19

On the French Constitutional Imaginary

The Erosion of the Long-standing Republican Tradition

François-Xavier Millet

19.1 INTRODUCTION

It is somewhat paradoxical nowadays to reflect on collective imaginaries at a time of individualism, post-nationalism and transnational governance. It is even more paradoxical to reflect on such imaginaries with a national key. Examining national imaginaries indeed entails looking at idiosyncrasies, that is those specific, unique, unparalleled features of a given national community that distinguish the latter from other national communities.

Such a type of idiosyncrasies, which often happen to be based on emotions, may understandably be perceived with suspicion in the context of European integration as both a unity-driven and reason-based political endeavour. They are the result of collective imaginaries that prominent scholars have called 'imagined communities', 'imagined structures of belief' or 'invented traditions'.[1] Where current times primarily value the present and, to some extent, the future, those imaginaries overlap with mental representations inherited from a certain mythical past that has often more to do with collective memory than scientific historicity.

Based on a supposedly pre-existing and mysterious 'We, the People', they create a sense of kinship, a feeling of national exceptionalism and a reason for pride for those sharing them that may ultimately turn into sheer nationalism and oppose political communities against one another. With their inherent dreamlike component, imaginaries bear a degree of irrationality and can therefore fuel potentially fateful passions when those passions are turned into political claims and ground nationalistic aspirations or populist claims.

[1] See, respectively, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 2016); Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty*, (Columbia University Press, 2012); and Eric Hobsbawm and Terence Ranger, *The Invention of Tradition* (Cambridge University Press, 2012).

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Researching on national collective imaginaries is thus arguably quite politically incorrect in a post-national Europe as it seems to be bound to be premised on an introspective and backward-looking interest into kinship, group psychology and self-perception and may foster divisive political claims leading to Europe's fragmentation. Now, however, can such research be redeemed if it mainly looks into collective imaginaries from a constitutional viewpoint? Is it that constitutional imaginaries mitigate the risks associated with collective imaginaries and render them more acceptable? Can they do so without undermining the virtues of collective imaginaries? All those questions require us to determine what a 'constitutional' imaginary is, what makes a collective imaginary constitutional and what that concretely entails.

There is an apparent tension within a simultaneously constitutional *and* collective imaginary. Its imaginary pole is potentially closed and gregarious and thus dangerous, while its constitutional one would appear open, more universal and individual-based. It is indeed often assumed in Europe – and more broadly in the Western world – that constitutionalism refers to universal, individual-based values (often under the banner of 'liberal constitutionalism' or 'liberal democracy') as opposed to community values defined along national lines.

The distinctive imaginary that France has forged over the centuries makes it a unique case-study to understand both the construction of national constitutional imaginaries in Europe together with the challenges that EU integration, with its own concepts, narratives and values, represent for those imaginaries. The self-perceived exceptionalism is indeed not confined to the United States. The French imaginary has generated its own political and social model. That feeling of uniqueness inherited from the French Revolution appears entrenched in the 'Great Nation'. Not only has it induced the widespread belief that France has something to say to the world but it also largely explains France's past as a colonial power yearning to share its model with other peoples as part of the 'civilising mission' of European states, often referred to in the English language as the 'white man's burden'.

The French constitutional imaginary is therefore worth examining as a domestic product but also as an export product that travelled, together with the political model underpinning it, to French ex-colonies but also to those former communist states in Europe where the French revolutionary ideals have inspired the Russian Revolution and thus shaped the own imaginary of those states. What is that imaginary? Has it changed over time and how? It is submitted in this chapter that the French 'constitutional' imaginary is the result of an enduring competition between two lines of political thoughts that rest on different concepts of liberty (positive and negative):[2] on the one hand, the dominant Republican thought as understood especially by Rousseau, and, on the other hand, the liberal thought as

[2] Isaiah Berlin, *Two Concepts of Liberty* (Oxford University Press, 1958).

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understood especially by Locke and which, albeit not foreign to the French political tradition, was somewhat less significant during the Westphalian times.

(National) constitutional imaginaries are similar to tectonic plates. While they have a smooth co-existence when they stay apart, the disruption may be immense where certain factors lead them to collide. That is arguably the case on the fertile ground offered by European integration as the most successful regional experiment of globalisation that thrives on neoliberalism, the rule of law, fundamental rights and more broadly liberal constitutionalism as the contemporary dominant type of liberalism in Europe. It would appear that the deep divide within French society nowadays is – at least partly – the result of a struggle, within the French imaginary, between the Republican thought and the liberal one, whereby the grand old French Republican pillars are shaken by Anglo-American narratives vehicled by European Union law (hereinafter 'EU law') together with the system established by the European Convention on Human Rights (hereinafter 'the ECHR') and its individualistic tide.

Against that background, this chapter explores the evolution of the French constitutional imaginary in the mirror-inverted light of the liberal imaginary inherited from Locke in particular. It is on the basis of the findings in Section 19.2 regarding the available tools to determine the past and current content of the constitutional imaginary of a given community that Section 19.3 teases out, in contrast with the Anglo-American tradition premised on negative liberty, how the Republican conception of positive liberty has had a hegemonic role in France through Rousseau's influence in particular. That latter section looks at how Republicanism found its concrete expression in France in the nature of public power, the concept of the separation of powers, the relationship between state and society and also property. It also examines the embedded character of the Republican tradition by showing how difficult it has been for French liberal authors to impose themselves within the intellectual history of France and the influence that Republican ideas have had on their own views. Section 19.4 subsequently addresses the liberal shift prompted by globalisation and European integration from the 1970s onwards and how it altered public law. It shows how the French long-standing Republican tradition, deeply engrained within the collective psyche, is being eroded by the Anglo-American political culture conveyed by the European Union and more generally by globalisation and the correlative rise of individualism and human rights. Section 19.5 looks at various political moments that bring to light the resistance of the French Republican tradition towards (neo) liberal tremors. The conclusion in Section 19.6 recaps the main findings.

