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## 9. French authoritarian constitutionalism and its legacy

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*The authority comes from above, the trust from below*  
Emmanuel Sieyès

*A constitution must be short and obscure.  
It must be so arranged as not to trouble the action of the government*  
Napoléon Bonaparte

A recurrent question in the French debate is whether French people are suited to democracy. After the French Revolution, they welcomed Napoléon Bonaparte's coup d'état and a few years later, they massively voted "yes" to the referendum question "do you agree that Napoleon be consul for life."<sup>2</sup> Half a century later, they legitimized Louis-Napoléon Bonaparte's coup d'état when they adopted by referendum, with an overwhelming majority, the Constitution of the Second Empire, abolishing the 1848 Republican Constitution and making Napoleon III a hereditary monarch.<sup>3</sup> In the 1962 referendum, they

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<sup>1</sup> I would like to thank Marcel Morabito, Michel Troper and Ran Hirschl for reading earlier versions of this chapter. I would also like to thank the editors and the participants in the author's workshop held at Sciences-Po in Paris in February 2018.

<sup>2</sup> The referendum result was almost unanimous: more than 99 percent in favour of Napoléon. Held on August 2, 1802, the vote was not secret, which explains the near unanimity. It is likely that those who did not favor the change chose to abstain, with only 3.5 million votes cast out of an electorate of seven million. Also, Lucien Bonaparte, the brother of Napoléon, dramatically inflated the numbers.

<sup>3</sup> The national plebiscite was held on December 20 and 21, 1851. The question read: "[Do] the French people want to maintain the authority of Louis-Napoléon Bonaparte, and delegate to him the necessary powers to establish a constitution on the basis proposed in its proclamation of 2 December 1851." Approximately 7.5 million people answered "Yes" (amounting to more than 90 percent of cast votes and 75 percent of registered voters). On November 21 and 22, 1852, a second plebiscite was organized, with the question: "[Do] the people want the reestablishment of imperial dignity in the person of Louis Napoléon Bonaparte, with rights of heredity vested in his direct, legitimate or adoptive descendants, and give him the right to rule on the order of succession to the throne in the Bonaparte family, as planned by the

voted to allow the President of the Fifth Republic to be directly elected by the French people without being accountable to Parliament.<sup>4</sup>

Two years before the 2017 presidential election, then Finance Minister Emmanuel Macron declared that French people were deeply nostalgic regarding the figure of the king—“a King they never wanted to die.”<sup>5</sup> Once elected president, Macron convoked both assemblies in the Palais de Versailles and delivered a policy speech, a practice last used by Louis-Napoléon Bonaparte in 1851.<sup>6</sup> Trying to embody a modern king—a “Jupiterian figure,” in his own words—he rarified his spoken interventions, insisted on the importance of his presidential “couple,” and voiced support for the reestablishment of several old royal traditions, such as hunting sessions patronized by the president in the Chambord Castle.<sup>7</sup>

Just like any constitutional history, the constitutional history of France can be read either in linear or in cyclical terms. The narration entailed by all constitutional histories aims to give a specific intelligibility to the chaotic and disjunctive succession of constitutional texts—15 in France<sup>8</sup>—some destined for

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sénatus-consulte of 7 November 1852.” Almost eight million people answered “Yes” (nearly 97 percent of cast votes and 77 percent of registered voters). The number of invalid votes increased drastically, especially in the capital city, where people wrote messages such as “No! What a farce” or “No! Mr. Bonaparte, I love my liberty too much to give you the sovereignty that resides in me and in any reasoning individual.” See La Documentation Française (2010) *Les Bonaparte, Regards sur la France impériale*, Paris: La Documentation Française, 20–1.

<sup>4</sup> On October 28, 1962, the question read “Do you approve the constitutional revision project submitted to the French people by the President of the Republic and related to the election of the President of the Republic by universal suffrage?” and the answer was affirmative for more than 62 percent of the electorate, with 13 million votes.

<sup>5</sup> Interview in the newspaper *Le 1* published on July 8, 2015.

<sup>6</sup> On July 3, 2017, Emmanuel Macron spoke before the parliamentarians of both chambers to announce his project. François Hollande had convoked both houses in Versailles following the terrorist attacks in Paris in November 2015, and Nicolas Sarkozy had also done so in 2009 in response to the financial crisis. Here, Emmanuel Macron seemed to have been inspired by both the American practice of the “State of the Union” speech at the beginning of each term and Louis-Napoléon’s application of the 1848 Constitution, according to which the president was required to give a general speech on the state of affairs each year: Louis-Napoleon did so in 1849, 1850, and 1851, before staging his military coup d’état.

<sup>7</sup> Hunting sessions at the Palais de Chambord have been held throughout the Fifth Republic, but since the presidency of Jacques Chirac (1995–2007), the president has not participated.

<sup>8</sup> France had 15 constitutions between 1789 and 1958 but an even higher number of political regimes, as some of France’s regimes did not rest on a constitution, such as the 1793 Terror, the provisional governments of 1848 and 1870, and the Vichy regime installed in 1940; also, a Constitution could be so substantially amended that it gave

instant death, like the 1793 Constitution, and others to relative posterity, like the Constitution of the Third Republic. It rests on the rejection of the radical thesis affirming that the succession of constitutional orders proceeds from “hazards.” Adopting either a cyclical or a linear representation of temporality, constitutional histories tend to rationalize the succession of constitutions based on either the narrative of the “eternal return,” according to which regimes repeat themselves in successive “phases” or “cycles,” or that of “continuous progress” of constitutional law toward an increasingly perfect organization of the *polis*.

In the context of French constitutional history, the linear approach is represented by the work of the doyen Georges Vedel, who spoke of “successive sedimentations,” and the “eternal return” approach by Alexis de Tocqueville, François Furet, and Maurice Hauriou. Vedel compares the successive constitutions of France to “waves, which one by one retire after having crashed, but which also start from a higher point than the preceding one,”<sup>9</sup> as if each constitution left a substrate, a sediment, on top of which the following constitutions would then “pile up.” To a certain extent, this thesis gained official recognition through the French Constitutional Council’s identification, in what Alec Stone Sweet referred to as a “juridical coup d’État,”<sup>10</sup> of a “constitutionality bloc” endowed with normative binding value integrating human rights applied in successive former constitutions<sup>11</sup>—a particularly useful addition given that the 1958 Constitution does not entail a catalogue of rights. French constitutional lawyers refer to the metaphor of the “successive generations” with reference to the successive waves of human rights embodied in successive constitutions.<sup>12</sup> Yet not all former French constitutions are equally recognized as part of the national constitutional heritage. The Constitutional Council only

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birth to a new regime, such as the introduction of the direct election of the president in France in 1962.

<sup>9</sup> Vedel, Georges (1949) (2002) *Manuel élémentaire de droit constitutionnel*, Paris: Dalloz, 71.

<sup>10</sup> Stone Sweet, Alec (2007) “The Juridical Coup D’État and the Problem of Authority” 8 *German Law Journal* 915–28.

<sup>11</sup> This is particularly interesting because, as Hummel notes, “les préambules constitutionnels se sont accumulés, et ceci à rebours de la pratique générale qui veut, en droit, que la norme nouvelle puisse déroger à la norme ancienne.” Hummel, Jacky (2012) “Histoire et temporalité constitutionnelles” 7 *Jus Politicum* 1.

<sup>12</sup> The first generation, that of civil and political rights, correspond to the rights posed by the 1789 Universal Declaration of Human Rights; the second generation, that of economic and social rights, correspond to rights recognized by the preamble of the 1946 Constitution; and finally the Environment Charter, integrated in the preamble of the 1958 Constitution, corresponds to the “third generation” of collective rights: environmental rights.

gives constitutional value to *republican* constitutional and legal dispositions, to the exclusion—understandably so—of monarchies, empires, and the Vichy Regime.<sup>13</sup> Yet present-day French constitutionalism builds on its former experiences of both republican and nonrepublican constitutions.

