The indivisibility of the French republic as political theory and constitutional doctrine

Eoin Daly*

Indivisibility of the French republic – sovereignty and French republicanism – universalism in French political thought – spatial and social dimensions of the indivisibility doctrine – indivisibility and identity-based classifications – Dilution of the indivisibility doctrine – a crisis of French universalism

'Does great genius not lie in distinguishing those cases where uniformity is required from those where there is need for difference … If the people follow the laws, what matter if the laws are the same?'

– Montesquieu, *Spirit of the Laws* (1748)[1]

'La France est un tout qui se suffit à lui-même.'

– Abbé Grégoire, October 22, 1792[2]

Introduction

Article 1 of the French Constitution of 1958 declares France to be 'an indivisible, secular, democratic and social republic'. The indivisibility principle can be considered a central tenet of France's republican identity, and indeed it enjoys something of a mythological status in French constitutional history as an integral

*Lecturer, School of Law, National University of Ireland, Galway.

[1] C. Monstequieu, *Spirit of the Laws* (University of California Press 1977/1748) Book 29, Chapter 18.

[2] 'France is a whole that is sufficient unto itself'. This is taken from Abbé Grégoire's speech to the Convention in 1792, '*Rapport sur la réunion de la Savoie à la France*' cited in E. Vallet, 'L'Autonomie Corse Face à l'Indivisibilité de la République', 22 *French Politics, Culture and Society* (2004) p. 51 at p. 58. All French-English translations are the author's unless otherwise stated.

European Constitutional Law Review, 11: 458–481, 2015

doi:10.1017/S1574019615000267

part of the ideological inheritance of the revolution.[3] At first glance, there is nothing remarkable in a constitutional affirmation of political unity or territorial integrity – similar principles are found in other European constitutions.[4] However, the distinctiveness of the French principle lies in the fact that 'indivisibility' embraces a social as well as territorial or political dimension: it is the social corpus of the citizenry, as well as the national territory, that is designated as 'indivisible'. Accordingly, republican indivisibility precludes certain identity-based distinctions and classifications that have no relation either to territorial organisation or political structure as such. This article aims to show how the principle of republican indivisibility is, in the French context, not simply the corollary of a generic notion of early-modern sovereignty. Instead, it is deeply and conceptually interconnected with a peculiar, republican understanding of citizenship and political freedom. In particular, I will argue that it can be understood as a corollary of a much broader and distinctive French-republican philosophy – broadly termed 'universalism' – which is defined primarily by an abstract understanding of citizenship and political identity, and correspondingly, a rejection of all distinctions or classifications based on infra-state or non-political identities.

In recent decades, this republican universalism has experienced a period of crisis as its central tenets have progressively been qualified or abandoned. In tandem with this, the unitary nature of the state, along with the traditional conception of national sovereignty, has been weakened to the point where the indivisibility doctrine may appear somewhat anachronistic or even redundant. Its specificity now resides only in its social and symbolic dimension – in its affirmation of the indivisibility of the social corpus, or indeed, the people as the abstract constituent power – rather than the territory as such. But far from relegating it to purely symbolic value, it is precisely this shift – from the territorial to the social dimension of indivisibility – which illuminates the ideological distinctiveness of the principle in the French-republican context.

In the first section, I will describe how while the French principle originated partly in an early-modern understanding of sovereignty that emphasised the authority of the central state, the contemporary doctrine conceives of indivisibility in social, rather than spatial or territorial terms, affirming the singularity of the abstract 'people' rather than of the territory, the administration or the legislative power. In the second section, I will discuss how, considered in this light, the indivisibility doctrine reflects a peculiar ideology of republican universalism,

[3] *See* generally F. Lemaire, *Le principe d'indivisibilité de la République; mythe et réalité* (Presses Universitaires de Rennes 2010); R. Debbasch and A. Roux, 'L'indivisibilité de la République', in B. Mathieu et M. Verpeaux (eds.) *La république en droit français* (Economica 1996).

[4] Lemaire notes that equivalent principles are found, for example, in the Spanish, Italian, Portuguese, Turkish and Norwegian constitutions: Lemaire, *supra* n. 3, p. 11.

defined primarily by its rejection of identitarian classifications and distinctions. Finally, in the third section I will argue that the incremental dilution of the principle can be linked to a wider crisis of French universalism.

Sovereignty, the people and the Republic: from spatial to social indivisibility

While inscribed in Article 1 of the current Constitution as one of the defining features of the Republic, the principle of indivisibility has somewhat ambiguous political and intellectual origins.

Although it featured prominently in the political rhetoric and the constitutional experimentation of post-revolutionary France – and while today it is considered a quintessentially 'republican' ideal – in fact the indivisibility principle predates the revolution of 1789 and the first republic of 1792. While the post-revolutionary constitution of 1791 declared the kingdom 'one and indivisible',[5] the idea was well established in the political doctrines of the *ancien régime*; in fact it had been affirmed in pre-revolutionary France as a fundamental characteristic of the monarchical, early-modern state.[6] And while the rhetoric of indivisibility played an important role in the tumultuous revolutionary decade of the 1790s, this was arguably borne as much out of political expediency – and particularly, the fear of centrifugal and counterrevolutionary tendencies in the provinces – as it was a necessary feature of a 'republican' polity. [7] Debbasch, for example, claims the Republic borrowed the doctrine directly from the *ancien régime* monarchy as a legitimation strategy.[8] Thus, the republican character often ascribed to the indivisibility doctrine overlooks this historical continuity between republican and non-republican regimes.