19.2 HOW CAN WE KNOW ABOUT CONSTITUTIONAL IMAGINARIES?

Delineating the content of any constitutional imaginary requires in the first place to understand what a constitutional imaginary is, what function it fulfils within a

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society and how it relates to power and the law.[3] Addressing those issues then makes it possible to come up with appropriate heuristic tools that allow us to grasp the content of specific imaginaries.

19.2.1 *Collective Imaginaries as Social Artefacts*

Constitutional imaginaries are a subcategory of collective imaginaries, which themselves are social artefacts. Collective imaginaries have little to do with scientific historicity. They have a lot to do instead with self-representation as a group. Because they are socially constructed, they primarily derive from (selective) memory, psychology or sociology. They consist in uniting myths whose function is to create a comforting feeling of kinship connecting the dead and the living. Truth does not matter as far as collective imaginaries are concerned. It does not matter indeed whether their subjective, memory-based content is in line with their objective, history-based substratum. Since they imply the idealisation and, often, the extrapolation of given community features, collective imaginaries are actually most likely to be erroneous or partial, without that being an issue in itself. What matters instead with collective imaginaries is that they manage to fulfil both their herding and dissociating functions: building a community feeling, a 'we', that is distinct from 'the others' and which may subsequently develop political aspirations to self-rule as 'We, the People'.

Nations are arguably one of the most – if not *the* most – successful and long-lasting collective imaginaries that have ever been conceived of by human mind. National imaginaries, often branded as 'national identity', are a made-up, subjective construct based on objective elements that have been sorted and ranked on the basis of their respective weights, those weights being themselves determined according to given criteria and preferences. In his influential lecture on the concept of the nation delivered at the Sorbonne in 1882,[4] French intellectual Ernest Renan explained that a nation was characterised by 'a rich legacy of memories' and by 'the desire to live together, the desire to continue to invest in the heritage that we have jointly received'. According to him, there would be no nation without 'forgetting' since 'the essence of a nation is that all individuals have many things in common and also that they have forgotten many things'. Nations and national identity, as any other collective imaginary, thus display a high degree of subjectiveness.

[3] On constitutional imaginaries (or imagination), see, e.g., Martin Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Review* 1, 1; Paul Blokker, 'Populism; Constituent Power and Constitutional Imagination', in Martin Belov (ed.), *Populist Constitutionalism and Illiberal Democracies: Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Intersentia, 2021).

[4] Ernest Renan, *What Is a Nation? And Other Political Writings* (Columbia University Press, 2018), 247–263.

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That subjectiveness raises in turn the issue of the authors of such social artefacts: *who* selects those specific community features that are to become the backbone of those imaginaries? As a social construct, imaginaries are arguably the creation of hegemonic elites who decide on the content of the legacy, what to keep and what to discard (or to forget, in Renan's parlance), what to insist on and what to set aside. Collective imaginaries are thus the result of an enterprise conducted by a happy few who pretend to speak on behalf of a given people in order to strengthen the ties within that community.

At the same time, however, collective imaginaries cannot be a sheer social construct devised by purely rational minds. Those elites are themselves influenced, at least unconsciously, by the groundswell constituted by those entrenched imaginaries inherited from the past. Although those elites shall certainly shape them and modify them, they also receive them as a given since those imaginaries are a part of their very autobiography. This bears a crucial consequence – addressed in Section 19.5 – regarding the possibility for an imaginary to be substituted by another: although an imaginary may certainly be redirected, it cannot arguably be entirely revamped. It is to be lasting.

19.2.2 *Constitutional Imaginaries as Collective Imaginaries*

As specifically regards *constitutional* imaginaries, this chapter adopts Jan Komárek's proposed definition:

> a set of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule. Such imaginaries are as important as institutions and office holders formally embedded in constitutions. They provide political action (anchored in the constitution and getting expression through the medium of law) with an overarching sense and purpose recognized by those governed as legitimate.[5]

Two aspects within constitutional imaginaries appear salient in this proposed definition: the foundational dimension and the unconsciousness dimension. It is in the light of each of these aspects that heuristic tools can be devised in order to determine the content of a given imaginary.

First, as far as the *foundational* element underpinning constitutional imaginaries is concerned, those imaginaries are characterised by their axiological importance for the building up and continued existence of a given political community. They confer democratic legitimacy and popular support on their political institutions by virtue of the supposedly deep adherence of the people to that mobilising imaginary. This chapter shall look at those foundations through two main tools. First,

[5] Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies and the Other', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), 2.

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intellectual history – as contextualised political thought[6] – will allow us to find the various strands within the political thought and their respective weights in a given community, at a given time. It will especially allow us to unearth continuity and rupture within political thought. Second, constitutional law – and more generally public law – arguably reflects constitutional imaginaries. It is thus opportune to examine the grand narratives contained in particular in the preamble or first provisions of a constitution. A certain imaginary will also be reflected by the structure and content of a constitution, together with the constitutional arrangements provided for therein regarding the form of the state, the type of separation of powers, the balance of powers among political institutions, judicial review and the degree of commitment towards fundamental rights achieved by the constitution and by constitutional jurisprudence.[7]

Second, as regards the *unconsciousness* element, it appears somehow more problematic: how may that element be unearthed? Constitutional imaginaries are indeed most of the time invisible.[8] They are so deeply engrained in a given collective psyche that they, for those who partake in it, sound like self-evident truths that are certainly hard to challenge but, above all, hard to identify in the first place. While looking at the foundations through intellectual history and public law may help unveil the content of those imaginaries, political events or moments are another heuristic tool to bring the invisible to the fore. The meaning of those events involving the people is not always easy to grasp of course. They may, however, support the conclusions on the content of constitutional imaginaries that derive from intellectual history and public law. Let us call *epiphanies* those – rare – eruptive moments of 'apparition' where the main features of a constitutional imaginary emerge as a society's reaction to a countervailing movement. Epiphanies refer to those moments of collision between tectonic plates where the old meets the young. Epiphanies are like precipitates in chemistry where the addition of a new substance to the invisible old mix suddenly reveals the nature and content of the latter. Accordingly, epiphanies occur when the heart of national imaginaries surface as the result of a tension, of a strain between an entrenched political culture and competing ideologies or trends.