Between 1789 and 1870, French constitutions twice saw the succession of constitutional monarchy (1791/1814), republic (1793/1848), and empire (1804/1852). Maurice Hauriou theorizes the “constitutional cycles”<sup>14</sup> of French constitutional history as being characterized by the following sequence: a “government by assembly,” then a presidential or dictatorial regime, and finally a parliamentary regime.<sup>15</sup> French constitutional history is described, from the 1789 revolution to the consolidation of the Third Republic, as a struggle between two forces, the first attached to the predominance of Parliament and the second to the preeminence of the executive, most notably through the use of plebiscite. Likewise, François Furet sees in French constitutional history a dialectic between revolutionary and traditional ideas.<sup>16</sup> It can also be read as an alternation of periods of “separation of powers” and “confusion of powers,” periods of parliamentary empowerment, and periods in which revenge is taken by the executive.<sup>17</sup>

As attractive as they may first appear, one must refrain from choosing one or the other of these two theses, and aim to write a constitutional history that fully accounts for its own contradictions. The objective of this historical storytelling of a new genre remains the ordering of a series of events toward a rationalization effort. Bearing this in mind, writing about French authoritarian constitutionalism and its legacy is necessarily a simplifying exercise. What immediately come to mind are the constitutional frameworks of monarchism, Bonapartism, and the later incarnation of the second of these, Gaullism. Many

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<sup>13</sup> This is one of the three criteria used by the Constitutional Council to identify a “fundamental principle recognized by the laws of the Republic.” Conseil constitutionnel, Décision n° 86-224 du 23 janvier 1987.

<sup>14</sup> Hauriou, Maurice (1929) *Précis de droit constitutionnel*, 2nd éd., Paris: Sirey, 85–6.

<sup>15</sup> Hauriou *Précis de droit constitutionnel* 85–6.

<sup>16</sup> Furet, François (1989) “Réflexions sur l’idée de tradition révolutionnaire dans la France du XIX<sup>e</sup> siècle” *Pouvoirs* 5–13.

<sup>17</sup> French constitutional history is described, from the French Revolution to the consolidation of the Third Republic, as a struggle between two forces: revolutionary (giving predominance to the legislature) and reactionary (giving predominance to the executive, and marked by the use of plebiscites). See Furet, François (1978) *Penser la révolution française*, Paris: Gallimard; Hauriou, Maurice (1929) *Précis de droit constitutionnel*, Paris: Sirey; Duverger, Maurice (2004) *Les Constitutions de la France*, Paris: PUF [1944]; Rials, Stéphane (2016) *Les textes constitutionnels français*, Paris: PUF.

have noted the continuity between these three constitutional moments.<sup>18</sup> The chapter will analyze the defining features of the two main French constitutional authoritarian traditions, namely monarchic constitutionalism and Bonapartism,<sup>19</sup> and analyze the extent to which Gaullism and the Constitution of the Fifth Republic build on such traditions.

As Günter Frankenberg puts it, “Liberal orthodoxy treats authoritarian constitutionalism (AC) not only as a contested concept, but a mere travesty or deceitful presentation of the rules and principles, values and institutions of what is innocently referred to as ‘Western constitutionalism.’<sup>20</sup> Yet French constitutionalism is one of the, if not *the*, archetypical models of ‘Western constitutionalism’ and it is precisely built on a tradition of authoritarian constitutional texts, leading to authoritarian and often brutal practices—committed in the territory of present-day France as well as in “the colonies” of the French empire—spanning the eighteenth, nineteenth, and twentieth centuries.

These traditions crystallize between Napoléon Bonaparte’s coup which ended the French Revolution in 1799 and the abdication of Louis-Napoléon Bonaparte, which paved the way for the Third Republic in 1870. Napoleon I ruled from 1799 to 1814 (with a three month return to power in 1815), Napoleon III from 1848 to 1870. Between the two rules, a constitutional monarchic regime was installed from 1814 to 1848; it ended in a shortlived republican parenthesis from 1848 to 1851 under the presidency of Louis-Napoléon Bonaparte.

First, Bonapartism is a specific form of monarchic constitutionalism. It is rooted in the monarchic tradition: the two Bonapartes made themselves hereditary emperors—in the tradition of French monarchism, they took dynastic numbers (Napoleon I and Napoleon III). Napoléon Bonaparte was crowned and anointed on December 2, 1804 in Notre-Dame de Paris in the presence of Pope Pius VII; Louis-Napoléon tried to replicate the ceremony with Pope Pius IX on December 2, 1852, but the endeavor ultimately failed. The major difference between Bonapartist regimes and constitutional monarchism lies

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<sup>18</sup> For Bonapartism and constitutional monarchism, see Duhamel: “Les régimes qui se succédèrent [depuis Napoléon Bonaparte jusqu’au Second Empire] furent tous monarchiques, s’ils ne furent pas tous identiques. Toujours un seul incarnait le pouvoir au sommet, sans l’avoir conquis par une élection disputée, sans le remettre en cause à des échéances fixes. Jamais l’Un ne s’en tenait à une souveraineté symbolique ni ne se contentait de régner sans gouverner. Ce trait commun suffit pour qu’on les regroupe en une catégorie.” Duhamel, Olivier (1994) *Histoire constitutionnelle de la France*, Paris: PUF, 37. See also Kirsch, Martin (1999) *Monarch and Parlament im 19. Jahrhundert: der monarchische Konstitutionalismus als europäischer Verfassungstyp—Frankreich im Vergleich*, Göttingen: Vandenhoeck & Ruprecht.

<sup>19</sup> The Vichy Regime will be excluded from this study.

<sup>20</sup> See Günter Frankenberg’s Introduction to this book.

in the use of universal suffrage: nineteenth century constitutional monarchic regimes did not allow male universal suffrage, while Bonapartist regimes fully rested on it. Like monarchic constitutionalism, Bonapartism featured a high concentration of power in the hands of a man sitting on top of a constitution that made reference to him, either in its preamble, its body, or both. Another difference lies in the means of power seizure. Unlike kings, the Bonapartes practiced the technique of coup d'état. The similarities between the two Bonapartes were noted by Karl Marx in the famous opening line of his book on the *18th Brumaire of Louis Napoléon Bonaparte*.<sup>21</sup>

Second, the parallels between De Gaulle and the Bonapartes are also striking. They seized power through a coup legalized *a posteriori* by referendum, which gave them power, either directly or indirectly, to craft new constitutions tailor-made for them. Once in power, they used the referendum-plebiscite to revise the text outside established procedures. Numerous books have drawn analogies between De Gaulle and the Bonapartes, emphasizing either their initial power seizure,<sup>22</sup> their attempts to “constitutionalize” their rule based on an initial ‘heroic leadership,’<sup>23</sup> their nationalistic conservatism,<sup>24</sup> their pretension to “rise above” deep-rooted political divisions,<sup>25</sup> their assertive foreign policy dedicated to “*la grandeur de la France*,”<sup>26</sup> or even the quasireligious cult they have inspired in the French people even to this day.<sup>27</sup> In support of the

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<sup>21</sup> “Hegel bemerkte irgendwo, daß alle großen weltgeschichtlichen Tatsachen und Personen sich sozusagen zweimal ereignen. Er hat vergessen, hinzuzufügen: das eine Mal als Tragödie, das andere Mal als Farce. Caussidière für Danton, Louis Blanc für Robespierre, die Montagne von 1848-1851 für die Montagne von 1793-1795, der Neffe für den Onkel. Und dieselbe Karikatur in den Umständen, unter denen die zweite Auflage des achtzehnten Brumaire herausgegeben wird!” Karl Marx (1869) *Der achtzehnte Brumaire des Louis Napoleon* [1852], 2nd ed., Hamburg: Otto Meißner.

<sup>22</sup> One of the most influential and critical opponents of General De Gaulle was François Mitterrand, who denounced the “Coup d'état permanent” in 1964. He likened the return of De Gaulle on May 13, 1958 to that of Louis-Napoléon Bonaparte on December 2, 1851, arguing that the events of May 13 in Algeria had been planned: Mitterrand, François (1964) *Le Coup d'Etat permanent*, Paris: Julliard.