While there is no obvious historical connection between republicanism and the indivisibility doctrine, neither is there necessarily a conceptual link. The principle of indivisibility, with its implications of centralism and vertical state authority, is absent in many historical strands of republican thought, for example, the federalist conception that prevailed in the early American republic, and the Roman model of mutually constraining authorities that has so heavily influenced contemporary neo-republican philosophy.[9] If the indivisibility principle has any distinctive

[5] Constitution of 1791, Title II.

[6] *See* generally Lemaire *supra* n. 3. *See also* generally J. Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 1995).

[7] *Ibid.*

[8] *See* R. Debbasch, *Le principle révolutionnaire d'unité de d'invisibilité de la République* (Economica 1998).

[9] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press 1997); Q. Skinner, *Liberty before Liberalism* (Cambridge University Press 1998).

intellectual origin, it seems to lie in the early-modern *concept* of sovereignty that was elaborated in tandem with the rise of the modern nation-state from the 17th century onwards. In fact, the indivisibility principle has clear origins in anti-republican and even absolutist thinkers such as Hobbes and Bodin, who both insisted that sovereign power was, by its nature, singular and indivisible.[10] Indeed while Rousseau, as the main intellectual influence on the republican revolutionaries, located sovereignty in the collective 'people' rather than the monarch, he more or less endorsed and maintained the early-modern, Hobbesian understanding of sovereign power as being singular and indivisible by its nature.[11] The sovereign's indivisibility, in this sense, is simply a conceptual necessity. Rousseau's sovereign, Philip Pettit notes, is 'single and absolute', just like Hobbes' version; it is conceptually similar, in many respects, despite being located in a different entity.[12] Furthermore, Pettit argues that for Rousseau as well as Hobbes, the singular and indivisible nature of the sovereign translated to a vertical and unchecked form of government, notwithstanding Rousseau's insistence on popular authorship of laws.[13]

In these early accounts, both republican and absolutist, it is the *sovereign*, in the sense of the ultimate political authority, that is designated as 'indivisible' – this being in part, at least, a necessary conceptual feature of sovereignty. In principle, the indivisibility of the sovereign might be consistent with various different models of government, divided and internally checked, and of territorial organisation. However, in practical politics, the doctrine of indivisibility is usually bound up with a centralised understanding of political authority and of territorial organisation (indeed, in Article 1 of the French Constitution, it is the 'republic' as a set of institutions, rather than the sovereign, that is declared indivisible). In turn, there is nothing distinctively republican, or indeed un-republican, about a state conceived in this way.

To some extent, this understanding of indivisibility is reflected in the French constitutional doctrine. While it became judicially enforceable only with the establishment of the *Conseil Constitutionnel* in 1958, the scope of the indivisibility principle is evident in traditions and doctrines of territorial organisation as much as in constitutional jurisprudence. And indeed, the indivisibility principle translates most obviously as a doctrine of territorial organisation. In some narrow historical interpretations it was understood simply as a principle of *territorial integrity* – and thus only as precluding a right of secession by sub-state

[10] T. Hobbes, *Leviathan: Or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill*, ed. by I. Shapiro (Yale University Press 2010); J. Bodin, *On Sovereignty: Four Chapters From Six Books of the Commonwealth* (Cambridge University Press 1992).

[11] P. Pettit, *On the People's Terms: a Republican Theory and Model of Democracy* (Cambridge University Press 2013).

[12] Pettit, *supra* n. 11, p. 12.

[13] Pettit, *supra* n. 11, p, 14.

territorial units, rather than as requiring any particular form of constitutional or administrative structure.[14] While the principle is usually considered applicable to administrative and institutional structure as well as territorial integrity in its narrow sense, this highlights its apparently obvious connection with a familiar doctrine of sovereignty. And even where understood more broadly as a doctrine of political and administrative centralism, it still has obvious resonances with the concept of sovereignty understood in a broader sense, in resisting centrifugal infra-state claims. Indeed, since the revolution indivisibility has usually been defined in opposition to federalism, as meaning there can be 'no states within the State'.[15]

What all the above seems to suggest, then, is that there was (and is) nothing intrinsically 'republican' about the principle – that in effect, it was simply a corollary of an early-modern concept of sovereign power that survived the transition from absolutist to republican government. It seems to suggest that the republican associations of the doctrine are historically accidental, and conceptually weak, at best.

However, while the republican associations of the principle might seem largely a product of historical accident, this interpretation is sustainable only if it is reduced to its territorial dimension. In the French context, however, the principle has assumed a much more specific content, going far beyond matters of territorial and political organisation: indeed, the administrative centralism with which indivisibility is associated has been incrementally but decisively weakened.