[6] On the methods in intellectual history, see in particular Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3, 8.

[7] In France, the contribution of constitutional scholarship to the study on constitutional imaginaries has been unfortunately somewhat limited because of the dominant positivistic tradition that has downplayed constitutional history and philosophy. There is little interest in the study of 'constitutional law in context' in France, apart from the notable exception of the Institut Michel Villey and its e-journal *Jus Politicum*. Even there, it is usually done with a retrospective, learned interest in past authors, with limited attention to the political and social context within which those authors developed their thoughts and to what could be, *mutatis mutandis*, their contribution for the present times. See, however, for a proposal to look at constitutions 'in their becoming', Denis Baranger, 'Le piège du droit constitutionnel' (2009) (No. 3) *Jus Politicum* 1, 13, http://juspoliticum.com/article/Le-piege-du-droit-constitutionnel-146.html.

[8] See, e.g., Laurence H. Tribe, *The Invisible Constitution* (Oxford University Press, 2018).

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19.3 THE FRENCH CONSTITUTIONAL IMAGINARY AS A REPUBLICAN IMAGINARY

19.3.1 *French Republicanism and Anglo-American Liberalism: A Tale of Two Different Liberal Traditions*

When looking at intellectual history, both liberalism and liberty appear to be multifaceted concepts. As Sir Larry Siedentop, an American-born British renowned specialist of French liberalism, explained in a famous essay first published in 1979,[9] there are – at least – two liberal traditions: the Anglo-American tradition and the French tradition. Despite their common commitment to liberty, those two traditions stand in stark contrast with one another. While the former is premised on Berlin's negative liberty as non-interference, the second one rests on positive, civic or political liberty. It follows that French liberalism would significantly differ from Anglo-American liberalism. For that reason, the terminology French Republicanism should arguably be preferred over that of French liberalism in order to avoid confusion.[10]

Within the Anglo-American scheme of thought, ever since John Locke at least, society prevails over the state and more generally over public authority. Accordingly, individuals enjoy rights that shall be enforced against the state. According to Locke, that entailed in the first place the absolute protection of the right to property as a condition for individual liberty. More generally, the Anglo-American liberal tradition acknowledges the importance of individual rights, ranging from the free exercise of religious beliefs up to the right to non-discrimination. Within that tradition, far from being an instrument the aim of which is to fulfil the goals of the state, law shall protect individual emancipation from undue state interferences (and the latter should themselves be limited since state intervention is itself curtailed in the Lockean type of liberalism). Law – and in particular constitutional law – thus serves as a limitation on state action in the name of the individual, of subjective rights, of liberal (or negative[11]) constitutionalism within a pluralistic society.

[9] Larry Siedentop, 'Two Liberal Traditions', in Alan Ryan (ed.), *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, 1979).

[10] While this chapter adopts Siedentop's distinction, it is reckoned, first, that the two concepts of liberty are present in French and Anglo-American political cultures and, second, that there are potentially other concepts of liberty in those cultures, such as Skinner and Pettit's freedom as non-domination if it is admitted that the latter does not overlap with either positive or negative liberty (see Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 2012); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1999)). That said, on top of its pedagogical dimension, Siedentop's somewhat essentialising distinction presents the advantage to put to the fore the tradition dominant within idiosyncrasies defined along national lines.

[11] See Loughlin, 'The Constitutional Imagination', 8.

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The French Republican tradition is at odds with such an approach.[12] It primarily values political liberty. Where Anglo-American liberalism focuses on the individual as both a starting point and an end in itself, Republicanism focuses on the abstract citizen. Where Anglo-American liberalism is deprived of grand narratives, collective mobilising stories pushing for voluntaristic, political action flourish within the Republican ethos. According to the Republican approach, the state is to shape society since what primarily matters within that model is not individual liberty, but the political liberty of – and as – 'We the people'.

Under that voluntaristic tradition, the bottom line of the French political thought for centuries has indeed been the state (and more generally the public sphere), be it in economic, political, social or legal matters. From Louis the Fourteenth (*'l'Etat c'est moi'*) up to the present times, the state has played in France that mystical and mythical role as the sole source of legal authority entrusted with the noble mission of creating the French citizen. While the Anglo-American thought rests on a strict separation between public and private, that is between state and society, the French Republican tradition, under Rousseau's influence in particular, embraces a looser approach to that separation on the somewhat authoritarian premise that the state knows better what is good for society than society itself. The state does not therefore need in all circumstances the latter's consent to decide and implement policies.

In that respect, the concept at the heart of the Republican culture is that of the general will.[13] Far from being the sum of individual interests within a pluralistic society (in a Smithian way), the general interest is presented as a transcending interest (in a Rousseauian way) that ultimately – and conveniently – allows state rulers to mould society at will.[14] It logically follows that, within that pattern, individual rights cannot be the paramount consideration. They will often be superseded by general will, that is public interest.

It thus appears that the French and Anglo-American 'liberal' traditions are different in essence because they are themselves based on significantly different definitions of liberty. The French tradition is premised on collective liberty (positive, civic liberty) where the state is the main, if not only, vector for realising such liberty

[12] On French republicanism, see, e.g., Claude Nicolet, *L'idée républicaine en France. Essai d'histoire critique (1789–1924)* (Tel Gallimard, 1995); Jean-Fabien Spitz, 'On the Supposed Illiberalism of Republican Political Culture in France', in Stephen W. Sawyer and Ian Stewart (eds.), *In Search of the Liberal Moment: Democracy, Anti-totalitarianism and Intellectual Politics in France since 1950* (Palgrave, 2016), 111–129.