<sup>23</sup> Hoffmann, Stanley (1967) “The Rulers, Heroic Leadership in Modern France,” in Lewis J. Edinger ed., *Political Leadership in Industrialized Societies*, New York: Lewis Joachim Edinger; Hayward, Jack (2014) “Bonapartist and Gaullist Heroic Leadership, Comparing Crisis Appeals to an Impersonated People,” in Baehr, Peter & Richter, Melvin eds, *Dictatorship in History and Theory: Bonapartism, Caesarism, and Totalitarianism*, Cambridge: Cambridge University Press, 227.

<sup>24</sup> Rémond, René (1982) *Les droites en France*, Paris: Aubier.

<sup>25</sup> Morabito, Marcel (1996) *Le chef de l'Etat en France*, Paris: Montchrestien, 137.

<sup>26</sup> Gueniffrey, Patrice (2017) *Napoléon et De Gaulle, deux héros français*, Paris: Perrin.

<sup>27</sup> Hazareesingh, Sudhir (2008) “De Gaulle et le mythe napoléonien,” *La Vie des idées*, <https://laviedesidees.fr/De-Gaulle-et-le-mythe-napoleonien.html/>.

topic of this chapter, the filiation between De Gaulle and the Bonapartes will be studied from the angle of their intimate relationship with “their” constitutions, or what one scholar referred to as their “constitutional vertigo.”<sup>28</sup>

Before coming to power, the three men devoted much of their time to thinking, writing, and speaking about constitutions.<sup>29</sup> Once in power, the constitutions they had enacted were not only their own creations, but also their own living creatures. The story goes that, when De Gaulle was being criticized for violating the Constitution in creating the direct election of the president, he answered: “Is it possible to rape one’s own spouse?”<sup>30</sup> In French, “rape” is *viol*, a word semantically and phonetically very close to “violation” as used in constitutional law. So, De Gaulle not only tended to think, in line with the spirit of the 1804 *Code Napoléon*,<sup>31</sup> that a spouse was a man’s possession who owed him marital sex (hinting at a link between patriarchy and authoritarian constitutionalism, as noted by Günter Frankenberg in his introductory chapter),<sup>32</sup> but also thought that the very constitution was his own, and owed him. De Gaulle reportedly said to then President of the Constitutional Council Léon Noël: “La Constitution, c’est moi.”<sup>33</sup>

This chapter argues that the first Bonapartism (1799–1814) laid the foundations for monarchic constitutionalism (1814–48), which in turn did the same for the second Bonapartism (1848–70) and for Gaullism (1958–69). It will mainly focus on “constitutional moments” and the question of constituent power, examining the initial “constitutional octroy” following a coup, and, in the cases of Bonapartism and Gaullism, the use of plebiscite to legalize what could anachronistically be called today “unconstitutional” constitutional revisions. The chapter is divided into three parts: the first considers monarchic constitutionalism, embodied in the 1814 and 1830 Constitutional Charters; the second Bonapartism, represented by the Constitution of Year VIII (1799) and the 1852 Constitution of the Second Empire, together with their amendments; and the third Gaullism, as a specific understanding of the Constitution of the

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<sup>28</sup> Borne, Etienne (1980) “De Gaulle et le bonapartisme” 10 *Commentaire* 2, 204.

<sup>29</sup> Napoléon wrote the “Projet de constitution de la Calotte” in 1789; Louis-Napoléon Bonaparte included a draft constitution in his “Rêveries politiques” published in 1832; De Gaulle exposed his constitutional ideas in detail in the 1946 “Bayeux speech.”

<sup>30</sup> Borne “De Gaulle et le bonapartisme” 204.

<sup>31</sup> An 1810 addition to the 1804 Napoleonic Code, which placed women under the control of first their fathers and then their husbands, made “conjugal debt” (*devoir conjugal*) an obligation and expressly contended that there was no rape among spouses.

<sup>32</sup> In fairness to De Gaulle, it must be noted that, until 1980, French penal law did not admit the possibility of rape among spouses. The first law specifically making rape among spouses a criminal offence was adopted in 2006.

<sup>33</sup> Quoted by Léon Noël in Beauvois, Yves (2001) *Léon Noël de Laval à De Gaulle via Pétain (1888–1987)*, Villeneuve d’Asq: Presses Universitaires du Septentrion 415.

Fifth Republic. The chapter ends with a very quick overview of the legacies of these three interrelated forms of French authoritarian constitutionalism in the world.

## 1. MONARCHIC CONSTITUTIONALISM: THE “CONSTITUTIONAL OCTROY”

Monarchic constitutionalism relied on the idea of a “granted constitution,” the *charte octroyée*, giving constituent power to the king while proclaiming adherence to the principle of national sovereignty.<sup>34</sup> The innovation lay in the “fusing of monarchical sovereignty and authority with modern constitutional principles and institutions.”<sup>35</sup>

In 1799, Napoléon Bonaparte seized power in a coup and announced that the French Revolution was over. Yet he pledged to further its legacy, most notably male universal suffrage and the principle of national sovereignty. Following the fall of Napoleon in 1814, the monarchy (abolished in 1792) attempted to return to power within the framework of a monarchic constitution, and Louis XVIII was placed on the throne. Refusing to derive his legitimacy from the people, on the Napoleonic model, the new king chose to lay emphasis on his dynastic legitimacy instead and requested the drafting of a Constitution that would reflect such a principle.<sup>36</sup> The new text, drafted by a commission nominated by the King, inaugurated a new form of constitutional monarchy granting much power to the king. Building on Napoléon’s precedent of a concentration of powers, it was a monarchical regime; however, it rejected universal suffrage and established a property-based voting system. The king had the right of legislative initiative on laws (article 16) and veto (article 22), and held executive power (article 13). The role of the assemblies was limited to “advising” the King to “give his consent” to royal projects. According to

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<sup>34</sup> Raymond Carré de Malberg states that the terms “popular sovereignty” and “national sovereignty” reflect two distinct conceptions of sovereignty, to which correspond two different views of suffrage. Michel Troper considers this distinction as purely strategic, related to the need to reconcile the principle of popular sovereignty and the existence of the king. Troper, Michel (1996) “La constitution de l’an III ou la continuité: la souveraineté populaire sous la Convention,” in Dupuy, Roger and Morabito, Marcel eds, *1795, pour une République sans Révolution*, Rennes: Presses universitaires de Rennes, 179–92. See also Troper, Michel (2012) “On Sovereignty,” in Rosenfeld, Michel & Sajo, Andras (eds) *Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 367. On sovereignty according to Carré de Malberg, see Beaud, Olivier (1994) “La souveraineté dans la Contribution à la théorie générale de l’État de Carré de Malberg” *Revue du Droit Public* 1251–1301.

<sup>35</sup> Esmein *Eléments de droit constitutionnel français et étranger* 82.

<sup>36</sup> Déclaration of Saint-Ouen, May 2, 1814.

the Charter, the chambers could only “beg the King” to initiate a legislative project (article 19). The king could also dissolve the Lower House (Chamber of Deputies) (article 50), which Charles X, successor to Louis XVIII, did in 1830, only to be overthrown by a Parisian insurrection.