Traditionally – and especially during the turbulent revolutionary decade of the 1790s – the principle was often interpreted as requiring uniformity and symmetry in institutional and administrative arrangements across the national territory, with administrative power being exercised by the central unitary state rather than infra-state territorial entities, and by the central state's representatives rather than local bodies. However, recent decades have witnessed decentralisation,[16] and even some forms of regional autonomy, within a unitary state, resulting in a new division of competences between the central state and the *collectivités territoriales* (sub-state administrative units)[17] and a constitutional principle of subsidiarity in territorial organisation.[18]

[14] Lemaire, *supra* n. 3, p. 16.

[15] Lemaire, *supra* n. 3, p 94. *See also* F. Luchaire, 'Les fondements constitutionnels de la décentralisation', 98 *Revue de Droit Public* (1982) p. 1543.

[16] *See* Loi no. 82-213 of 2 March 1982. Article 59.6 states: 'l'émergence du niveau régional en métropole et outre-mer ne porte atteinte ni à l'unité de la République, ni à l'intégrité du territoire' ('the emergence of a regional level in the metropole and overseas undermines neither the unity of the Republic nor the integrity of the territory').

[17] In particular, executive power was transferred from the prefect to head of the *Conseil Général* (the *collectivité*'s elected assembly). *See* Luchaire, *supra* n. 15.

[18] Article 72 provides that *collectivités territoriales* will make decisions using powers that are 'best exercised at their level'.

Thus the strict centralism of the post-revolutionary period has dramatically diminished despite France still rejecting the federalist and regionalist models that characterise other large European states. Even the minimal core of the indivisibility principle, the prohibition on territorial secession, was weakened somewhat in the post-war period as a corollary of decolonisation, with the 1958 Constitution recognising a right of self-determination for the Republic's overseas territories[19] – a right which the *Conseil Constitutionnel* has said extends to overseas 'populations', and not just formalised overseas territories (*territoires d'outre-mer*, now *collectivités d'outre-mer*).[20]

If its doctrinaire territorial centralism has dissipated, what significance remains, then, in the indivisibility principle? Ostensibly at least, it can be interpreted as a doctrine concerning the nature of legislative power rather than of the administration or of territorial organisation – and thus, in other words, as requiring *political* if not *administrative* centralism. In its post-revolutionary incarnation at least, the indivisibility doctrine embraced principles of *legislative unity* and *legislative uniformity*, requiring both that legislative power be exercised by a unique and exclusive source – the national parliament – and that in its content it applies identically across all of the national territory.

In this guise, the indivisibility doctrine seems less concerned with the territorial manifestations of sovereignty and begins to appear as the product of a more specific political theory, one associated with the particularities of French-republican thought. Obviously, the idea of legislative uniformity – the belief that the law should be the same for everybody, irrespective of geographical as well as social criteria – featured predominantly in French revolutionary doctrine, with its abolition of privileges.[21] Of course, legislative uniformity in this sense was never realised in any period of French constitutional history, republican or otherwise. In the colonial period, overseas territories were governed under diverse legislative and administrative schemes, such as the *Code de l'indigénat* which applied to Muslim

[19] Under the Fifth Republic, the *Conseil Constitutionnel* recognised that the indivisibility principle did not preclude secession by colonial territories exercising their right of self-determination. *See Conseil Constitutionnel* no. 75-59DC, 30 December 1975, *Loi relative aux conséquences de l'autodétermination des îles des Comores*.

[20] *Conseil Constitutionnel*, no. 2000-428, 4 May 2000. While this right was initially given expression as a right to secession in the postcolonial context, it is now interpreted as encompassing a right for overseas populations within the Republic to change their territorial status. *See* generally A.M. Le Pourhiet, 'Départements d'outre-mer : l'assimilation en questions', 12 *Cahiers du Conseil Constitutionnel* (2002) p. 1.

[21] Indeed, former Prime Minister Jean-Pierre Raffarin suggested that the foundational premise of French territorial organisation was 'the need for consistency so that every citizen, whatever his territory, gets the same rights': National Assembly debates, 3 July 2002, cited in V. Hoffman-Martinot, 'The French Republic: One Yet Indivisible?', in N. Kersting and A. Vetter (eds.), *Reforming Local Government in Europe* (Springer 2003) p. 157 at p. 159.