[13] See Patrick Riley, *The General Will before Rousseau: The Transformation of the Divine into the Civic* (Princeton University Press, 2016).

[14] On the prevailing Rousseauian philosophy in French legal thought, in particular with regard to Europe, see Justine Lacroix, *La pensée française à l'épreuve de l'Europe* (Grasset, 2008); Céline Spector, 'La "voie rousseauiste" et les impasses de la critique souverainiste de l'Union européenne', in Tristan Coignard and Céline Spector (ed.), *Europe philosophique, Europe politique: L'héritage des Lumières* (Classiques Garnier, 2022), 171–189.

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by achieving the common good. Such a view, with Rousseau as the main protagonist, has arguably been the dominant political thought over centuries in France. Dating back to the Enlightenment and the French (Jacobine) Revolution, it is however possible, with some minor stretching, to hold that that Republican thinking was already present in a specific form during the Ancien Régime. As famously shown by Tocqueville,[15] there are indeed key elements of continuity between the Republican thinking and the Ancien Régime. In particular, the state has always had a key role in the construction of France and the French people as a nation; and the general interest is ultimately the secular avatar of the Ancien Régime's common good.

19.3.2 *Traces of the Republican Imaginary within French Public Law*

Now, what are the expressions of that dominant political culture in the law? Several traces of the Republican tradition may be identified in French constitutional law.

First of all, in France there has always been an unbridled passion for constitutions. Since 1791, France has had no fewer than fifteen constitutions, when the United States has notoriously had only one. While the constitution that is currently in force in France bears the longevity record (67 years old), it has however itself been revised on numerous occasions. One could assume that such constitutional frenzy suggests the adherence of the French people to Montesquieu's separation of powers, to his plea in favour of the English constitution and to the now widespread vision of constitutionalism as an individual-rights-based limit on state action (that is liberal or negative constitutionalism). Such a view is ill-conceived. The fact that the French appear so eager about constitutional change rather suggests adherence to a very different approach to constitutionalism that appears somewhat forgotten in learned discussions on constitutionalism nowadays, namely positive or political constitutionalism: the will to achieve the best political regime through constitutional arrangements.[16]

Such trust for constitutions as tools to establish an ideal regime is a noteworthy trait of the Republican thought. What matters is not the protection of the individual but the type of collective, political liberty and the most suitable balance between the executive power and the legislative power. The key question within the Republican model is therefore not how to best safeguard individual liberty against public encroachments, but what is the suitable balance of powers to ensure political liberty.

[15] See Alexis de Tocqueville, *The Ancien Regime and the Revolution* (Cambridge University Press, 2011).

[16] For notable exceptions, see Loughlin, 'The Constitutional Imagination'; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); Nicholas W. Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018).

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In other words, the French seem to have been more generally concerned with maximising political liberty through political institutions rather than with constraining the latter in order to maximise individual freedoms. Accordingly, when it comes to constitutionalism, French political thinkers – Sieyès in the first place but also Mably – preferred the positive version thereof under which a constitution is the expression of the sovereign people's absolute *pouvoir constituant* (constitution-making power) as opposed to the negative version under which a constitution is primarily a means for individuals to be protected against the sovereign people.[17]

Second, the pervasiveness of Republicanism throughout French constitutions is shown by those grand narratives and principles that are usually mentioned in the preamble or the very first provisions of a constitution. Most French constitutions up to the present times have begun with the mention of France as 'one and indivisible'.[18] Such statements are certainly illustrative of the significance of the centralisation of power in Paris. They are also indicative of the indivisible character of sovereignty and of the general will in France: one people, one power, one state. It is what has precluded until now any evolution of France towards a federal form of the state or any recognition of another people within France but the French people.[19]

Third, in accordance with the conception under which the public interest (under the label 'general interest' or 'general will') is paramount in France, the French republican imaginary has not been primarily concerned with individual rights. The traditional precedence of the general interest over rights has taken different forms in French law, ranging from the lack, until relatively recent times, of an adequate judicial review mechanism designed to enforce individual rights against a parliament that could adopt any law in the name of the general will. Such priority granted to the general interest has also taken the form of a limited protection of certain individual rights on account of the sacrosanct general will. Within the Republican pattern, individuals are indeed still primarily seen as abstract citizens, not as individuals with their specific features. Individuals seem worth consideration only to the extent that they contribute to political liberty as active citizens.

It follows that, up to the present days, the right to non-discrimination for instance has been interpreted in a restrictive manner in France. Unlike in those jurisdictions where different situations must be treated differently, in France different situations may be treated in the same way if the general interest mandates it.[20] By the same token, the

[17] See, e.g., Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2008).

[18] See, for instance, the first sentence of Article 1 of the 1958 Constitution: 'France shall be an indivisible, secular, democratic and social Republic'.

[19] See decision n° 91-290 of the Conseil constitutionnel of 9 May 1991, that refused to admit the existence of the 'Corsica people'.

[20] See, for example, judgment of the French Conseil d'Etat of 29 March 1997, *Société Baxter*, case no 179049.

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Republican model also finds its expression in the curtailed freedom of religion.[21] As is well-known, France is characterised by a strong commitment towards the hardly translatable term of *laïcité* and French courts have been adamant regarding in particular the wearing of the Islamic veil in schools or other public services.[22] Although that exception has until now been upheld by the European Court of Human Rights (ECtHR) under the margin of appreciation doctrine, it arguably constitutes a significant, perhaps even disproportionate, restriction to freedom of religion.

Likewise, and in stark contrast with Locke's view, private property has hardly been central within the Republican thought. During the French Revolution, Robespierre unambiguously expressed his doubts regarding private property and explained that it was supposed to yield to the right to exist and live as human beings.[23] Still nowadays, there is in France a significant fringe of the population and of political parties or trade unions that believe in collective property, demonise private property and defend public property of network industries. In such contexts, there is therefore little wonder why a significant body of legal rules (known as 'droit administratif des biens') aims at protecting public property in France.

