senior Fellow, 2016-17, Freiburg Institute of Advanced Studies.*

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<sup>199</sup> Consider, as one illustration of the gap between the abstract principle and its institutionalized achievements, the issue of equality between the sexes: see J. WALLACH SCOTT, *Parité!: Sexual Equality and the Crisis of French Universalism*, Chicago, University of Chicago Press, 2005.



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