The Parisian people disliked Charles X as much as they did the 1814 Charter itself, precisely because the latter was not a constitution but a granted “Charter.” It was the preamble of the 1814 Charter, where this principle was stated, that crystallized all the resentments against the regime. Indeed, it expressly made the king the owner of constituent power. It started with a proclamation of the owner of sovereignty: “Louis, by the grace of God, King of France and Navarre, to all those to whom these presents come, greeting.” It ended with the octroy: “For these reasons, We have voluntarily, and by the free exercise of our royal authority, accorded and do accord, grant and concede to our subjects, as well for us as for our successors forever, the constitutional charter which follows.” The five long paragraphs that lay in between glorify past kings, and affirm, in a sophisticated exercise of style, both the recognition of Enlightenment ideals and that all authority must however reside in the monarch.<sup>37</sup>

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<sup>37</sup> For instance, “A constitutional charter was called for by the actual condition of the kingdom; we promised it, and we now publish it. We have taken into consideration that, although all authority in France resides in the person of the king, our predecessors have not hesitated to alter the exercise thereof in accordance with the change of the times: that it was in this manner that the communes owed their emancipation to Louis the Fat, the confirmation and extension of their rights to Saint Louis and Philip the Fair; that the judicial system was established and developed by the laws of Louis XI, Henry II and Charles IX; and finally, that Louis XIV regulated almost all parts of the public administration by various ordinances whose wisdom nothing has yet surpassed . . . While we have recognized that a free and monarchical constitution was necessary to meet the expectation of enlightened Europe, We have also been constrained to remember that our first duty towards our subjects was to preserve, in their own interest, the rights and prerogatives of our crown. We have hoped that, taught by experience, they may be convinced that only the supreme authority can give to institutions which it establishes the strength, permanence, and majesty with which it is itself invested; that thus, when the wisdom of the king freely coincides with the wish of the people, a constitutional charter can be of long duration; but that, when violence wrests concessions from the feebleness of the government, public liberty is not less in danger than the throne itself. In a word, we have sought the principles of the constitutional charter in the French character and in the enduring examples of past ages. Thus, we have seen, in the renewal of the peerage, an institution truly national and one which must bind all the recollections with all the hopes, in bringing together former and present times.” English translation from Maloy Anderson, Frank (1904) *The Constitutions and Other Select Documents Illustrative of the History of France, 1789–1901*, Minneapolis: H.W. Wilson Company.

Through this preamble, the Charter created the system of royal “constitutional octroy” that inspired many other European countries. The royally invented concept of “constitutional octroy” did not fully attain the character of a doctrine, yet it still guided constitutional interpretation, especially kings’ interpretation of their own powers. First, when the constitutional text was silent or imprecise, it was interpreted in a way favorable to royal power. Second, when a crisis happened, kings addressed it through extraconstitutional means.<sup>38</sup> As Paul Bastid states, whenever a constitutional text is granted, “The King does not exist according to the law; it is the law that exists based on the royal will.”<sup>39</sup> In other terms, if the king has granted the constitution, he can also revoke it.<sup>40</sup> Throughout Europe and beyond, nineteenth century examples of such are plentiful.<sup>41</sup>

In 1815, Napoléon briefly returned to power. He asked the liberal Benjamin Constant, an advocate of monarchy, to draft him a new constitution. The 1815 constitutional preamble resembled the 1814 Charter in all aspects; the Constitution, called “Additional Act to the Constitutions of the Empire,” built on the tradition of royal octroy. It read: “Napoleon, by the grace of God and the constitutions, Emperor of the French. Since we were called fifteen years ago by the will of France to the government of the state we have sought at different times to improve the constitutional forms, according to the needs and desires of the nation and by profiting from the lessons of experience.” It ended with the following words: “For these reasons, wishing, on the one hand, to retain from the past whatever is good and salutary, and on the other, to make the constitutions of the Empire entirely conformable to the national wishes and needs, as well as to the state of peace which we shall desire to maintain with Europe, we have resolved to propose to the people a series of provisions tending to alter and improve these constitutional acts.”

Likewise, half a century later, Louis-Napoléon’s Constitution of the Second Empire starts with a proclamation praising Napoléon, on the model of the 1814

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<sup>38</sup> Esmein *Eléments de droit constitutionnel français et étranger* 145.

<sup>39</sup> Bastid, Paul (1954) *Les institutions politiques de la monarchie parlementaire française (1814–1848)*, Paris: Sirey, 183.

<sup>40</sup> Bastid writes: “une charte octroyée est de sa nature modifiable et révocable par son auteur et par lui seul”: Bastid *Les institutions politiques de la monarchie parlementaire française (1814–1848)* 146.

<sup>41</sup> Kings revoked the following constitutions: the constitutions of Portugal in 1828, of Hanover in 1837, of Austria in 1848, 1861, and 1865, of Tuscany in 1852, and of Monaco in 1959. Senelle, Robert, Clément, Elise, and Van de Velde, Edgard (2006) *A l’attention de Sa Majesté le roi, La monarchie constitutionnelle et le régime parlementaire en Belgique*, Bruxelles: Mols, 18.

Charter glorifying past kings. The proclamation features Napoléon speaking directly to the people, on the model of the 1814 and 1815 preambles:

These are the ideas, these are the principles you have authorized me to apply. May this constitution give to our land calm and prosperous days! May it prevent the return of intestine struggles where victory, as legitimate as can be, is always bought at a high price! May the sanction you gave to my efforts be sanctified! Then peace will be assured in and out, my wishes will be fulfilled, and my mission accomplished.<sup>42</sup>

The unilateral octroy, although ratified *a posteriori* by the people, remains a unilateral octroy—and can thus be modified or abolished unilaterally, with the additional requirement of an *a posteriori* ratification.

## 2. BONAPARTISM: CONSTITUTIONAL PLEBISCITE AS THE NEW “OCTROY”

In 1799, Sieyès, one of the most influential revolutionary jurists, wanted to overthrow the Constitution of Year III (1795), which provided for a collegial executive of five directors and a bicameral assembly. As, according to the modes provided in the constitution, it could only be revised after nine years, he plotted a coup. Sieyès needed military help from a soldier, and found Bonaparte, though the latter was not his first choice.<sup>43</sup> Pretexting a Jacobin conspiracy, he moved both assemblies to Saint-Cloud, in the suburbs of Paris. Moving the Assembly outside the capital provided protection against insurrection on the part of the Parisian crowds. On the 18th of Brumaire (November 9), the decree transferring the Assembly to Saint-Cloud was read by Bonaparte. The next day, the directors Sieyès, Ducos, and Barras resigned. Lucien Bonaparte, brother of Napoléon and president of the Lower House (“Conseil des Cinq-Cents”), opened the session, asking for a vote to revise the constitution. Skirmishes ensued, but the parliamentarians finally agreed, and inaugurated a “consulat” headed by three “consuls,” terms borrowed from the Roman Empire. Napoleon became first consul, then consul for life, and eventually emperor. The 1814 capitulation of Paris followed by his military defeat at Waterloo in 1815 led to his demise and inaugurated more than 30 years of monarchy, before the Second Republic, proclaimed in 1848, saw the

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<sup>42</sup> Proclamation of January 14, 1852.

<sup>43</sup> Sieyès had long been looking for a general to stage a military coup. He often repeated: “I need a sword.” His first choice was General Barthélémy Joubert-Catherine, but the General died in August 1799. Duhamel, Olivier (1994) *Histoire constitutionnelle de la France*, Paris: PUF, 33.

election of Louis-Napoléon Bonaparte, then a not very well-known relative of Napoleon.

In 1848, Louis-Napoléon Bonaparte was elected President of France by direct popular vote, in accordance with the provisions of the new constitution. The text created a presidential republic on the American model. The president was elected for a nonrenewable four-year term. He could not dissolve the Lower House, nor initiate a constitutional revision. The constitution was particularly rigid, and Louis-Napoléon Bonaparte's endeavor to have the Assembly vote through a constitutional revision failed. Meanwhile, the Assembly passed an electoral law restricting male universal suffrage. Louis-Napoléon Bonaparte requested the abrogation of the law, but his request was rejected by the Assembly. On December 2, 1851, on the anniversary of his uncle's coronation, Louis-Napoléon Bonaparte issued four decrees: he dissolved the assembly, dissolved the Conseil d'Etat, created a provisional commission, and reinstated male universal suffrage. He became emperor in 1852 and lost the throne following his military defeat at Sedan in 1870.