That said, it would be of course erroneous to think that fundamental rights were not protected at all in France until recent times. Their status has long been somewhat ambiguous, ever since the famous 1789 Declaration of the Rights of Man and of the Citizen.[24] Most interestingly, the first fundamental rights that have been effectively safeguarded and enforced in France are not individual rights, but collective, public freedoms ('*libertés publiques*'), that is those rights (such as freedom of the press, freedom of reunion, freedom of association) that foster that very political liberty central to the Republican ethos. The modus operandi whereby those freedoms have been protected is equally interesting: they were laid down *by Parliament*, not by courts, which is again illustrative of the fact that it has been considered in France the task of political institutions (as opposed to judicial organs) to realise political liberty by putting forward such freedoms.

As a fourth and last illustration of the pervasiveness of the Republican imaginary in French law, it appears necessary to insist on that specific branch of public law that has emerged in the wake of the French revolution and which is either envied or looked at with suspicion, if not horror, by those who embrace the Anglo-American, negative approach to liberty and thus rather logically look at judicial review of administrative action from a subjective rights perspective.[25] Despite the French

[21] See Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press, 2012).

[22] See, for instance, judgment of the French Conseil d'Etat of 2 November 1992, *Kherouaa*, case no 130394.

[23] See Spitz, 'On the Supposed Illiberalism of Republican Political Culture in France', 114–117.

[24] See Stéphane Rials, *La Déclaration des droits de l'homme et du citoyen* (Hachette, 1988).

[25] See, e.g., Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Oxford University Press, 2013); Bernard Schwartz, 'French and Anglo-American Conceptions of

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passion for constitutions and unlike in the United States or Great Britain, constitutional law is certainly not the most prestigious discipline within public law in France. The most noble branch is administrative law. The very existence in France of *ad hoc* administrative courts (for a long time the sole Conseil d'Etat) to adjudicate on disputes involving state organs and the gradual definition by that Conseil d'Etat of a corpus of special, derogatory rules favourable to the public interest is itself revealing. Together with the *summa divisio* within French academia between public law professors and private law professors, administrative law attests to the special status of public authorities that, at least in theory, are entrusted with the eminent task of implementing legislative choices made by Parliament in the name of Rousseau's general interest. In particular, in the wake of Léon Duguit, a famous administrative and constitutional lawyer from the early twentieth century, administrative law was meant to provide a framework for the state to deliver various public services with an explicit solidarity aim inspired by Emile Durkheim. The objective of ensuring social interdependence between individuals justified the derogatory character of those rules and the unilateral enforcement privilege enjoyed by executive organs of the state, with no need for the explicit consent of individual addressees of administrative measures.

19.3.3 *Are French Liberal Authors* Liberals?

Against that strong Republican background, France has often been criticised or mocked, for example by Hayek, for what appears to be an illiberal political culture when liberalism is defined in Anglo-American terms. The claim is that France could never convert to a liberal culture that would value the likes of private property, entrepreneurship and individual rights. That is perhaps true. However, it would be caricatural to claim that there have never been any liberal authors in France so that the individualist approach to liberalism would be entirely foreign to the French political thought.[26] Admittedly, purely liberal authors are scarce and little known or studied. Views like those of Frédéric Bastiat or Jacques Rueff, who believed first and foremost in individuals and entrepreneurship and wished to limit state interference within economics, politics and society, have always been marginal in France. Even someone like Raymond Aron,[27] despite all his intellectual prominence in the 1970s,

Administrative Law', 6 *University of Miami Law Review* 433 (1952); John Bell and François Lichère, *Contemporary French Administrative Law* (Cambridge University Press, 2022), 1–25.

[26] For a comprehensive approach on French liberals ever since the Enlightenment, see Raf Geenens and Helena Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge University Press, 2012). See especially the editors' introduction 'French Liberalism, an Overlooked Tradition?', 1–12.

[27] See, e.g., Aurelian Craiutu, 'Raymond Aron and the Tradition of Political Moderation in France', in Raf Geenens and Helena Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge University Press, 2012), 271–290.

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seems to have been forgotten, as if his own liberal legacy did not matter much in Republican France.

There are, however, several names who are usually associated with an individualistic, Anglo-American approach to liberty: Montesquieu in the eighteenth century and Benjamin Constant, Alexis de Tocqueville or Guizot in the nineteenth century. All those thinkers have, however, developed a complex, non-conventional liberal approach that combines what has been described above as the two liberal traditions. Those authors have indeed endorsed a refined political thought that does not conform to Anglo-American liberalism but rather reaches a unique mix between political liberty and individual rights. Starting with early French liberals, Montesquieu developed more a theory of moderation than a liberal theory and his '*doux commerce*' theory is not as favourable to free trade and globalisation as one may think.[28] He was also primarily concerned with the separation of powers, that is ensuring that no political institution would abuse its own power at the expense of another institution. Montesquieu appeared less interested in how power could negatively affect individual rights. It is also well-known that he did not have high trust in courts of law and only saw in judges the mere 'mouths of the law'.

By the same token, even among those authors that have advocated in favour of individual rights, be it Constant or Tocqueville, neither of them has embraced a one-sided conception of freedom.[29] Their works displayed an equal insistence on political liberty. In particular, in the famous *Discours de l'Athénée*,[30] Constant expressly distinguished between *liberty of the Ancients* (in essence, the Republican freedom) and *liberty of the Moderns* (in essence, Anglo-American, liberal liberty), but considered that both were important and should therefore be valued. For its part, a statesman such as Guizot in 1830, who is usually presented as a liberal, did not hesitate to implement state-based policies. Guizot, thus, equally proved Republican in his approach to the extent that his economic liberalism appeared somewhat authoritarian, top-down and definitely state-friendly as opposed to being purely market-based.[31]

As far as more recent liberal authors are concerned, their commitment towards liberalism appears equally dubious and by all means contingent. As is well-known, France offered a vibrant intellectual scene in the 1970s. That time was not only

[28] See Céline Spector, 'Was Montesquieu Liberal? The Spirit of the Law in the History of Liberalism', in Raf Geenens and Helena Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge University Press, 2012), 57–72.

