

LECTURE III

The Eighteenth Century

The political positions taken up by Grotius, Pufendorf and Barbeyrac dominated the first half of the eighteenth century; their hegemony is illustrated by the distribution of Barbeyrac's great editions of De Iure Belli ac Pacis and De Iure Naturae et Gentium, in their Latin, French and English versions, which we can find in libraries from the Mississippi to the Urals; it will unquestionably have been Barbeyrac's French translation of Grotius which lay (as Rousseau later recalled) on his father's workbench. Indeed, Helena Rosenblatt has drawn our attention to the importance of these texts, and the more popular version provided by Burlamaqui, in the political struggles at Geneva in Rousseau's youth. It is striking that in the arguments she has documented between the democrats and the patricians in Geneva over the rights of the popular General Council against the small governing councils of the city, the distinction between sovereign and government was a recurrent theme in the writings and speeches of the democrats, and a denial of the distinction was equally part of the patricians' repertoire. For example, the radical Jacques-Barthélemy Micheli du Crest described Geneva in a MS of the 1730s as a "democratic republic", by which he meant "a free state, in which the people itself exercises the acts of sovereignty, without however exercising subordinate government".¹ Barbeyrac himself responded to Micheli, insisting that "the people of Geneva can be as sovereign as you please; it still does not exercise the acts of sovereignty itself.." - that is, what Micheli called merely a government was, in Barbeyrac's eyes, to be treated as an effectual site of sovereignty, exactly the point which Grotius and Pufendorf had made. But Micheli spent the last part of his life as a political prisoner in a Bernese gaol, while Barbeyrac died an honoured and successful jurist; as Rousseau observed, "truth is no road to fortune, and the people dispenses neither ambassadorships, nor

¹ Rosenblatt p.143. See also the democrat Pierre Fatio's remarks in 1707, *ibid* p.104.

professorships, nor pensions.”² The commanding heights of the early eighteenth century belonged to Grotius and his followers, and their influence reached into all the prestigious areas of intellectual life - for example, contemporary classical scholarship was enlisted to endorse Grotius and Barbeyrac’s ideas about the sovereignty of the dictator in Johannes Jens’s essay De dictatoribus populi Romani of 1698.³

Something like their assumptions even lurks behind Montesquieu’s L’Esprit des Lois. Montesquieu remarked that “je rends grâce à MM. Grotius et Pufendorf d’avoir exécuté ce qu’une grande partie de cet ouvrage demandait de moi, avec cette hauteur de génie à laquelle je n’aurais pu atteindre”, though he seems to have been particularly impressed by Pufendorf’s De statu imperii Germanici.⁴ Pufendorf’s scorn in that work for the “scholastic” nature of any constitutional theory which disregarded the actual shape of politics in a given country would clearly have struck a chord with Montesquieu, and there is no suggestion in L’Esprit des Lois of anything resembling the idea of a sleeping sovereign. Indeed, Montesquieu consistently (and perhaps quite deliberately) conflated the terms “sovereign” and “government”, as in the fundamental definitions of II.1:

le gouvernement republicain est celui où le peuple en corps, ou seulement une partie du peuple, a la souveraine puissance; le monarchique, celui où un seul gouverne, mais par

² Social Contract p.184

³ Cited by Barbeyrac, DIBP I.3.11 n.7.

⁴ Montesquieu, Oeuvres complètes ed D. Oster (Paris 1964) p. 874. See p.211 for Montesquieu’s enthusiasm for De statu imperii Germanici.

des loix fixes & établies: au lieu que, dans le despotique, un seul, sans loi & sans regle, entraîne tout par sa volonté & par ses caprices.

And in general throughout the work it was gouvernement with which he was concerned, and which (for example) he wished to divide into “legislative” and “executive” powers, without any suggestion that the legislative was sovereign and the executive was not.⁵

When Rousseau turned against this entire culture, which in his eyes had done nothing but rationalise the inequalities of eighteenth-century Europe, he expressly put a revival of the distinction between sovereign and government at the heart of his project. He seems first to have drawn the distinction in his article for the Encyclopedie entitled “Economie”, seven years before the Social Contract,⁶ But Book III of the Social Contract gives the fullest account of his views.⁷

⁵ See e.g. his remarks on England in the famous chapter VI of Book XI, in which he described the “puissance exécutrice” as “partie du gouvernement”, and insisted that the executive must not be subordinate to the legislative but must (e.g.) possess a veto over it. See also his criticism of Hobbes in his Pensées for supposing that the people has identity only through the prince.