If Bonapartism can be considered as a regime type, it can be characterized, beyond its military character, by the following elements: the seizure of power in a coup d'état, the secret writing of a new constitution, and the introduction of constitutional changes reinforcing the power of the emperor against both the government and the parliament, all ratified by plebiscite. The plebiscite, which lies at the heart of the Bonapartist practice, can be traced back to the idea of "constitutional octroy." It embodies the revolutionary principles of national sovereignty and the authoritarian idea of despotism. To Napoléon Bonaparte as to Louis-Napoléon Bonaparte, the people must be consulted whenever a change in the initial contract linking its members is made—but these consultations must be mere ratifications of projects "granted" by the monarch. Together, both Napoleons organized seven plebiscites, all of which dealt with the constitution of the country.<sup>44</sup>

Although the word "plebiscite" was never used by Napoleon,<sup>45</sup> four plebiscites were organized under his Consulate and the Empire. The 1800 plebiscite gave France a new constitution providing for a collegial executive of three consuls, giving preeminence to First Consul Napoléon. In 1802, an amendment to the 1799 Constitution making Napoléon Consul for life and giving him specific royal attributes, such as the right to pardon and to sign peace and alliance treaties, was put to a referendum. Two years later, the

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<sup>44</sup> The practice had actually been inaugurated under the Convention. The Constitution of Year I (1793) and the Constitution of Year III (1795) had been submitted to a vote.

<sup>45</sup> It was introduced by Louis-Napoléon Bonaparte: cf *infra*.

1804 plebiscite legitimized an amendment to the 1799 Constitution making Napoléon an hereditary emperor, and granting him the power to appoint the presidents of the Tribunat and Senate. Most of these changes were made *before* they were approved by the people. In 1799, the new constitution had been proclaimed one month before its approval by referendum; in 1804, the Empire had been promulgated by a *senatus-consulte* almost six months before the referendum.<sup>46</sup> Napoleon's final plebiscite asked French people to approve the promulgation of the "Additional Act to the Constitutions of the Empire" (1815). Louis-Napoléon Bonaparte stayed longer in power than his uncle, but organized plebiscites with more restraint. In 1851, French men voted in favor of delegating their powers to Louis-Napoléon Bonaparte to write a new constitution. The next year, they agreed to make Napoleon a hereditary emperor, and in 1870, they approved parliamentary reforms aimed at liberalizing the 1852 Constitution. Here, the trajectories of Napoléon and his nephew differ—unlike his uncle, Louis-Napoléon Bonaparte eventually set his regime on a path toward liberalism.

The similarity seen in the heavy focus on constitution drafting and constitutional revision is striking. Napoléon and Louis-Napoléon Bonaparte were directly involved in their constitution drafting processes, for which they relied on a handful of their most trusted people, most notably Sieyès in 1799,<sup>47</sup> and Rouher in 1852.<sup>48</sup> In contrast with the revolutionary practice, both texts were drafted secretly and did not go through Assembly deliberations, yet both men proclaimed their adherence to the revolution.

As for constitutional revision, many differences between the two Bonapartes must be noted. In the 1799 Constitution, powers of constitutional revision initially were not mentioned. In practice, they were granted to the Senate through the enactment of a new legal category, the "*senatus-consulte*," a term borrowed from the Roman Empire and absent from the constitutions, initially proposed to Napoleon by the Conseil d'Etat.<sup>49</sup> According to the Constitution of 1799,

<sup>46</sup> Morabito, Marcel (2004) *Histoire constitutionnelle de la France 1789–1958*, Paris: Domat, 155.

<sup>47</sup> The Constitution was drafted "at Napoleon's place" based on a proposal by Sieyès. A few other people took part in the process, including Daunou, Boulay de la Meurthe, and Roederer. Bourdon, Jean (1941) *La Constitution de l'an VIII*, Rodez: Carrère Éditeur; Colombo, Paolo (2000) "La question du pouvoir exécutif dans l'évolution institutionnelle et le débat politique révolutionnaire" 319 *Révolution Française* 1–26; Menichetti, Johan (2013) "L'écriture de la constitution de l'An VIII: quelques réflexions sur l'échec d'un mécanisme révolutionnaire" 18 *Napoleonica: La Revue* 68–83. See also Lentz, Thierry (ed.) (2017) *Napoléon et le droit*, Paris: CNRS.

<sup>48</sup> It was a five-member commission composed of Flahaut, Mesnard, Persigny, Rouher, and Troplong. Morabito *Histoire constitutionnelle de la France* 252.

<sup>49</sup> Morabito *Histoire constitutionnelle de la France* 150.

the Senate was to act as the guardian of the Constitution: it could void laws and acts as unconstitutional (article 21). However, it never did so. It formally gained the power to revise the constitution through the constitution of 1802, which made a distinction between ordinary and organic *senatus-consulte*. The first, requiring a simple majority, gave the Senate crisis powers as well as the power to dissolve the two other assemblies (the *Tribunat* and *Corps Législatif*, whose roles were also reduced<sup>50</sup>) (article 55); the second, requiring a two-thirds majority, enabled the Senate to interpret or amend the Constitution (article 54). Under the Constitution of 1804, the the Senate was also given the power to review the constitutionality of laws of its own initiative (articles 70–71). These moves seemed to empower the Senate, but they were counterbalanced by the loss of its institutional independence. Indeed, its members were to be nominated by Napoléon himself (according to the 1799 Constitution, the *Corps Législatif* and the *Tribunat* also participated in the selection process), who also presided over its sessions and had the exclusive right to convoke it. Also, only the government—that is, Napoléon—could initiate a *senatus-consulte* (article 56). Thus, Napoléon had entrenched his constituent power in the constitution—and also gained, through the Senate, the power of dissolution of the Assembly. The Paris capitulation in 1814 led the Senate to—unexpectedly, given its institutional state of subordination toward the executive—declare and decree as follows: “Napoléon Bonaparte has forfeited the throne, and the right of inheritance established in his family is abolished. The French people and army are absolved from the oath of fidelity to Napoléon Bonaparte”. The guardian of the Constitution had moved against its creator.

In the 1852 Constitution, the Senate retained a limited role in constitutional amendment, but more fundamental constitutional revisions came to rest entirely on plebiscites.

[T]he Emperor [Napoleon I] used to say to the *Conseil d’Etat*: “A Constitution is the work of time; one could not leave too much room for future improvements”. That is why the present Constitution has determined only what it was impossible to leave uncertain. It has not locked up in an impassable circle the destinies of a great people, it has let the changes a large enough way to provide, in great crises, for other means of salvation than the disastrous expedient of revolutions. The Senate can, in concert with the government, modify any matter not being fundamental in this Constitution; but the modifications to make to the fundamental principles, sanctioned by your votes, can be definitive only after having received your ratification.

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<sup>50</sup> The *Senatus-Consulte* of 1802 and 1804 reduced the roles of the two other chambers. The *Corps législatif* was deprived of its annual four-month session, instead to only be convoked by the government (art. 75). The *Tribunat* was reduced by half (art. 76). The *Senatus-Consulte* of 19 August 1807 definitively suppressed the *Tribunat*.

The “fundamental principles” mentioned here refer to the five constitutional principles announced by the emperor on the day of his coup d’état, namely the accountability of the Head of State appointed for ten years, the existence of ministers only accountable to the Head of State, the recreation of the Conseil d’Etat, the existence of a Lower House elected by male universal suffrage, and a Senate. Later, the regime introduced some mechanisms of parliamentarism, by increasing the powers of the parliament vis-à-vis the executive and creating a responsible government. These included, most notably, a right of interpellation in response to the discourse of the throne in 1860, a right on the vote of budget in 1861, and the general right of interpellation in 1864.<sup>51</sup> The 1870 Constitution introduced responsible government (article 19). However, the 1870 Constitution could not be put into practice, as Napoleon abdicated the same year. The main features of the Constitution, namely parliamentary features associated with presidentialism, would be fully realized a century later, under the presidency of De Gaulle and the Constitution of the Fifth Republic.