subjects in Algeria even after its assimilation within metropolitan France.[22] And in the post-colonial period, legislative pluralism was conceded, to some degree, on pragmatist grounds. The 1946 Constitution permitted the parliament to make legislative variations or adaptations for those ex-colonies, such as Guadeloupe and Martinique, that were integrated as overseas *départements* (*départements d'outre-mer*).[23] In addition to this possibility of legislative adaptation, maintained in the 1958 Constitution,[24] a 2003 amendment allowed a power of legislative adaptation for the *départements d'outre-mer* themselves, subject to parliamentary oversight, while all territorial collectivities – including, crucially, the metropolitan *départements* and regions – were given a power to derogate from national legislation falling within their sphere of competence, on a temporary and 'experimental' basis.[25] Going further again, overseas territories not incorporated as *départements* – the *collectivités d'outre-mer* (formerly *territoires d'outre-mer*) – are not subject to parliamentary legislation unless specifically stated otherwise, with the Constitution explicitly providing for their 'particular organisation'.[26] Thus they enjoy particular, varying degrees of autonomy as provided for in specific parliamentary statutes.[27] The instance of legislative pluralism that most dramatically contradicts republican orthodoxy is probably the provision in Article 75 of the Constitution allowing differentiated systems of 'personal law' in certain territories such as Mayotte,[28] whose residents were permitted to refer litigation to tribunals operating according to customary and Islamic law (although the *justice cadiale* has been phased out as Mayotte becomes a *département*).[29]

[22] *See* J.P. Pastorel, 'Le principe d'égalité en outre-mer', 35 *Nouveaux Cahiers du Conseil constitutionnel* (2012) p. 1; E. Saada,, 'Citoyens et sujets de l'Empire français: Les usages du droit en situation coloniale', 53 *Genèses* (2003) p. 4

[23] The *département* is the basic and oldest administrative unit of the French republic, both in the *métropole* and overseas.

[24] Under the revised 1958 Constitution, legislation can be differentiated in its application to the *départements d'outre-mer*, subject to the principle of equality before the law, and albeit only to the extent that is justified by the legislative objective in question in light of situational differences between the *métropole* and the department in question. Pastorel, *supra* n. 22, p. 6. *See also Conseil Constitutionnel,* no. 2003-478 DC, 30 July 2003, *Loi organique relative à l'expérimentation par les collectivités territoriales*.

[25] Articles 72 and 73, Constitution of 1958; *see also* loi organique 21 juillet 2003.

[26] Articles 74 and 74-1, Constitution of 1958.

[27] Lemaire, *supra* n. 3, p. 148.

[28] *See* J.R. Binet, 'Le croissant et la balance: De quelques spécificités du droit applicable à Mayotte au crépuscule de la justice cadiale', 43 *Revue internationale de droit compare* (2002) p. 787.

[29] Lemaire, *supra* n. 3, p. 164-5. *See also* generally A. Abdallah, *Le Statut Juridique de Mayotte* (Harmattan 2014); and Pastorel, *supra* n. 22. *See also Conseil Constitutionnel,* no. 2003-474, 17 July 2003. *See also* French Senate report, 'Départementalisation de Mayotte: sortir de l'ambiguïté, faire face aux responsabilités', report no. 115. (Paris: Senate 2008). *See* < www.senat.fr/rap/r08-115/r08-1151.pdf> visited 18 October 2015.

Moreover, legislative pluralism is not merely an accident of postcolonial history, as compromises have also been made to legislative uniformity within the metropolitan territory. For example, a form of local legislation (*droit local*) still applies in the eastern metropolitan *départements* of Alsace and Moselle as a legacy of German rule between 1870 and 1918. Most notably, the law of separation of churches and state of 1905 – a cornerstone of French-republican identity – does not apply, and clergy are still publicly remunerated.[30] More recently, Corsica – previously treated no differently from the contiguous metropolitan territory – was recognised in 1982 as a sui generis *collectivité territoriale*, as part of a wider accord recognising the unique status of the island.[31] It acquired a regional assembly with specific powers, thus introducing a significant asymmetry in the territorial organisation of the metropolitan territory,[32] as well as a devolved power to enact secondary legislation (*pouvoir réglementaire*).[33]

It might be argued that while legislation has been differentiated on a territorial basis, for pragmatic and prudential reasons, the fundamental core of the principle is not the *uniformity* of legislation in its content, but rather the *singularity of legislative power*. Thus territorial variations in legislation do not compromise the overarching singular authority of the national legislature, precisely because such legislative differentiation depends on its authority Indeed, the power of adaptation enjoyed by infra-state authorities depends on parliamentary authorisation, while the autonomous status of various overseas territorial entities largely depends on parliamentary statute (*loi*). And even though territorial assemblies may now enjoy the power to intervene in the domain of the national legislature, this power is effectively an executive or administrative function (*pouvoir réglementaire*), and so these acts may be struck down by the administrative courts.[34] Thus the legislative power remains singular, and indeed, *indivisible* notwithstanding limited phenomena of legislative pluralism or legislative differentiation; there is no constitutional division of legislative competences as between the central state and the *collectivités* in the model of a quasi-federalist or regionalist system. In this perspective, then the unitary and indivisible nature of the state lies not in the uniform nature of laws, but only in the denial of freestanding legislative power to

[30] *See* in particular J. Baubérot, *Laïcité 1905-2005: entre passion et raison* (Seuil 2009); *L'intégrisme républicain contre la laïcité* (Editions de l'Aube 2006).

[31] *See* Vallet, *supra* n. 2.

[32] On Corsican autonomy *see* Vallet, *supra* n. 2 and M. Bernard, 'Les statuts de la Corse', 12 *Cahiers du Conseil Constitutionnel* (2002) p. 1.