⁶ “I must here ask my readers to distinguish also between public economy, which is my subject and which I call government, and the supreme authority, which I call Sovereignty; a distinction which consists in the fact that the latter has the right of legislation, and in certain cases binds the body of the nation itself, while the former has only the right of execution, and is binding only on individuals.” p.120

⁷ See also his use of the distinction in his analysis of the Genevan constitution in the Eighth Letter from the Mountain (Pléiade ed. III 837; Letter to Beaumont, Letters Written from the Mountain, and related writings trans. Christopher Kelly and Judith Bush, ed. Christopher Kelly and Eve Grace (University Press of New England 2001) p.257). “Up to the present the democratic Constitution has been poorly examined. All those who have spoken about it either did not know it, or took too little interest in it, or had an interest in presenting it in a false light. None of them have sufficiently distinguished the Sovereign from the Government, the legislative power from the executive...”

It is organised round the distinction, and begins with the remark “Before speaking of the different forms of government [gouvernement], let us try to fix the exact sense of the word, which has not yet been very clearly explained” - which as we have seen was precisely the case in the tradition Rousseau was attacking. He continued by stating at the start of Chapter I Government in General that “I warn the reader that this chapter requires careful reading, and that I am unable to make myself clear to those who refuse to be attentive”, in recognition of the fact that what he was going to argue was widely unfamiliar. What he then proceeded to assert was much closer to Hobbes than anyone had been prepared to say for almost a century, though there were of course some significant differences, particularly in terminology.

What then is government? An intermediate body set up between the subjects and the Sovereign, to secure their mutual correspondence, charged with the execution of the laws and the maintenance of liberty, both civil and political.

The members of this body are called magistrates or kings, that is to say governors, and the whole body bears the name prince. Thus those who hold that the act, by which a people puts itself under a prince, is not a contract, are certainly right. It is simply and solely a commission, an employment, in which the rulers, mere officials of the Sovereign, exercise in their own name the power of which it makes them depositaries. This power it can limit, modify or recover at pleasure; for the alienation of such a right is incompatible with the nature of the social body, and contrary to the end of association.

He had first used the distinction in Book II Chapter II That Sovereignty is Indivisible

Sovereignty, for the same reason as makes it inalienable, is indivisible; for will either is, or is not, general; it is the will either of the body of the people, or only of a part of it. In the first case, the will, when declared, is an act of Sovereignty and constitutes law: in the second, it is merely a particular will, or act of magistracy—at the most a decree [un décret].

But our political theorists, unable to divide Sovereignty in principle, divide it according to its object: into force and will; into legislative power and executive power; into rights of taxation, justice and war; into internal administration and power of foreign treaty. Sometimes they confuse all these sections, and sometimes they distinguish them; they turn the Sovereign into a fantastic being composed of several connected pieces: it is as if they were making man of several bodies, one with eyes, one with arms, another with feet, and each with nothing besides. We are told that the jugglers of Japan dismember a child before the eyes of the spectators; then they throw all the members into the air one after another, and the child falls down alive and whole. The conjuring tricks of our political theorists are very like that... [W]henver Sovereignty seems to be divided, there is an illusion: the rights which are taken as being part of Sovereignty are really all subordinate, and always imply supreme wills of which they only sanction the execution.

And he linked this polemic expressly to Grotius and Barbeyrac, ridiculing them for entangling “themselves up in their own sophistries, for fear of saying too little or too much of what they think, and so offending the interests they have to conciliate.”

In place of these juggling tricks, Rousseau proposed a simple scheme. As in Hobbes,

individuals in a state of nature agreed that henceforward their particular wills would be subsumed in a collective or general will. (It is incidentally, I think, fairly clear that the language of general and particular wills in Rousseau comes from Pufendorf's discussion of the civil covenant in DNG VII.2.5, and not - as Patrick Riley conjectured - from the theological discourse of Malebranche et al. It thus straightforwardly belonged to the discourse of the transformation of a multitude into a people). Also as in Hobbes, this general will formed the canon of moral as well as political rectitude, as Rousseau said in his *Encyclopedie* article.

[T]his general will, which tends always to the preservation and welfare of the whole and of every part, and is the source of the laws, constitutes for all the members of the State, in their relations to one another and to it, the rule of what is just or unjust: a truth which shows, by the way, how idly some writers have treated as theft the subtlety prescribed to children at Sparta for obtaining their frugal repasts, as if everything ordained by the law were not lawful.

Which is of course precisely the example Hobbes used to make the same far-reaching claim in De Cive XIV.10.