### 3. THE REPUBLICAN MONARCHY: MORE (UN) CONSTITUTIONAL “PLEBISCITES”

Following his participation in the postliberation French government in 1944, General De Gaulle strongly opposed the parliamentary constitution of the Fourth Republic. He left power in January 1946, eight months before its promulgation. In June he gave the “Bayeux speech,” in which he described his constitutional view of a strong presidency endowed with discretionary dissolution powers. He then disappeared from politics for more than ten years, in the midst of a tense political situation, at a time when the war in Algeria, which had begun in 1954, showed no sign of ending. In April the Assembly had withdrawn its confidence in the government, and in May Pierre Pflimlin agreed to form a new government. On May 13 an uprising in favor of French Algeria occurred in Algiers. In the context of a looming civil war, Pflimlin resigned and the President of the Republic, René Coty, appointed Charles De Gaulle prime minister (“Président du Conseil”); he obtained the confidence of Parliament on June 1, perhaps under the threat of a military coup.<sup>52</sup> De Gaulle

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<sup>51</sup> Troper, Michel and Hamon, François eds (2015) *Droit constitutionnel*, Paris: LGDJ, 357.

<sup>52</sup> 329 votes to 224. Only the Communist Party had massively voted against: Troper and Hamon, *Droit constitutionnel* 421. René Coty threatened to resign if parliamentarians refused to give De Gaulle a vote of confidence. The extent to which De Gaulle’s power seizure was a coup is still highly contested among French scholars. See Winock, Michel (2006) *13 Mai 1958: l’agonie de la IVe République*, Paris: Gallimard, and for the opposing view, Rémond, René (1998) “Le 13 mai 1958: un coup d’État?”,

immediately enacted a resolution on the effective dissolution of the Assembly, as well as a law giving him full power to issue laws without parliamentary approval.<sup>53</sup> On June 3, he promulgated a constitutional law which gave him full power to revise the 1946 Constitution. This law referred to De Gaulle and De Gaulle only. Indeed, it read: “the Constitution will be revised by the government which obtained the confidence of parliament on 1 June 1958.” This personalization of a delegation of (derived) constituent power resembled the plebiscites of Napoleon I and III, and fit the doctrine of monarchical “constitutional octroy.” If the procedure of constitution drafting was a lot more complex than was the case under the Bonapartes,<sup>54</sup> it still relied on the ideas set out by General De Gaulle, rearranged with the help of his close aide Michel Debré.<sup>55</sup> The constitution drafting consultative committee, composed of law experts, immediately saw the Napoleonic ghost hidden in the constitutional project. In August 1958 they wrote to De Gaulle, arguing against the incompatibility of parliamentary and ministerial functions and emphasizing the principle of responsibility of the prime minister before Parliament, not the president. They also warned against future uses of the referendum that might bypass the Assembly to put it in opposition to the people.<sup>56</sup> The text put to a referendum in September 1958 nevertheless mixed the early Bonapartist presidential (incompatibility between ministerial and parliamentary functions: article 23) and plebiscitary (discretionary dissolution: article 12; referendum: article 11) features while adding late Bonapartist parliamentary mechanisms (vote of no confidence: article 49).

Bearing in mind the memories of 1940, the Fifth Republic granted the Head of State the discretionary use of full emergency powers (article 16)—a true Prerogative, in Locke’s sense, namely, “the power to act according to discretion, for the public good, without the support of the law and sometimes even

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*Les Collections de l’Histoire*, n° 1, February. See also Nick, Christopher (1998) *Résurrection: Naissance de la Ve République, un coup d’État démocratique*, Paris: Fayard.

<sup>53</sup> Troper and Hamon (eds) *Droit constitutionnel* 422.

<sup>54</sup> The first draft was to be sent to a special advisory committee composed of members nominated in majority by the Assembly. The draft was then submitted to the Conseil d’Etat before being put to a referendum.

<sup>55</sup> Two bodies participated in the constitution drafting process: a body of experts, composed of renowned jurists under the presidency of Michel Debré, and a political organ, composed of Charles De Gaulle, Michel Debré, and former ministers of the Fourth Republic such as Pierre Pflimlin and Guy Mollet. The decisional organ was the latter; the former had only advisory powers.

<sup>56</sup> Troper and Hamon (eds) *Droit constitutionnel* 426.

against it.<sup>57</sup> De Gaulle used it in April 1961 to quell the attempted putsch in Algiers. In doing so, he drastically reduced liberties in Algeria, such as by increasing the length of pretrial detention to 15 days (putting alleged offenders at increased risk of torture) and creating a special military court to try the rebellious generals, whose rulings could not be appealed. Following the abrogation of article 16 in September 1961, De Gaulle organized a referendum on the status of Algeria,<sup>58</sup> which gave him the power to take ‘any legislative or administrative measures required’ to implement the peace process.<sup>59</sup> He created a new special court, the Cour militaire de justice, which likewise did not allow appeals (except presidential pardon), and would issue death sentences. When the act establishing the court was invalidated by the Council of State in October 1962,<sup>60</sup> De Gaulle disregarded the ruling, and threatened to use article 16 against the Council of State.<sup>61</sup> Meanwhile, the special military court continued to operate until 1963.

The National Assembly under the Fifth Republic was not as servile as the Bonapartist Houses, but it was soon domesticated by De Gaulle. In 1962, he replaced his prime minister, Michel Debré, although the latter still enjoyed the confidence of the Assembly. According to the constitution, De Gaulle did not have the power to undertake such an act—and he had many times assured the Assembly representatives that this was the case.<sup>62</sup> Yet he nevertheless replaced Michel Debré with his trusted aide Georges Pompidou, who was not a member of the Assembly. At the same time, De Gaulle announced his planned referendum on the direct election of the president, against which the Assembly retaliated by dismissing Pompidou. De Gaulle dissolved the Assembly and, following elections which returned him a majority, renominated Pompidou

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<sup>57</sup> Locke, John (1988) *Two Treatises of Government* [1699], Cambridge: Cambridge University Press, 265–428. See also Loughlin, Martin (2010) *The Foundations of Public Law*, Oxford: Oxford University Press, 385–406.

<sup>58</sup> The referendum was held in France on April 8, 1962. It was approved by an overwhelming majority (90 percent).

<sup>59</sup> Loi n° 62-421 du 13 avril 1962, related to the Evian Accords between France and Algerian representatives.

<sup>60</sup> Conseil d’Etat 1962 Canal, Robin et Godot.

<sup>61</sup> He set up a commission to reform it instead. Beauvois *Léon Noël, de Laval à De Gaulle via Pétain* 413.

<sup>62</sup> During the constitution drafting process, in response to a question asked by Paul Reynaud about the responsibility of the prime minister before the president, De Gaulle said no such responsibility would exist. Documents pour servir à l’histoire de l’élaboration de la Constitution, 1988, vol. 2, 300.

as prime minister. To date, no other prime minister has been dismissed by the Assembly.<sup>63</sup>

In 1962, De Gaulle introduced a procedure for direct election of the president without consulting the Assembly, which many considered a violation of the constitution.<sup>64</sup> Indeed, according to the title “Revision” of the Constitution, constitutional revision initiated by the president had to be approved by both chambers before being submitted either to a referendum or to a vote in a joint sitting of both chambers (article 89). De Gaulle put his constitutional reform directly to a referendum, without a vote in the Assembly, based on another article of the constitution (article 11). Parliamentarians petitioned the Constitutional Council, which declined jurisdiction to review, arguing that referenda are the “direct expression of national sovereignty.”<sup>65</sup> In 1969 De Gaulle once again put a constitutional revision to a referendum without consulting the Assembly. During his presidency, which ran from 1958 to 1969, De Gaulle organized four referenda: one every 2.5 years. Each time, he solemnly stated that he was “responsible before the people”<sup>66</sup> and would resign if disavowed. When the referendum did not return a favorable majority in April 1969, he kept his word, and resigned the next day. Many observed that, like Napoléon Bonaparte at Waterloo and Louis-Napoléon Bonaparte at Sedan, De Gaulle’s defeat on the field led immediately to his fall.<sup>67</sup>

#### 4. CONSTITUTIONAL PRACTICES, CONSTITUTIONAL TRADITIONS: AUTHORITY VERSUS AUTHORITARIANISM

Louis-Napoléon Bonaparte wrote in 1840 that Bonapartism was “the marriage of order and freedom, of the rights of the people with the principles of authority.”<sup>68</sup> De Gaulle’s swings between authority and authoritarianism can be explained by looking at the several, often contradictory constitutional traditions to which he adhered, and which have left their mark on the very text of the Constitution of the Fifth Republic. As Raymond Aron stated: “None of the articles of the Constitution [of the Fifth Republic] as considered in isolation from one another are in themselves scandalous. [But] *All of them take us to*

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<sup>63</sup> There were unsuccessful attempts, such as in 1992 against the government of Pierre Bérégovoy and in 2016 against the government of Manuel Valls.