[29] Andrew Jainchill, 'The Importance of Republican Liberty in French Liberalism', in Raf Geenens and Helena Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge University Press, 2012), 73–89.

[30] Benjamin Constant, 'De la liberté des anciens comparée à celle des modernes' in *Ecrits politiques*, 2nd ed. (Gallimard, 1997), 618.

[31] See Lucien Jaume, 'The Unity, Diversity and Paradoxes of French Liberalism', in Raf Geenens and Helena Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge University Press, 2012), 36–54.

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characterised by libertarian aspirations but also by the discovery of the crimes committed in the name of communism, especially in the wake of the publication of Solzhenitsyn's writings. Several authors who used to be at least sympathetic towards communism changed under what was usually called 'the liberal turn' of the 1970s,[32] when Constant and Tocqueville, in particular, who had fallen into oblivion, were rediscovered.[33] That is the case of François Furet but also of Claude Lefort or Marcel Gauchet, who started embracing the cause of individual rights protection.[34] However, before being liberal in the negative sense of liberty, the 'liberal turn' was actually anti-totalitarian or at least anti-fascist in the first place. Although philosophers such as Lefort and Gauchet started to embrace liberalism, it would be wrong to see in the evaluation of their political thought a conversion to Anglo-American liberalism, especially on the part of Lefort who actually had limited interest in subjective rights. Instead of coming up with a theory on the limitation of power (negative constitutionalism), Lefort came up with a theory of political regimes and democracy, illustrating yet again that French interest in the ideal type of political regime (positive constitutionalism). He developed on that occasion a theory of *political* rights which assumed the 'situatedness' of human beings as a legacy, in Lefort's case, of both Rousseau's Republicanism and Marxism. By the same token, Pierre Manent or Marcel Gauchet embraced Tocqueville and Aron while remaining deeply indebted to the Republican thought, as illustrated both by their strong critique of the 'human rights ideology' and by their attachment to the figure of the nation-state, outside of which they consider that democracy cannot be achieved.

Thus, it is highly debatable whether, *intellectually*, France went through a liberal turn in the 1970s. It seems almost impossible for French thinkers to embrace with resolve Anglo-American, negative liberalism precisely because of that entrenched Republican imaginary, especially when that latter was combined with a Marxist ideology. It is worth recalling that, back in the 1970s, it was considered more appropriate 'to be wrong with Sartre [the Marxist] than right with Aron [the liberal]'. French intellectual elites' affinity with Marxism was considered the ultimate

[32] On that liberal turn in French political thought, see especially Stephen W. Sawyer and Iain Stewart, 'Introduction: New Perspectives on France's "Liberal moment"', in Stephen W. Sawyer and Ian Stewart (eds.), *In Search of the Liberal Moment: Democracy, Anti-totalitarianism and Intellectual Politics in France since 1950* (Palgrave, 2016).

[33] For a collection of the main articles dedicated to Tocqueville written by various authors in the 1970s or 1980s, see Laurence Guellec (ed.), *Tocqueville et l'esprit de la démocratie* (Presses de Sciences Po, 2005).

[34] See, e.g., Samuel Moyn, 'The Politics of Individual Rights: Marcel Gauchet and Claude Lefort', in Raf Geenens and Helena Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge University Press, 2012), 291–310; Noah Rosenblum, 'Rethinking the French Liberal Moment: Some Thoughts on the Heterogeneous Origins of Lefort and Gauchet's Social Philosophy' in Stephen W. Sawyer and Ian Stewart (eds.), *In Search of the Liberal Moment: Democracy, Anti-totalitarianism and Intellectual Politics in France since 1950* (Palgrave, 2016), 61–83.

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offspring of a type of Republicanism stretched to its outer limits. Today, the situation does not seem to have drastically changed. Robespierre and Sartre are still 'alive' while Raymond Aron is off radar. By the same token, the entrenched Republican imaginary in France seems to make it almost impossible to think of Europe in a 'non-French', that is in a 'non-Republican' way. As a consequence, not only is it hard to grasp an idea such as federalism, the latter being arguably not a part of the French hardware, but there is also a tendency to conceptualise the European Union as a bigger, centralised France, thus on the basis of French political concepts such as sovereignty,[35] the Republic[36] or the state. As regards the latter, it is striking, as Lacroix pointed out, that the issue of the nature of European integration is still discussed nowadays in French scholarship in institutional terms (is the EU a (federal) state or a mere international organisation?), as if it was simply impossible for a French mind to think of European integration outside an *institutional* framework.[37]

19.4 THE LIBERAL TURN IN FRENCH CONSTITUTIONAL LAW

French intellectual history thus appears out of tune with the specific developments that France has gone through since the 1970s. While the 'liberal turn' of the 1970s *within political thought* is ambiguous in its meaning and motivations, it remains that the French Republican imaginary has been specifically shaken up from the 1970s by major political and legal transformations largely induced by (Anglo-American) liberal tremors under the influence of external factors such as globalisation, the belonging to the EU and the ECHR system, the rise of rule of law considerations together with judicial protection of individual rights and the correlative distrust towards a transcendental approach to the general interest and what can be done in its name. Although those factors have not provoked a shift in the political thought (yet have triggered resistance and discussion among political philosophers), they have pushed or at least supported significant changes in the theory and practice of French law, especially public law.[38] That liberal turn in the law has materialised in at least two ways: first, those various factors have put to the test several key concepts that have been at the crossroads between French constitutional law and Republican political thought; second, they have fostered the Anglo-American, negative version of liberalism, economically through neoliberalism and politically through liberal constitutionalism.