Thirdly, Rousseau entirely endorsed Hobbes's claim in De Cive that the initial location of the general will must be in a democratic assembly governed by majority voting. "Apart from this primitive contract, the vote of the majority always binds all the rest. This follows from the contract itself" (IV.2 p.250). And lastly, as he said in the passage from Book III from which we began, he insisted that there could only be one covenant or contract, that which forms the civil

society. In Book III Chapter 16 he expressly attacked the double covenant theory which as we saw was at the heart of the Grotian and Pufendorfian scheme, and which in the pages of Pufendorf and Burlamaqui had explicitly been presented as a repudiation of Hobbes's single contract theory.⁸ Speaking of the creation of a government, Rousseau remarked that

It has been held that this act of establishment [of a government] was a contract between the people and the rulers it sets over itself - a contract in which conditions were laid down between the two parties binding the one to command and the other to obey. It will be admitted, I am sure, that this is an odd kind of contract to enter into...

First, the supreme authority can no more be modified than it can be alienated; to limit it is to destroy it. It is absurd and contradictory for the Sovereign to set a superior over itself; to bind itself to obey a master would be to return to absolute liberty.

Moreover, it is clear that this contract between the people and such and such persons would be a particular act; and from this it follows that it can be neither a law nor an act of Sovereignty, and that consequently it would be illegitimate...

There is only one contract in the State, and that is the act of association, which in itself excludes the existence of a second... (p.243)

The resemblance between Rousseau's theory and Hobbes's in these respects (not to mention, I would say, in many other respects) is so striking that it is not surprising that many

⁸ For Pufendorf, see DNG VII.2.9 (with Barbeyrac's notes), and for Burlamaqui see Liberty Fund ed. p.294.

early readers of Rousseau accused him of being a Hobbist, or even (in the words of the Dutch conservative Elie Luzac) believed that “ to talk in this way is not only to outdo Hobbes, but to go beyond all the bounds of good sense.”⁹

Rousseau did indeed move beyond Hobbes in a number of ways, though not in the ways that Luzac supposed. One is that he was committed to the idea that the will of the sovereign is law, and only law. He frequently expressed this by defining the power of the sovereign as legislative and that of the government as executive, thereby moving back from Montesquieu’s use of those terms, where neither was sovereign, to something closer to Locke’s usage, where the legislative was “supreme”. Though Hobbes of course believed that the will of the sovereign was law, he generally included in the category of law sovereign acts with a very specific focus, more like governmental measures - as in Chapter XXVI of Leviathan.

[E]very man seeth, that some Lawes are addressed to all the Subjects in generall, some to particular Provinces; some to particular Vocations; and some to particular Men; and are therefore Lawes, to every one of those to whom the Command is directed... (p.137 original ed)

And he obviously included among the acts of sovereignty the declaration of war. Rousseau famously denied all this: as far as he was concerned, the democratic sovereign’s acts could only be general in form, and the “whole people” could only legislate for the “whole people”. In the

⁹ “mais en parler comme vous faites, ce n’est pas seulement rencherir sur Hobbes, c’est passer toutes les bornes du bon sens.” [Elie Luzac], Lettre d’un anonyme à Monsieur J.J. Rousseau (Paris 1766) p.70.

well-known words of Book II Chapter VI,

law considers subjects en masse [en corps] and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anybody by name. It may set up several classes of citizens, and even lay down the qualifications for membership of these classes, but it cannot nominate such and such persons as belonging to them; it may establish a monarchical government and hereditary succession, but it cannot choose a king, or nominate a royal family. In a word, no function which has a particular object belongs to the legislative power.

And as he said in Book II Chapter II,

the acts of declaring war and making peace have been regarded as acts of Sovereignty; but this is not the case, as these acts do not constitute law, but merely the application of a law, a particular act which decides how the law applies...

But we should be a little cautious about how we interpret these remarks. In the same chapter, in words I quoted earlier, he said that the act of a government “is merely a particular will, or act of magistracy—at the most a decree [un décret tout au plus]”, thereby picking up the kind of contrast between a law and an edict or decree which Bodin had drawn. The distinction Rousseau made between sovereign acts which applied to the whole people, and governmental acts which did not, did not map straightforwardly onto the institutional structures of any state in

his own time, nor of most states since. It was, for example, not like the distinction between acts of the US Congress and orders of the President, nor was it like the distinction between Acts of Parliament in England and Orders in Council; those are distinguished not (on the whole) by scope, but by source - that is, an act of Congress or Parliament can overrule an executive order, but not vice versa. Modern legislatures are quite prepared to pass legislation which in Rousseau's terms would count as "particular". The same could abundantly be said of the ancien regime French monarchy, most of whose legislative pronouncements were far from general in character, including such things as edits setting up monopolistic trading companies. It may be relevant that when Rousseau discussed the structure of governments, and the advantages and disadvantages of aristocratic, democratic and monarchical administration, he treated the English Parliament as an example of a possible mixed type (which - like Bodin and Hobbes - he endorsed as a conceivable form at the level of government, though not sovereignty); that is, the English legislature was part, on his analysis, of a government.