[33] Vallet, *supra* n. 2.

[34] *See* F. Lemaire 'L'outre-mer, l'unité et l'indivisibilité de la République', 35(2) *Nouveaux Cahiers du Conseil constitutionnel* (2012) p. 1; *Conseil Constitutionnel*, no. 65–34 L of 2 July, 1965; *Conseil d'Etat*, no. 77577, 27 February 1970, *Saïd Ali Tourqui*.

infra-state territorial entities – and thus in the 'singularity (*unicité*) of the initial normative power'.[35]

While legislative pluralism remains subject to the overarching authority of the national legislature, even this core principle has been partly compromised. A 1998 constitutional amendment relating to New Caledonia effectively recognised a category of legislation – *lois du pays* – that cannot be revoked or altered by the national legislature.[36] Effectively this constitutionalised, for the first time, a division of competence between national and sub-national legislatures.[37] The New Caledonian arrangement was very much a *sui generis* constitutional arrangement in view of an independence plebiscite scheduled for 2014. But the point remains, that a willingness to compromise a seemingly fundamental aspect of the indivisibility doctrine shows how French constitutional tradition has conceded a regionalist drift in response to centrifugal tendencies.

From spatial to social unity

If, as outlined, the indivisibility principle no longer requires uniform legislation or even the unity and singularity of national legislative power, what distinctive elements, if any, remain of the revolutionary doctrine? One possible explanation is that it is neither administrative structure, legislative content nor even legislative competence, but rather simply, the abstract 'people' that is designated 'indivisible'. On the one hand, the doctrine was historically understood in relation to problems of territorial organisation.[38] However, with many of the traditional components of the doctrine whittled away, whether by evolving political practice or by constitutional amendment, the *Conseil Constitutionnel* has, in recent decades, steadfastly emphasised the singularity of the people, as the abstract constituent power. Ostensibly, this sees the principle pared back to such an extent that it is merely of symbolic, abstract value. However, in fact it yields concrete constitutional restrictions that limit legislative accommodation of *de facto* diversity within the national territory. And specifically, while the indivisibility principle does not preclude recognition of asymmetric territorial structure

[35] Lemaire, *supra* n. 3, p. 176. *See also*, generally, M. Verpeaux, 'L'Unité et La Diversité dans la République', 42 *Les Nouveaux Cahiers du Conseil Constitutionnel* (2014) p. 7.

[36] Lemaire, *supra* n. 3, p. 175-177. *See also* Y. Brard, 'Nouvelles-Calédonie et Polynésie française: les 'lois du pays' (de la spécialité législative au partage du pouvoir legislative)', 1 *Revue Juridique Polynésienne* (2001) p. 4.

[37] For Senator Catherine Tasca, this fundamentally compromised the principle of indivisibility, a key component of which, she insisted, is that the 'legislative power is singular [*unique*] … that it determines the domain of authority of intervention for local authorities and that this can be changed or revoked at any time', as cited in Lemaire, *supra* n. 3, p. 177.

[38] *See* in particular Debbasch, *supra* n. 8.

or even legislative pluralism as such, it prohibits recognition of separate, plural *peoples*, and their distinctive characteristics, within the French nation. Effectively, then, this represents the vestigial, impregnable and resilient core of the historical doctrine.

This emerged in particular from the *Conseil Constitutionnel*'s 1991 judgment on a legislative accord relating to Corsica. The *Conseil* held that the principle of republican indivisibility could not prevent territorial collectivities such as Corsica from being accorded a differentiated administrative or legislative status. However, it held the legislature could not recognise separate 'peoples' within the French nation. The impugned Bill had referred to a *'Corsican people'*, as a 'component of the French people', acknowledging its 'rights to the preservation of its cultural identity and to the defence of its specific social and economic interests.'[39] The reference to the Corsican 'people' was unconstitutional, as the Constitution 'recognises only the French people, without distinction of origin, race or religion'.[40] Similarly it invalidated a law that recognised, in largely symbolic terms, a 'pact that links the *outre-mer* (overseas) to the Republic'[41] – implicitly, because the overseas populations constitute an integral part of the Republic in the first instance.[42] Thus the *Conseil* has effectively enshrined the *singularity of the French people* ('unicité du peuple francais') as an implied constitutional principle. In a 1999 decision on minority language rights, it explained that this principle 'precludes the recognition of collective rights for any community based on its origins, its culture, its language or its beliefs'.[43] Accordingly, both the *Conseil Constitutionnel* as well as the *Conseil d'Etat* have held that the principle justifies reservations entered by France to the European Charter for Regional and Minority Languages.[44] And it is commonly affirmed, in political and constitutional discourse, that constitutionally the French people cannot be *fractionné* (subdivided). While of course legislation classifies citizens on various legitimate grounds (income, age, etc.), what this suggests is that republican indivisibility precludes the recognitions of discrete sub-groups that are defined by a shared communal identity, whether regional, linguistic or religious.