<sup>64</sup> Troper and Hamon (eds) *Droit constitutionnel* 454–66.

<sup>65</sup> Conseil Constitutionnel, Décision n° 62-20 du 6 novembre 1962.

<sup>66</sup> Capitant, René (1972) *Démocratie et participation politique*, Paris: Bordas, 161.

<sup>67</sup> Hazareesingh, “De Gaulle et le mythe napoléonien.”

<sup>68</sup> Quoted in Berstein, Serge and Winock, Michel (2002) *L’invention de la démocratie 1789–1914*, Paris: Seuil, 168.

*back to the constitutional monarchy or the parliamentary Empire of the last century.*<sup>69</sup>

First, the Constitution of the Fifth Republic builds on the liberal-conservative tradition of monarchic constitutionalism. Maurice Duverger dubbed the system of the Fifth Republic a “Republican Monarchy.”<sup>70</sup> The royalist liberal-conservative tradition sees the king both as an arbiter above politics, as in the writings of Benjamin Constant, and as a “chief,” as in Victor de Broglie’s ideas. According to the latter, in a republic, the Head of State should be “a chief like a King but with a different name” and “invested with all the attributes of royalty.”<sup>71</sup> Michel Debré, the core drafter of the Constitution of the Fifth Republic, also expressed his preference for a “republican monarch,” elected for a 12-year term.<sup>72</sup> According to the Constitution of the Fifth Republic, the president is only the “arbiter” (article 5), but according to Michel Debré’s interpretation and De Gaulle’s practices, he is “*la clé de voûte*” (key-stone): both arbiter and chief.

Second, the Constitution of the Fifth Republic builds on the military-plebiscitarian tradition of Bonapartism. Raymond Aron dubbed the Fifth Republic “a Parliamentary Empire.”<sup>73</sup> Charles De Gaulle’s constitutional thought was influenced by Paul Déroulède’s idea of a “plebiscitary republic.”<sup>74</sup> The constitutional reflections of military men such as Patrice de Mac Mahon, associated with ideas of a strong executive and the assertive exercise of the right of dissolution, are likely to have influenced Charles De Gaulle’s thought as well.<sup>75</sup> To De Gaulle, the right of dissolution was one of the most important prerogatives of the Head of State, not a formal power exercised de facto by the prime minister along the British model. The right of dissolution is, like the referendum, a core component of a plebiscitary

<sup>69</sup> Aron, Raymond (2012) *Une histoire du XXème siècle, Anthologie*, Paris: Perrin, 406, emphasis added.

<sup>70</sup> Duverger, Maurice (1974) *La monarchie républicaine ou comment les démocraties se donnent des rois*, Paris: Robert Laffont.

<sup>71</sup> Victor de Broglie (1872) (2nd ed.) *Vues sur le gouvernement de la France*, Paris: Michel Levy, 227. “Un chef investi de tous les attributs de la royauté,—l’initiative et le veto,—l’exécution des lois,—la direction de l’administration dans toutes ses branches, la nomination à tous les emplois, aux conditions légales—le commandement des armées de terre et de mer.”

<sup>72</sup> Debré, Michel (1945) *Refaire la France: l’effort d’une génération*, Paris: Plon.

<sup>73</sup> Aron *Une histoire du XXème siècle* 406.

<sup>74</sup> Joly, Bertrand (1998) *Déroulède, l’inventeur du nationalisme*, Paris: Perrin, 210.

<sup>75</sup> Mac Mahon was a general during the Second Empire and was elected president under the system of the Third Republic following the fall of Adolphe Thiers in 1873. In 1877, he obtained agreement from the Senate to dissolve the Lower House, in what was called a “coup.”

republic, fostering a direct relationship between the president and the people as a whole that bypasses both Parliament and prime minister. According to the Constitution of the Fifth Republic, the exercise of dissolution and the calling of a referendum only require one signature: that of the president (article 19).

The common features of monarchism and Bonapartism converge toward the creation of a powerful yet unaccountable Head of State. Except in cases of cohabitation, which did not occur until 1986, the president—neither responsible nor accountable to Parliament, and blessed with a long term in office (until 2000 the term was seven years, renewable)—can not only dissolve Parliament (article 12) but also appoint the prime minister at his own discretion (article 8). Thus, the key characteristics of this fusion of royalist liberal conservatism and military plebiscitary republic are a Head of State as the embodiment of the people, having the right to use discretionary powers to dissolve the Assembly while remaining in power, choosing and revoking the prime minister and his cabinet members at his own discretion, while the prime minister is accountable to both the Chamber and the president. Like monarchic constitutionalism and unlike early forms of Bonapartism, the system of the Fifth Republic is characterized by *de facto* dualism: the prime minister is responsible before both the legislature and the Head of State. In such systems, the prime minister is like a “chief of staff” to the Head of State—he is described in France as the “fuse of the system,” shielding the Head of State from the Assembly, having no power, but being politically responsible.

*De facto*, the Head of State is both head of state and head of government. If he controls the Chamber, he has, *de facto*, the initiative in terms of laws. The practice of the Fifth Republic combines the strong presidency *à l'américaine* with a regime of fusion of powers *à l'anglaise*, while being rooted in French monarchic constitutionalism-Bonapartism traditions. This makes the French president one of the most unaccountable heads of state among democratic regimes.

Yet unaccountability before Parliament coupled with the wide exercise of discretion (*de jure* referendum, dissolution of Parliament, emergency powers, *de facto* choice of prime minister and cabinet members) does not automatically translate into a practice of authoritarianism, precisely because of the Head of State's accountability before the people. This last feature both gives extraordinary authority to the Head of State and tends to constrain it. In 1964, De Gaulle declared that the president alone holds the entire authority of the State:<sup>76</sup> “The indivisible authority of the State is entirely vested in the President by the people who elected him, and there is no authority, neither ministerial, nor civil, military or judicial, that could be conferred or maintained by any other

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<sup>76</sup> Troper and Hamon, *Droit constitutionnel* 423.

means than his.<sup>77</sup> To De Gaulle as to the two Bonapartes, universal suffrage rests above the constitution. The divine right of monarchic constitutionalism had been progressively replaced by the “anointment” of the election, with the two empires operating a synthesis between the ancient and the modern by proclaiming Napoléon emperor “by the grace of God and the republican constitutions”<sup>78</sup> and Napoléon III “by the grace of God and national will.”<sup>79</sup>

It must be noted that in the context of troubled political times, incessant war and the French expanding/receding Empire, the three men were linked—either directly or indirectly, and in different proportions—to brutal repression of populations in metropolitan France, as well as in annexed or colonized territories. Yet their achievements for the “*grandeur de la France*” washed the blood away. Today, Napoléon Bonaparte and De Gaulle are still celebrated as the two greatest national heroes,<sup>80</sup> bolstering the provocative assertion that French people might not always value liberal democratic constitutionalism over authority and its excesses when the “*grandeur*” of France is at stake.

## 5. EPILOGUE: SPREADING AUTHORITARIAN CONSTITUTIONALISM IN THE WORLD

The legacy of French authoritarian constitutionalism and its influence in the world is tremendous. Monarchic constitutionalism, Bonapartism, and Gaullism spread in Europe but also in the rest of the world—elaborating both a doctrine and a technique of authoritarian constitutionalism that still informs authoritarian constitutionalism today. As Rosanvallon puts it, Bonapartism is one of the early models of “illiberal democracy”: restricting specific liberties such as press freedom and prohibiting or controlling political parties in the very name of democracy, it rests on a direct, unmediated relationship between the leader and the people.<sup>81</sup> In the nineteenth century, Bonapartism spread as a promising doctrine challenging that of representative government, which was deemed a failure to be relegated to the past.<sup>82</sup>

We usually tend to look at the history of constitutionalism in terms of either its eighteenth century foundations or its twentieth century realizations, discarding the nineteenth century as something irrelevant—a sort of deviant

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<sup>77</sup> Press conference, January 31, 1964, quoted in Mitterrand *Le coup d'Etat permanent* 79.