The principal force of Rousseau's remarks about the necessary generality of "law" and the contrast with the particularity of government, was to draw attention to the fundamental character of popular sovereignty. As he said in Book III Chapter IV,

If we take the term in the strict sense, there never has been a real democracy, and there never will be. It is against the natural order for the many to govern and the few to be governed. It is unimaginable that the people should remain continually assembled to devote their time to public affairs, and it is clear that they cannot set up commissions for that purpose without the form of administration being changed.

So the democratic and sovereign legislator would meet only intermittently, just as Hobbes's sleeping democratic sovereign would. Rousseau made this even clearer in his important discussion at the end of Book III about the maintenance of sovereign authority.

It is not enough for the assembled people to have once fixed the constitution of the State by giving its sanction to a body of law [une fois fixé la constitution de l'État, en donnant la sanction à un corps de lois]; it is not enough for it to have set up a perpetual government, or provided once for all for the election of magistrates. Besides the extraordinary assemblies unforeseen circumstances may demand, there must be fixed periodical assemblies which cannot be abrogated or prorogued, so that on the proper day the people is legitimately called together by law, without need of any formal summoning.

But, apart from these assemblies authorised by their date alone, every assembly of the people not summoned by the magistrates appointed for that purpose, and in accordance with the prescribed forms, should be regarded as unlawful, and all its acts as null and void, because the command to assemble should itself proceed from the law.

This passage suggests that Rousseau recognised that a natural implication of what he had said was that “legislation” was essentially “fixing the constitution of the State”, but that he was keen to stress that this did not mean that it would then be a kind of deus absconditus. There should be periodical assemblies in which (we may suppose) the people renew their sense of themselves as sovereign, as well as “extraordinary” assemblies; the parallel which we might draw would be with Jefferson's idea that the American Constitution should be revisited at the end of every

nineteen years.¹⁰ But there is no suggestion that the democratic legislature should be in session in the way modern legislatures are, and even in the way the eighteenth-century House of Commons was; in Rousseau's eyes those would have counted as "governments", of a kind, as his remarks on England indeed revealed.¹¹

A second area in which Rousseau may have moved beyond Hobbes is one which has, I think, been widely misunderstood. Over the last thirty years or so it has often been said, including by the most perceptive scholars, that Rousseau rejected the whole Hobbesian idea of the sovereign as representative. In the words of Michael Sonenscher, Rousseau was "openly critical of the idea of representation that was the cornerstone of Hobbes' political theory".¹² Now, it is of course true that Rousseau denounced the idea that the sovereign general will can be represented:

Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the

¹⁰ Letter to Madison 6 Sept 1789

¹¹ The limited and foundational character of the assemblies is made clear in Book III Chapter XVIII: "The periodical assemblies of which I have already spoken are designed to prevent or postpone this calamity [of usurpation of sovereignty by a government], above all when they need no formal summoning; for in that case, the prince cannot stop them without openly declaring himself a law-breaker and an enemy of the State. The opening of these assemblies, whose sole object is the maintenance of the social treaty, should always take the form of putting two propositions that may not be suppressed, which should be voted on separately. The first is: "Does it please the Sovereign to preserve the present form of government? The second is: "Does it please the people to leave its administration in the hands of those who are actually in charge of it?" "

¹² Sieyes ed p. xlvi

same, or other; there is no intermediate possibility. (III.xv)

But what he was addressing in this passage was representation by elected deputies, as in England, and, as his remarks shortly afterwards about the modern character of representation make clear, he was engaged here not with Hobbes but with Montesquieu's chapter on the English constitution. Rousseau was not in fact at all critical of the idea of representation as used by Hobbes; there is no criticism in Rousseau of the fundamental Hobbesian thought that individuals are represented by the sovereign, that its will is taken to be their will, and that it is this (so-to-speak) collection of individual representations which makes the sovereign's will general in character. This is, as I have stressed, Rousseau's idea also, and is expressed in words with which Hobbes could not have disagreed: "Each of us puts his person and all his power in common under the supreme direction of the general will", and each person ceases to be "his own judge".