Fundamentally, then, it is a principle of French constitutional law that citizens cannot be classified as a function of their *origins*. And importantly, this limits the extent to which the State can legislatively recognise or accommodate the *de facto*

[39] *Conseil Constitutionnel*, no. 91-290 DC, 9 May 1991 (emphasis added).

[40] *See further Conseil Constitutionnel*, no. 2001-454 DC, 17 January 2002.

[41] *Conseil Constitutionnel*, no. 2000-435 DC, 7 December 2000, *loi d'orientation pour l'outre – mer*.

[42] *See* Lemaire, *supra* n. 34.

[43] *Conseil Constitutionnel*, no. 99-412, 15 June 1999.

[44] Conseil d'Etat, Advisory Opinion of 7 March 2013. *See* P. Roger, 'Le Conseil d'Etat défend l'unicité du peuple francais', *Le Monde*, 26 March 2013.

cultural heterogeneity of the citizenry: for example, Chicot notes that the indivisibility principle has prevented the recognition of the Amerindian 'peoples' in the overseas *département* of Guyane.[45] The revised Article 72 of the Constitution recognises the 'populations', but not the *peoples* of the overseas territories.

Indivisibility and republican universalism

While a focus on the indivisibility of the French *people*, instead of the territory or the legislative power, might seem to signify the relative banality and loss of specificity in the constitutional principle, in fact precisely the reverse is true: it highlights how the principle is conceptually connected to the peculiarities of French-republican ideology. The most resilient aspect of the doctrine has been the idea that it is the social and human component of the republic – the abstract corpus of citizens called the people, rather than the territory or administrative structure as such – that is affirmed as singular and unitary. In turn, I will argue, this helps to illustrate how the principle is linked to a broader political philosophy of republican 'universalism' that conceives of citizenship and political community in abstract terms, and embraces a strict prohibition on communalist distinctions and classifications.

Thus the social, as distinct from the territorial, aspect of the indivisibility principle highlights the distinctively republican character of the contemporary principle. Notably, the prohibition on communal classifications, and thus the idea of a singular abstract 'people', was absent in the pre-revolutionary doctrine.[46] And while the principle still has some territorial aspects, understood as precluding secession or full-blown federalism, it has become alloyed to a broader republican ideology that was characterised in large part by an aversion to social '*différentialisme*' – that is, to any legal recognition of identitarian differences, whether ethnic, religious or social – within the corpus of the citizenry.[47] Thus while it is true that the principle originated in the early modern, pre-revolutionary and not especially republican concept of undivided sovereign power, it outgrew this initial influence and assumed a much broader meaning that incorporated certain ideological specificities of republican thought which can, in turn, be traced

[45] P.Y. Chicot, 'Le principe d'indivisibilité de la République et la question des minorités en Guyane française, à la lumière du cas amérindien', 12 *Pouvoirs dans la Caraïbe* (2000) p. 153.

[46] Lemaire, *supra* n. 3, p. 85.

[47] *See* particularly O. Bui-Xuan, *Le Droit Public Français entre Universalisme et Différencialisme* (Economica 2004). *See also* D. Schnapper, *Qu'est-ce que la citoyenneté?*, Gallimard 2000) and *La communauté des citoyens*: *sur l'idée moderne de nation* (Gallimard 1994); P.A. Taguieff, *La République enlisée* (ed. des Syrtes 2005); F. Constant, *Le multiculturalisme* (Flammarion 2000); D. Lochak, in *Le droit et les paradoxes de l'universalité* (PUF 2010).

from the embryonic regimes of the 1790s through to the 20th century republican constitutions.

Therefore, despite its apparent origins in a rather generic early-modern understanding of sovereignty, the indivisibility principle was adapted to, harnessed by and became bound up with a broader ideology of *republican universalism*. In the French tradition, republican universalism refers to an understanding of citizenship and political community as transcending 'pre-political' commonalities or solidarities, one which assumes no organic unity or alikeness – whether ethnic, cultural or religious – amongst citizens.[48] It refers to an understanding, in short, in which citizenship is abstracted from any communal identity, in which political unity is based instead on the shared general will of the citizenry, and which emphasises citizens' shared commitment to a common good and to shared public institutions, rather than 'blood and soil' commonalities.[49] Political unity is constituted without reference to anything external or prior to the political: it is grounded, according to a French leitmotif, in the '*vouloir vivre ensemble*' – literally, 'the desire to live together', rather than an organic *ethnos*. The optimistic premise of revolutionary ideology was that abstract republican ideas – liberty, equality, fraternity and so forth – could be endorsed and internalised by citizens independently of their non-political or private identities.[50]

This republican universalism is often juxtaposed with an alternative conservative tradition, represented by Burke and Maistre in particular, which privileges the organic and particularistic basis of political community above the abstract notion espoused by the revolutionaries.[51] In the 19th century, Ernest Renan's influential voluntarist conception of nationalism sustained this tradition in the face of romantic nationalism,[52] affirming an understanding of political unity as the product of a social contract – and the continuing will to live together – rather than as 'the sociological expression of a pre-existing volkgeist'.[53] This model of nationalism could, it was assumed, integrate citizens of diverse origins and beliefs.[54]

Crucially, in concrete terms, this universalist ideology translates most notably as a prohibition of communal or identity-based classifications, and the denial of

[48] *See* generally C. Laborde 'Citizenship', in E. Berenson et al. (eds.), *The French Republic: History, Values, Debates* (Cornell University Press 2011) p. 136.