[35] See Emmanuel Macron's speech on Europe in September 2017 at the Sorbonne.

[36] See, e.g., Philippe Crignon, 'De l'Europe républicaine à la République européenne', in Tristan Coignard and Céline Spector (ed.), *Europe philosophique, Europe politique* (Classiques Garnier, 2022).

[37] See Lacroix, *La pensée française à l'épreuve de l'Europe*, 14.

[38] See, on the impact of that transformation on scholarship, Wanda Mastor and Jean-Gabriel Sorbara (eds.), *La doctrine publiciste et le tournant des années 1970* (La Mémoire du Droit, 2024).

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First, the demise (or at least transformation) of the traditional concepts of constitutional law can be witnessed. As explained by French professor of constitutional law Baranger, 'the key concepts of constitutional law are leaving the stage. That withdrawal takes the form of a gradual loss of meaning. The words are still used but one does no longer know what they mean'.[39] For instance, while the figure of the (abstract) citizen was central in the Republican ethos and notably found its specific legal expression in the case-law on equality, the concept of citizenship is often used nowadays as a mere vague adjective. Where it is used as a noun, like in EU law, it refers to citizens who enjoy substantive rights within a conception of freedom as individual emancipation, not as civic participation in the general interest of society. A similar transformation has affected the concept of constitution. That concept is increasingly replaced by that of constitutionalism understood as liberal or negative constitutionalism. Nowadays, constitutions are increasingly seen, including in France, as an instrument to limit public power, not mainly an instrument to devise the best and most suitable political regime. That explains the more and more frequent paradox whereby a constitution can be deemed unconstitutional.

By the same token, the concept of sovereignty, which has been salient in France since the emergence of the modern state, no longer appears intelligible or useful to understand state power while it used to be a defining element of the latter. The traditional meaning of sovereignty is at odds with liberal constitutionalism. Even when bestowed upon the people and not the king, it still refers to the idea of an absolute, unitary and indivisible power that is intrinsically incompatible with the idea of limitation of power underpinning liberal constitutionalism. Moreover, its meaning has become diluted because of the variety of its uses. Sometimes, (state) sovereignty is said to be pooled or shared (but is it still 'sovereignty' once the classic concept has been stripped of its constitutive element?). Sometimes, sovereignty is just discarded for its being no longer a fully operative concept to describe those nation states that have now become member states. It is then replaced by another discourse, that of 'constitutional identity', which appears to be a pale substitute of a bygone sovereignty. Sometimes again, if no longer used in relation to the states, the word sovereignty is simply used in relation to the European Union to suggest some kind of strategic autonomy vis-à-vis other regions of the world.

Second, the major transformation of constitutional law that has been prompted by the liberal turn from the 1970s onwards is the result of the constant rise of fundamental rights protection and rule of law considerations. In France, there used to be no review of legislation with regard to individual rights. Three reasons may explain that legal vacuum: the primary role initially assigned to the French constitutional court by the Constitution of 1958 currently in force was to enforce the separation of powers, not fundamental rights; the Constitution did not enumerate fundamental rights nor contained a bill of rights; parliamentary sovereignty (the so-called

[39] Baranger, 'Le piège du droit constitutionnel', 19.

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légicentrisme, that is the intangible character of acts adopted by parliament) together with distrust towards courts have been material to the Republican tradition and have long precluded judicial review of legislation. It is in 1971 that liberal constitutionalism started to pervade French constitutional law in a seminal judgment of the Conseil constitutionnel (the French *Marbury v Madison* so to speak) whereby the constitutional court has for the first time struck down a parliamentary bill for a breach of a fundamental right (or rather 'public liberty' in French parlance), namely freedom of association. Despite that major change, the Conseil constitutionnel was still not entitled to review parliamentary acts after their enactment. Once in force, parliamentary acts could not be challenged on constitutionality grounds. It is only four decades later, from 2010, that France revised its constitution and provided for a constitutional adjudication procedure allowing the Conseil constitutionnel to carry out *ex post* review of acts of parliament (the now famous 'QPC', standing for *question prioritaire de constitutionnalité*).[40]

However, the rise of liberal constitutionalism in the 1970s and 1980s is primarily the result of external factors, namely EU integration and the ECHR. French ordinary courts have indeed gradually accepted to enforce international and above all European treaties and acts adopted on the basis of the latter against French acts of parliament.[41] Such Copernican revolution prompted from outside France significantly undermined the French Republican imaginary in at least two ways: first, that transformation empowered non-democratically-elected courts to the expense of democratically-elected institutions, Parliament in the first place; second, such transformation did not only entail that nation-states were not the only source of law and power but that legal norms created outside the state could prevail over state law. Accordingly, ever since the 1970s, the Republican imaginary has been constantly undermined through a phenomenon of legal acculturation to liberal constitutionalism.

19.5 EPIPHANIES OF THE REPUBLICAN TRADITION IN REACTION TO ANGLO-AMERICAN LIBERALISM

Should it be needed to further demonstrate the fact that the French imaginary is being insidiously shaken up by the rise of Anglo-American liberalism, it suffices to look at those political acts of resistance or contestation that highlight the tensions within French society itself, between the entrenched Republican tradition and the pervasiveness of Anglo-American liberalism. As previously explained, epiphanies are those moments full of dramatic intensity where various competing strands of

[40] See François-Xavier Millet, 'From messianic republicanism to global constitutionalism: the paradigmatic changes of French public law through European law', forthcoming in *European Law Open*, 2025.

[41] See Daniel Halberstam, 'How Europe Brought Judicial Review to France: A Response to Bruce Ackerman', in Richard Albert (ed.), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Hart Publishing, 2020), 239–264.