What Rousseau profoundly disagreed with was the idea that a sovereign, once constituted, could be represented, and in particular that a sovereign people could be represented in its sovereignty through deputies; his rejection of this idea was simply part of his general rejection of the standard eighteenth-century view that a people could have an identity as a sovereign and autonomous body, but would be unable to act unless represented by an omniscient institution such as a King or a Parliament. The denial of representation is thus merely the correlate of the distinction between sovereign and government, for the essence of that distinction is that the government cannot represent the sovereign as sovereign. But it can act as the sovereign's agent in specific areas, and Rousseau had no problem about that - "in the exercise of the legislative power, the people cannot be represented; but in that of the executive power,

which is only the force that is applied to give the law effect, it both can and should be represented”, he said in Book III Chapter XV - though he immediately added, “we thus see that if we looked closely into the matter we should find that very few nations have any laws”. Again, Hobbes could not have disagreed with any of this; this after all was precisely his point in denying that an elective king was a sovereign. The moment at which a sovereign’s agent represents a sovereign in the same sense that the sovereign represents the individual citizen - that is, that the will of the representative fully comprehends that of the represented person - is for Hobbes, as much as for Rousseau, a moment at which sovereignty has been transferred, and the vizier has become the king.

But there is one area where Rousseau unquestionably diverged from Hobbes, and it is the key difference between them. Rousseau, as we all know, did not believe that the sovereign legislature could transfer or alienate its sovereignty to another person or assembly, and Hobbes did - this after all was the basis of his own royalism. But it is fair to say that Rousseau spotted a genuine problem about Hobbes’s account. A democratic legislature in Hobbes has the full power to create a new site of sovereignty for its citizens, for its decisions in all potentially controversial matters are authoritative, and among those potentially controversial matters is the location of sovereignty. So much is clear, and consistent. The problem arises from the fact that a democratic assembly, for Hobbes, is itself an entity which has a single will and a determinate institutional character, and that Hobbes treats it throughout his work as strictly equivalent to a monarch. But no sovereign agent is entitled to transfer its sovereignty to another: as Hobbes said in Chapter XXX of Leviathan, “it is the Office of the Sovereign, to maintain those Rights [“the essential Rights of Sovereignty”] entire; and consequently against his duty, First, to transerre to

another, or to lay from himselfe any of them.” (p.175 original ed.) Moreover, if an assembly dissolves itself, this is the equivalent of suicide in a monarch, and no coherent account can be given of why it should choose to do so. Hobbes may have had in mind the thought that a democratic assembly might find its power being undermined by the “aristocracy of orators” who would hijack its discussions, and that eventually it would have to transfer its powers to a monarch because it could no longer exercise them effectively itself (as in the fall of the Roman Republic); but such a failed sovereign assembly would no longer properly represent its citizens already, before the moment of transfer. Rousseau, who certainly thought that a democratic sovereign assembly would inevitably fail and be corrupted, interpreted this as the “death of the body politic”, and on the face of it this is more consistent with Hobbes’s ideas than Hobbes’s own claim that a transfer could take place from a democracy to a monarchy. It is true that we might read Leviathan as suggesting that there need not be an initial democracy, and thereby avoiding some of these difficulties; but it is not clear that this is a correct reading,¹³ and anyway De Cive - which was the important text for all Continental readers of Hobbes - is absolutely clear that civil society must begin with democracy. Understood in this way, Rousseau’s theory is Hobbes’s with an inconsistency removed, rather than a theory which is in fundamental opposition to Hobbes.

But of course, the removal of this inconsistency made an enormous difference, for it completely changed the political implications of Hobbes’s ideas, and linked them henceforward to the cause of radical democracy. The significance of this began to be appreciated as soon as the

¹³ See the remarks on this subject by Maurice Goldsmith in his introduction to the reissue of Toennies’s edition of the Elements of Law pp xix-xx.

French started to argue about a new constitution in the autumn of 1789. Though the initial assumption was that (as indeed happened) the constitution would be drawn up and promulgated by the National Assembly without a formal recourse to a popular vote of ratification, a group of members of the National Assembly, almost all of whom (interestingly) were later associated with the Girondins, proposed to introduce a plebiscitary element into the new structure through an appel au peuple triggered by any royal veto of a measure proposed by the newly-fashioned legislature. With the possible exception of a couple of American cases (which I will touch on in the next lecture), this was the first time that the modern notion of a plebiscite or referendum had been raised, and it is clear that it was intended precisely to give an institutional structure to the idea of a legislative sovereign underlying but separate from the normal governmental structures (which would include the National Assembly).¹⁴ The leading exponents of this scheme in September 1789 were Jérôme Petion de Villeneuve and Jean-Baptiste Salle (both of whom were later to die in the Terror). Responding to a work by the liberal monarchist Jean Mounier, which had defended an absolute royal veto on the grounds that popular government was dangerous - the people “is essentially credulous; and, in its moments of fury, it uses ostracism against a great man. It wishes the death of Socrates, bewails it the next day, and a few days later dresses the altars for him”¹⁵ - Salle wrote

¹⁴ This is made particularly clear in a speech by Petion to the Assembly on 10 August 1791, in which he argued that the people of England had alienated their sovereignty to Parliament precisely because they had no extra-Parliamentary means short of insurrection for changing their constitution. AP XXIX p.328.