[49] J. Jennings (2011) 'Universalism', in E. Berenson et al. (eds.), *The French Republic: History, Values, Debates* (Cornell University Press 2011) p. 145.

[50] *See* e.g. C. Nicolet, *Histoire, Nation, République* (Odile Jacob 2000).

[51] Lemaire, *supra* n. 3, p. 18.

[52] E. Renan, *Qu'est-ce qu'une nation?* (Calmann Lévy 1882/1995).

[53] L. Kritzman, 'Identity Crises: France, Culture and the Idea of the Nation' 24 *Substance* (1995) p. 5 at p. 6.

[54] Bui-Xuan, *supra* n. 47.

legal status, recognition or personhood to infra-state communities, whether ethnically, culturally or religiously defined.[55] Thus it supports a rather strict and formalistic concept of equality before the law which prohibits recognition of identitarian, as distinct from social or economic, differences. This, in turn, is often traced to the French revolution's abolition of social and religious ranks. The connection between formalist egalitarianism and abstract universalism was encapsulated, for example, in Tonnerre's famous insistence to the National Assembly, in 1789, that 'we must accord the Jews nothing as a nation, but everything as individuals: they must neither become a state nor a separate order, but become individual citizens'.[56]

In turn, insofar as universalism is manifested primarily as a rejection of identity-based classifications and distinctions, it supports the understanding of republican indivisibility, described in the previous section, as affirming the unitary character of the people. Indeed throughout modern French constitutional history, the Rousseauian and revolutionary inheritance sustained an anti-differentialist bourgeois conception of equality, defined by the general applicability of legislation irrespective of social rank. Article 3 of the Constitution of the Year III, for example, proclaimed: 'equality consists in the law being the same for all, whether it punishes or protects'. Article 1 of the 1789 declaration, which still has legal effect, prohibits legislative classifications other than those based on 'social utility'. In contemporary French politics, this is manifested primarily as a rejection of claims for group-specific rights, and especially, in practice, of any legal recognition of minorities or minority rights. Bui-Xuan notes that 'in French public law, it is individuals, not groups that possess rights and duties … individuals enjoy a veritable "right to indifference" with regard to their origins'.[57] Individual rights, the orthodoxy holds, cannot be conditioned or differentiated along ethnic, cultural or religious lines. In particular, this has precluded positive discrimination measures based on race, ethnicity or religion – although socio-economic criteria have been used[58] – and it has even led to a prohibition on the compiling of ethnic or racial statistics.[59] Pastorel, reflecting the orthodox view, goes as far as to argue that the principle of equality, understood in this formalistic way, is itself '*nothing other than the corollary of sovereign indivisibility;* it means that

[55] Nicolet, *supra* n. 50, p. 30.

[56] Cited in Z. Szajkowsk, *Jews and the French Revolutions of 1789, 1830 and 1848* (Ktav Publishing House 1970) p. 581.

[57] Bui-Xuan, *supra* n. 47, p. 5.

[58] Bui-Xuan, *supra* n. 47, p. 4; Baubérot, *supra* n. 30, p. 117.

[59] M. Möschel, '*Race judicata:* the Ban on the Use of Ethnic and Racial Statistics in France', 5 *European Constitutional Law Review* (2009) p. 197; G. Calvès, 'L'hésitation des politiques de lutte contre les discriminations', 148 *CNAF: Informations sociales* (2008) p. 34.

within the nation, there are no intermediary bodies, but only citizens with the same rights and duties'.[60]

As Bui-Xuan notes, this universalist ideology is typically described as 'republican' both 'to convey the rupture with the *ancien régime*' and 'to distinguish it from foreign legal systems, notably Anglo-Saxon law which, whether implicitly or explicitly, recognise the rights of infra-state communities'.[61] Indeed in broader French discourse, both political and academic, republican universalism is commonly invoked against a much-derided *communautarisme* ('communalism') associated – whether correctly or otherwise – with Anglophone jurisdictions that are seen as being more receptive to group-specific rights. Thus anti-differentialist universalism is seen as a cornerstone of French exceptionalism, as grounding a nationalism that is imagined to somehow transcend the specificities of 'blood and soil'. 'Universalism', then, has become integral to the French-republican self-image, and so it is little wonder that it underlies the intellectual and doctrinal specificity of the constitutional principle of indivisibility.