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thought, *in casu* the Republican tradition and the liberal thought, frontally clash, thereby confirming the core Republican content of the French constitutional imaginary. Three epiphanies are well illustrative of the tectonic tension between the French and Anglo-American traditions diffused by European integration and globalisation: the referendum on the Maastricht Treaty in 1992, the referendum on the European Constitution in 2005 and the Yellow Vests movement. First, the referendum on the ratification of the Maastricht Treaty in 1992, which was narrowly won by the 'Yes' side, shed light on a split within French society between what French philosopher Régis Debray called the 'nationaux-républicains' and the 'libéraux-libertaires'.[42] That terminology is revealing in itself since it opposes, on the one hand, the Republican thought, which is attached to the nation-states and to the concepts of Republicanism and, on the other hand, the liberal thought that focuses on individual freedoms. Second, the referendum on the ratification of the European Constitution in 2005 opposed the two same groups. However, another divide along economic lines also appeared within French society between those in favour of a 'social Europe' and those in favour of a 'neoliberal Europe'. Although that second divide did not correspond to the earlier one but cut across it, it suggests that there is also another type of opposition prompted by EU integration, this time between neo-liberals and those that adhere to the solidarity component of the Republican ideal. Finally, although the Yellow Vests movement in 2018/2019 was not directly born from a public discussion on Europe, it largely overlapped with the pro-Maastricht and the anti-Maastricht divide, between those that make gains out of globalisation and those do not.

Interestingly, those moments have always concerned debates closely or remotely relating to Europe. That is not surprising inasmuch as the latter tests the very Republican concepts and political thought.[43] EU integration as a regional embodiment and experiment of globalisation has carried with it values different from those characteristic of the Republican thought. Not only does the EU's existence suggest that there can be legitimate law – and even constitutionalism – beyond nation-states, the EU itself was founded on neoliberal premises that praise the market and competition and limit state interferences in the economy. The EU has gradually also embarked on the liberal constitutionalism ship to such an extent that the Court of Justice has recently taken the view that the protection of individual rights and the rule of law are part and parcel of no less than the EU's own constitutional identity.[44] In all three events, the lurking Republican tradition thus abruptly erupted to the surface in the context of liberal perceived threats for its integrity. Although it is hard to know whether all three epiphanies show a persistently strong, albeit rather

[42] Régis Debray, *Le Code et le Glaive: Après l'Europe, la Nation?* (Albin Michel, 2016).

[43] See Lacroix, *La pensée française à l'épreuve de l'Europe*; Céline Spector, *No Demos? Souveraineté et démocratie à l'épreuve de l'Europe* (Seuil, 2021).

[44] CJEU, Case C-156/21, Judgment of 16 February 2021, *Hungary v European Parliament and Council*, ECLI:EU:C:2022:97, para. 232.

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unconscious, adherence of the French people to the Republican thought as a whole or merely to certain of its dimensions (such as solidarity), they all highlight a rejection of Anglo-American liberalism by a significant portion of the population.

19.6 CONCLUSION

In order to unearth the content of the French constitutional imaginary, I have started with providing a method to that effect. I have proposed to examine the grand narratives and key concepts as they notably derive from French intellectual history and constitutional law. I have also suggested to look at epiphanies, that is salient political events in times of crisis, for a confirmation of the content of constitutional imaginaries, where tectonic tensions between opposing ideologies come to the fore within public discussion. Relying on that method, this chapter showed how republicanism differs from liberalism, primarily on account of the importance assigned to political liberty and to constitutions as instruments that allow to realise that type of liberty through the search of the ideal political regime. Rousseau's Republican thought permeates French constitutional law. It is what explains the latter's key concepts, the adherence to the political approach to constitutions and the French passion for constitutions to fulfil political liberty. Political liberty, the underlying vision of society and the role of political institutions in shaping society have indeed been the red thread that has been running through French political thought and legal practice for decades. The Republican imaginary appears so strong that a great deal of French authors who are usually portrayed as liberals, Montesquieu included, have in fact endorsed a conception of liberalism that differs from Anglo-American authors by combining political liberty and civil liberties.

The rise of Anglo-American liberalism in the Western world from the 1970s onwards has, however, created fertile ground for a destabilisation of the French Republican tradition. The latter is being shaken up by the vehicles of negative liberty, such as the European Union and the system established by the European Convention on Human Rights, which have promoted individualism and strengthened fundamental rights and rule of law considerations to the detriment of the general will. Those vehicles have triggered major, insidious changes in the law through the demise or semantic transformation of the grand Republican narratives and concepts and the emergence of new modus operandi and procedures.

Although legal practices have significantly changed over the past fifty years, French political philosophers and, *a fortiori*, the people themselves seem to remain attached to the Republican imaginary. The rise of Anglo-American liberalism in Europe has not translated yet into a new corpus of political thought (nor into a significantly 'new people') that would clearly privilege civil liberties. Intellectuals appear so much imbued with general-interest-based Republican thinking that it appears virtually impossible to fully embrace in France a different approach to liberty, as if intellectuals were captive of their own context, as if the Republican

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values were so deeply rooted in the collective psyche in France that it is impossible to significantly depart from it and embrace a new intellectual path. It is striking, from intellectuals who should precisely be totally insulated from their own autobiography so to speak, be it individual or collective, that few French philosophers have theorised liberalism until its ultimate boundaries without bouncing back to some Republican ideals. It is equally striking that 'non-Republicans', politically speaking (that is monarchists or Bonapartists), also embraced the view of an overriding general interest, which is so central in the Republican thought.[45] Of course, different contents are then assigned to the general interest by those 'non-Republicans'. Yet, what seems to unite them is the concept and function of an overhanging general will that justifies limits to individual action and empowers the state in shaping society: the 'Res Publica'.

Accordingly, there seems to be no proper escape from the Republican tradition in one form or another and that it is perhaps simply impossible to be 'properly' liberal in France. At best, the Republican tradition could adopt a slightly new shape under the sway of liberalism. This is probably what is already happening now.

[45] Spitz has shown that bonapartism is not far away from the Republican culture, nor from the Ancient Régime (Spitz, 'On the Supposed Illiberalism of Republican Political Culture in France', 113).

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