¹⁵ Jean Mounier, Considérations sur les gouvernements (Paris 1789) p.6

The people does not know how to govern without passion! But who talks here of governing? Government is not sovereignty; to govern is not to legislate; [footnote: “M. Mounier repeatedly confounds these two things in his last work. This is a familiar sophism of his...”] when the people of Athens judged its great men, it was fulfilling the function of magistracy; it had in view a particular object; it governed, it could go wrong, and it often did so. But, when the people of Athens, of those of Sparta, of Rome, etc., exercised sovereignty, that is made law; when they decreed [stipulaient] by themselves and for themselves, they did not go wrong, they were wise, and if their political laws were defective, since political science was in its infancy, their civil laws, you well know, Gentlemen, are still today the wonder of the world...¹⁶

Petion argued the same about the royal veto. Earlier, he had concluded - rather regretfully, as he took himself in this respect to be dissenting from “the profound author of the Social Contract”¹⁷ - that the new constitution could not be sent back to the primary assemblies for ratification, as the assemblies would inevitably want to pick it apart and ratify some articles and not others.¹⁸ But in September he seized on the idea of a plebiscite or appel following a royal veto as an appropriate occasion for popular consultation, as the question would be a straight oui or non. In his Opinion sur l’appel au peuple he argued for two principles. One was that the members of the corps legislatif were purely mandated delegates, and “we do not see any

¹⁶ Archives Parlementaires VIII pp 530-531

¹⁷ Oeuvres (Paris An I) II p.337

¹⁸ Oeuvres II pp 336 ff

difference between these mandataires and ordinary mandataires: both act under the same title; they have the same obligations and the same duties”. The second was that “the law ought to be the expression of the general will... if each person can make known his particular will, the combination [réunion] of all the wills will truly form the general will.”¹⁹ Government and representation were necessary for practical purposes, but on basic and straightforward matters the sovereign people should make their will known directly.²⁰

Condorcet also took seriously the idea of a popular referendum as early as 1789. Unlike Petion, he proposed that the new constitution should be put to the primary assemblies for ratification, though in line with his own distinctive views about political judgement²¹ he suggested that the citizens should simply be asked first to approve the Declaration of the Rights of Man and then asked of each article of the constitution whether it contradicted the Declaration.²² France was not yet ready, he thought, for any further use of referendums, and he did not support Salle and Petion over the royal veto. But by February 1793 all of them had come

¹⁹ Oeuvres III p.31-32.

²⁰ It is interesting that Jeremy Bentham, whose contribution to the French debate is usually treated from an English perspective, broadly shared these ideas. Like Salle and Petion he believed that the King’s veto should trigger an appeal “from the will of the National Assembly to the nation at large”, though unlike them he thought that this appeal should take the form first of a new general election. But if a bill presented by a new Assembly was once again rejected by the King then the major part of the Provincial Assemblies which he proposed, or perhaps even of the sub-provincial assemblies, could declare it law. Rights, Representation and Reform pp 230, 239-239. Bentham’s links were with the Girondins, through his admirer Jacques Pierre Brissot, who tried to get Bentham elected to the National Convention, and was responsible for making him an honorary French citizen in 1792 (Bentham, Correspondence V p.254)

²¹ See Jaume

²² Oeuvres (Paris 1847) IX pp 427-428. This pamphlet was published in August 1789 - see AP VIII p. 549 n.1.

round to the view that a new constitution must rest on a popular vote, and when on February 15 Condorcet presented to the Assembly the report of the committee charged with producing the first republican constitution (the so-called “Girondin Constitution”) (a committee on which Petion also sat) he stressed (as is well known) the need for the constitution to be ratified by a majority vote of the French electorate. Nothing else, he said, would “preserve [the people’s] sovereignty in its entirety.”²³ This element of the Girondin constitution was preserved in the “Jacobin” constitution of June 1793, but that constitution revealingly blurred the distinction the Girondins had tried to keep between the sovereign and the governmental levels.

Under the Girondin constitution, all constitutional amendments had to be put to the vote of the sovereign, and other laws which occasioned concern in the population could also be recalled to the primary assemblies for discussion, but in the absence of a specific reclamation of this kind legislation was to be promulgated in the name of the Assembly; Article VII Section II stated flatly “Au Corps législatif seul appartient l'exercice plein et entier de la puissance législative.” The Jacobins however proclaimed that all laws, however minor, had - in theory - to be enacted by the people, though the mechanism they proposed was less far-reaching in practice, for the primary assemblies were taken to have consented to a law unless enough of them specifically objected. Indeed, Salle accused the Jacobins of having rendered popular control over legislation less effective than in the Girondin proposal, as they left the mechanism by which assemblies would be called together to discuss legislation completely unclear, with the prospect of disorganised mobs taking control of the legislative process. He contrasted this with the detailed mechanism provided in Condorcet’s draft for the scrutiny of legislation, along the lines

²³ Oeuvres VI p.345.