<sup>78</sup> 1804 Constitution, Sénatus-consulte du 28 floréal an XII, art. 140 and 142.

<sup>79</sup> 1870 Constitution, Sénatus-consulte du 21 mai 1870, preamble.

<sup>80</sup> Hazareesingh, “De Gaulle et le mythe napoléonien”; Gueniffey, Patrice (2017) *Napoléon et de Gaulle, deux héros français*, Paris: Perrin.

<sup>81</sup> Rosanvallon, Pierre (2000) *La démocratie inachevée*, Paris: Gallimard, 201.

<sup>82</sup> *Ibid* 206; 237–8.

constitutionalism, a “dark age.”<sup>83</sup> However, the study of nineteenth century constitutionalism is key to understanding today’s wave of authoritarian constitutions throughout the world. Nineteenth century European constitutionalism, influenced by both monarchic constitutionalism and Bonapartism and called *monarchister Konstitutionalismus*, has been categorized as a French innovation, starting with the 1814 Charter.<sup>84</sup> The model was then adopted across Europe.<sup>85</sup> It also spread to other noncolonized countries as part of a process of “conservative modernization”: Japan in 1889;<sup>86</sup> China, whose first constitutional documents date back to 1908;<sup>87</sup> Siam in 1932.<sup>88</sup> Meanwhile, the improperly called “semipresidential system,” building on nineteenth century experiences, was adopted in many former French colonies in Africa, as well as in ex-Soviet States. The legacy of French authoritarian constitutional thought is as prevalent as that of liberal constitutional thought, and is equally worthy of constitutional enquiry, especially in times of rising illiberalism.

This chapter has shown that the practice of the *constitutional plebiscite* characteristic of Bonapartism and later Gaullism can be analyzed as a development of the practice of *constitutional octroy*. In times of crisis, charismatic leaders (“*grands hommes*”) emerge to restore peace and order, and give a new consti-

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<sup>83</sup> In the course of the nineteenth century, about 50 countries adopted constitutions. They were often counterrevolutionary and authoritarian; hence the nineteenth century could have been referred to as “the dark age of constitutionalism.” Yet the proliferation of constitutions makes this century a particularly interesting laboratory for constitutional experiments. See Frankenberg, Günter (2013) “Constitutional Transfers and Experiments in the Nineteenth Century,” in Frankenberg, Günter, *Order from Transfer: Comparative Constitutional Design and Legal Culture*, Cheltenham: Edward Elgar, 279–305. See also Grotke, Kelly L. and Prutsch, Markus J. (2014) *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, Oxford: Oxford University Press.

<sup>84</sup> Brandt, Hartwig (2002) *Europa 1815–1830, Reaktion Konstitution Revolution*, Stuttgart: W. Kohlhammer. See Schutze, Carola (2002), *Frühkonstitutionalismus in Deutschland*, Baden-Baden: Nomos.

<sup>85</sup> For instance in the United Netherlands and Congress Poland in 1815, in Bavaria and Baden in 1818, in Württemberg in 1819, in Spain in 1834, Greece in 1844, Prussia in 1848/1850, in Piedmont in 1848–52, in Denmark in 1849, in Austria in 1861/1867, in the German Empire in 1871, and in Russia in 1906: Prutsch, Markus J. (2014) “Monarchical Constitutionalism” in Post-Napoleonic Europe,” in Kelly and Prutsch *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* 77.

<sup>86</sup> Kazuhiro, Takii (2007) *The Meiji Constitution, The Japanese Experience of the West and the Shaping of the Modern State*, Tokyo: International House of Japan.

<sup>87</sup> Balme, Stéphanie and Dowdle, Michael (eds) (2009) *Building Constitutionalism in China*, Paris: Sciences Po.

<sup>88</sup> Mérieau, Eugénie (2018) “The 1932 Siamese Constitutions, Matrix of Thailand’s Constitutional Instability,” in Tan, Kevin and Ngoc Son, Bui (eds) *Constitutional Foundings in Southeast Asia*, Oxford: Hart Publishing, 297–318.

tution to the people, *their* constitution. In so doing, they do act extraconstitutionally, but the plebiscite washes away the illegality of their action. Following his coup, Louis-Napoléon Bonaparte explained: “I left legality only to return to law. More than seven million votes absolved me.”<sup>89</sup> De Gaulle also famously said “The best Supreme Court is the People.”<sup>90</sup> Moreover, Bonapartism and Gaullism relied on the idea that the constitution is the leader’s own norm, and the leader is responsible to the people and the people only. Therefore, when the circumstances so require, the Head of State can act against the Constitution if the people accept it *a posteriori*—universal suffrage supersedes constitutionality. Against this background, the common institutional characteristic of French authoritarian constitutionalism is that the King-President-Emperor has the discretionary power to call for a referendum, and effectively uses it in “constitutional moments” for the people’s exercise of original and derived constituent power.

Maurice Duverger once wrote that when, rather than De Gaulle, the presidency was held by an “ordinary man,” the initial dual parliamentarism (double responsibility of the prime minister, turning him into a king’s advisor) of the institutional framework would evolve toward “classical parliamentarism.”<sup>91</sup> In 2012, President François Hollande indeed distanced himself from the figure of the “extraordinary man” and labeled himself a “normal president.” He tried to create a “normal/ordinary presidency” and encourage institutions to evolve toward greater parliamentarism (ministers being Members of Parliament), but this practice did not outlast him. His successor Emmanuel Macron, once in power, spoke about the nostalgia of monarchy and espoused the use of monarchical regalia, while putting himself, like De Gaulle, “above parties and politics” by being “not leftwing, not rightwing.”

Like the Bonapartes and De Gaulle before him, Macron tried to reconcile the various antagonistic forces that have shaped French political and constitutional thought, between the *ancien régime* and the Revolution, monarchy and republic, left and right. Having acceded to power without the vehicle of a political party, he staged, in the words of French philosopher Alain Badiou,

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<sup>89</sup> “Je n’étais sorti de la légalité que pour rentrer dans le droit. Plus de sept millions de suffrages viennent de m’absoudre”: Emeri, Claude and Bildégaray, Christian (1997) *La Constitution de la France de 1789 à nos jours, études de droit politique et constitutionnel*, Paris: Armand Colin, 44.

<sup>90</sup> “Je crois qu’en France, la meilleure Cour Suprême, c’est le peuple.” De Gaulle, Charles (1970) (2014) *Mémoires d’Espoir*, Paris: Plon.

<sup>91</sup> Duverger, Maurice (1990) “Les institutions de la Vème République,” *Naissance de la Vème République analyse de la Constitution par la Revue Française de Science Politique en 1959*, Paris: Presses de la Fondation Nationale des Sciences Politiques, 101.

a “democratic coup d’état” along the model of Louis-Napoléon Bonaparte.<sup>92</sup> Emmanuel Macron—who remains fully unaccountable to Parliament—has set out plans to revise the constitution to decrease the number of parliamentarians (by referendum, based on the precedent set by De Gaulle?), walking in the footsteps of French strongly anti-parliamentary and authoritarian leaders. As he once said:

French politics lacks the figure of the King . . . We then tried to reinvest this hole, to put in there other figures: these are the Napoleonian and Gaullist moments, notably. The rest of the time, French democracy does not fill the space. We can see it very well with the permanent questioning on the presidential figure, acute since the departure of De Gaulle. After him, the normalization of the Presidential figure reinstalled a vacant seat at the heart of political life. However, what we expect from the President of the Republic, is that he fills this function.<sup>93</sup>

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<sup>92</sup> Badiou, Alain (2017) *Eloge de la politique*, Paris: Flammarion, 115–18.

<sup>93</sup> Interview in the newspaper *Le 1*, July 8, 2015.