(he said) of Rousseau's ideas; under the Jacobins "the apparent homage rendered in these articles to the sovereignty of the people is nothing but a scandalous derision".²⁴ From the point of view of these Girondin theorists, the Jacobins had blurred the distinction between sovereignty and government every bit as much as Grotius or Pufendorf had done, though they had done so (allegedly) in the interests of democratic rather than monarchical rule; they had failed to keep separate acts of sovereignty, which determined the basic structures of the society, and acts of government - including, most alarmingly, as Salle pointed out, acts of criminal jurisdiction.²⁵

Though the Girondins lost the constitutional struggle of 1793, and Condorcet, Salle and Petion all lost their lives, their novel idea, that a constitution should be ratified by a plebiscite, was not to be abandoned. Between 1793 and 1815 seven national referendums were held, with each new constitution being ratified in this way, including the Jacobin constitution of the Year I, the Directorate constitution of the Year III, the Constitution of the Year VIII (though as I observe below, this may not have been seen as a true ratification), and the Perpetual Consulship of Napoleon in 1802. After the fall of Bonaparte plebiscites were not used until the rise of Napoleon III; and after 1870 they were not to be used again until the post-war referendums which established the Fourth and Fifth Republics. But in the sixty-seven years since 1945 there have been fourteen national plebiscites in France, and it is clear that the Girondin model is now permanently established there, as it is in most European countries (with the obvious and important exception of Germany).

²⁴ Examen critique de la constitution de 1793 (Paris An IIIe) pp 14-16.

²⁵ See Robespierre's speech to the Assembly on 10 August 1791, in which he insisted that all powers had to be retained by the people. AP XXIX p. 326 (the same debate as Petion's speech, above n.13).

However, this ultimate success of the plebiscite in practice should be contrasted with the striking fact that the theorist of the Revolution who has commanded most attention and respect over the last fifteen years or so was a dedicated opponent of this whole way of thinking about politics. This was of course Emmanuel Sieyès, who is now often regarded (in the words of the title of Pasquale Pasquino's path-breaking book) as the inventor of French constitutionalism.²⁶ From Pasquino's perspective, this is because Sieyès more than anyone else theorised the role of a constitutional court, which has come to be central to many modern constitutions; but from my perspective in these lectures Sieyès appears as the antagonist to what I take to be the fundamental feature of modern constitutionalism, its location within a political community of an institutionally specific sovereign which can act as the author of fundamental laws. Despite the fact that Qu'est ce que le tiers état contains a clear account of the difference between a constituting and a constituted power, Sieyès was always opposed to what I have called the Girondin model. As is now well understood, he believed from the start of the Revolution that representation, not in the Hobbesian but in something closer to the Montesquieuan sense, was the key feature of a political structure. Decisions even on the foundational laws should be taken not by the people as a whole, grouped in their primary assemblies but with their votes counted as a single total for the country, but instead by representatives meeting in some kind of special assembly or convention. Direct election of delegates was the basic kind of representation, but Sieyès in his various constitutional projects was also always interested in different kinds of indirect election. Above all he wanted multiple sites of representation, corresponding to different

²⁶ Pasquale Pasquino, Sieyès et l'invention de la constitution en France (Paris: Edition Odile Jacob 1998)

aspects of our political life - just as, he said in a striking and famous analogy, the division of labour in a modern economy allows all our various material interests to be represented by different workers hired by us for different tasks. One of those sites should represent the nation in its unity, and he was led by this idea to propose the distinctive idea of a Great Elector who would do nothing but represent the nation as a single person, the beginning of the modern idea of a constitutional president or constitutional monarch. Other sites should represent the nation's interest in its constitutional rules; their revision would fall to a dedicated assembly, and their enforcement would fall to some kind of constitutional court. Yet other sites would represent citizens' interest in administration and their interest in legislation.

It was this concern with multiple representation which underlay his argument in Qu'est ce que le tiers état for a clear separation of the pouvoir constituant and the pouvoir constitué, and not the Rousseauian or Girondin belief that there must be a sovereign pouvoir constituant. Indeed, as Pasquino has observed, the term "sovereignty" only appears in Sieyès's texts "in a negative and critical form".²⁷ This is particularly marked in his great writings from the Year III, in the debates over the constitution of that year which ushered in the Directory; in his Opinion of 2 Thermidor (where we also find his fullest account of the representative character of the division of labour) he proclaimed that

This word [sovereignty] only looms so large in our imagination because the spirit of the French, full of royal superstitions, felt under an obligation to endow it with all the heritage of pomp and absolute power which made the usurped sovereignties shine...

²⁷ Sieyès et l'invention de la constitution en France p.10.

[P]eople seem to say, with a kind of patriotic pride, that if the sovereignty of great kings is so powerful and so terrible, the sovereignty of a great people ought to surpass it...²⁸

And in a manuscript essay written probably at this time, he made his distinctive position very clear. The initial act by which individuals formed themselves into a civil society was (as in Hobbes and Rousseau) unanimous - anything else would derogate from their natural liberty. But this act was not an agreement to be bound by a majority. Instead, it was an agreement to respect a constitutional order which put a brake (frein) on majorities, and

since this brake can only be located in the separation of powers and the organisation of each of them, but especially in the organisation of legislation, I say that the separation of powers and their organisation, that is the constitution (for it is nothing else) is a fundamental law anterior to all law passed by a simple majority. Obedience to the constitution is part of the primordial commitment [engagement] of each individual in the association... If the constitution did not exist before the action of the majority ... or if the majority could break the constitutional laws, then aristocracy would show itself in place of liberty. It is a mistake to talk of the sovereignty of the people as if it had no bounds...²⁹

But this reworking of Hobbes and Rousseau, in which a constitution was put in place of

²⁸ Les Discours de Sieyès dans les débats constitutionnels de l'an III ed. Paul Bastid (Paris: Librairie Hachette 1939) p.17.

²⁹ Sieyès et l'invention de la constitution en France p.178.

their initial democracy, had a very dramatic result. A democratic assembly could be the author of constitutional rules, and more importantly could change them by majority vote (Rousseau would have said, a supermajority, but I do not want to deal with that issue now, though it is important). The initial commitment which each citizen had to make in the civil contract was of a general and open-ended kind, and allowed the possibility of extensive reworking of the terms of the political association over time. But a Sieyèsian constitution could either never be amended, as it would require something like a new and unanimous act of association to introduce new constitutional provisions on the original basis, or it could only be amended by a set of elected representatives with no appeal to the people. When Sieyès was in effect given free rein to devise a constitution, after the Eighteenth Brumaire in the Year VIII, he duly put forward a scheme which - astonishingly - had no provisions for its own amendment, and which (on one view) did not even require ratification to be declared law; though the very last article declared “The present Constitution will be offered at once for the acceptance of the French people” it in fact came into force before the plebiscite was held.³⁰ The imperial constitution of the Year XII was also not put to the people as a whole, though Article 142, on the hereditary nature of the new office, was put to a plebiscite. The danger of a constitution which could not be democratically amended had

³⁰ Sieyès’s notes are in Des Manuscrits de Sieyès 1773-1799 ed. Christine Fauré, Jacques Guilhaumou and Jacques Valier (Paris: Honoré Champion 1999) pp 519ff. Sieyès’s secretary Antoine Boulay de la Meurthe published a fascinating memoir of the negotiations between Sieyès and Bonaparte over the constitution in his Théorie constitutionnelle de Sieyès. Constitution de l’an VIII (Paris 1836). If anything, Bonaparte was pushing in a rather more democratic direction during the negotiations. Faustin-Adolophe Hélie noted that the Constitution of the Year VIII did not specify the nature of constituent power or the means of amendment, (Les Constitutions de la France (Paris 1880) p.602), though this has seldom been discussed by later commentators. The consular proclamation on 24 frumaire putting the constitution to the people concluded with the famous sentence, “Citoyens, la Révolution est fixée aux principes qui l'ont commencée: elle est finie”.

already been observed by Bentham in his attacks on “Citizen Sieyès” and the other supporters of the Constitution of 1791,³¹ but at least the Constitution of 1791 had allowed for amendment, albeit at the end of an extremely laborious process with no direct appeal to the people. With the Constitution of the Year VIII the full implications of Sieyès’s views became apparent.

³¹ “We the unlawful representatives of the people will govern the people for ages and in spite of ages: we will govern them for ages after we are no more. The only lawful representatives, the first and all succeeding lawful representatives of the nation, the deputies appointed by the people for the time being, shall not govern them as we do, shall not exercise any jurisdiction over them except such as it has been our pleasure to allow.” The Necessity of an Omnipotent Legislature (1791), Rights, Representation and Reform p.272. For his explicit attacks on “Citizen Sieyès” see his Observations on the Declaration of Rights from 1789 (?), *ibid* pp 389 ff. Bentham believed that Sieyès had blocked the consideration of his scheme for a new judicial establishment in France, Correspondence VII p.280.