While this anti-differentialist universalism might seem like a French peculiarity, in fact it can be interpreted, in one sense, as the corollary of a distinctively republican, and specifically a Rousseauian, understanding of political freedom. As already discussed, the Rousseauian ideas that so decisively influenced French revolutionary doctrines perpetuated the early-modern understanding of sovereign power as supreme, singular and undivided. However, equally I argue that the idea of indivisibility manifested in contemporary French discourse should not be understood as the expression of a generic concept of sovereignty, present in Hobbes' absolutist philosophy as well as Rousseau's republican thought. Like Bodin, Hobbes framed the sovereign as singular and indivisible based largely on a concern for social order: a single, authoritative sovereign was needed as a final arbiter of social disputes, to prevent chaos and disorder.[62] And similarly, while Rousseau located sovereignty in a different (more abstract) entity, the people, he equally understood the sovereign as a singular, indivisible and supreme political authority. Like Hobbes, he insisted the sovereign was by its nature singular and indivisible, unchecked and unconditioned by any internal authority.[63]

However, these superficial similarities obscure fundamental differences in the concept of sovereign power in Rousseau and Hobbes' understanding of sovereignty. While it may be argued that Rousseau's notion of sovereign indivisibility was

[60] Pastorel, *supra* n. 22, p. 3

[61] Bui-Xuan, *supra* n. 47, p. 5. On liberal multiculturalism, *see* W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1995); C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press 1989).

[62] Hobbes, *supra* n. 10.

[63] J.J. Rousseau, *Du Contrat Social* (ENAG 1988) (hereinafter *The Social Contract*) Book I, Chapter 6 (author's translations).

informed, in part, by concerns of efficacy and authority, it stemmed, primarily, from very different philosophical concerns. Specifically, the indivisibility of sovereign power is a corollary of a very particular concept of political freedom conceived of as self-government via the rule of the general will, where the general will is understood as the corporate will of a political community directed towards the common aims and interests of its members.[64] The departure point of Rousseau's political theory is that servitude and domination can only be avoided by mutual interdependency in a self-governing political community, where citizens govern themselves based on an interpretation of their common interest.[65] Asymmetric dependency on private will would be replaced by dependency on a *general* will – a collective will that citizens could recognise as being in some sense their own.[66] Thus political freedom is realised through collective identification with, and the rule of, the general will. This means that citizens' subjection to the rule of the general must be unconditioned and absolute: each must 'put his person and all his power in common under [its] supreme direction', thus becoming 'an indivisible part of the whole'.[67] As in Hobbes' account, they effectively alienate all their 'natural' freedoms to the collective sovereign: 'the alienation being without reserve, the union is as perfect as it can be'.[68]

This understanding of sovereign power has ostensibly authoritarian implications. Pettit, identifying the continuity between concepts of sovereignty in Hobbes and Rousseau, interprets Rousseau as prescribing a form of democratic absolutism, with the people assuming the authoritarian role of Hobbes' sovereign.[69] However, arguably the singular, indivisible and authoritative character of sovereign power stems simply from Rousseau's peculiar understanding of unfreedom, and of its cure in the guise of participative republican politics. If man is to experience law as something other than the manifestation of an alien will, he would have to identify it as his *own* will; free citizens cannot remain poised incoherently between the natural and the civil states.[70] This is all Rousseau means, effectively, by subjection to the general will being 'absolute'. Political freedom can be realised only by citizens who enjoy equal membership of a political community, and the political community is constituted and defined by its possession of

[64] *See* generally J. Cohen, *Rousseau: A Free Community of Equals* (Oxford University Press 2010).

[65] Cohen, *supra* n. 64.

[66] This 'transforms personal dependence into dependence on the Republic': F. Neuhouser, 'Freedom, Dependence and the General Will', 102 *Philosophical Review* (1993) p. 363 at p. 390.

[67] Rousseau, *supra* n. 63, Book I, Chapter 9. Pettit, for example, describes Rousseau's understanding of a 'total subjection' of citizen to sovereign. Pettit, *supra* n. 11, p. 14.

[68] Rousseau, *supra* n. 63, Book I, Chapter 9.

[69] By way of contrast, Pettit claims that Rousseau's scheme, like Hobbes' account, can tolerate 'no independent centre of power', whether internally or externally – but this overlooks the extent to which the principle of sovereign indivisibility is confined to legislative power specifically. Pettit, *supra* n. 11, p. 226.

[70] P. Riley, 'A Possible Explanation of Rousseau's General Will', 64 *The American Political Science Review* (1970) p. 86.

a single corporate will – the general will: 'as long as several men united consider themselves a single body, *they have a single will*, concerned with their preservation and general well-being'.[71] Thus it follows that political freedom can be realised only in a community that is governed under a *single* and general will, expressed in an impersonal institutionalised form. In turn, that will can only be generated or instantiated by an indivisible sovereign authority that exercises legislative power.

Thus, the indivisibility of the sovereign manifests itself directly as the singularity of legislative power *and* the uniformity of legislation in the republican state. In order to experience political freedom understood as mutual interdependency in a political community, we must subject ourselves to the rule of the *same* corporate and 'general' will, and thus to the same legislation. If it is to be non-arbitrary and thus non-dominating – if it is to enshrine our equal citizenship – the will by which we are ruled must be *singular* as well as 'general'. Free citizens are subject to a single legislature and to the same laws. Thus while Pettit interprets Rousseau's concept of sovereignty as yielding an internally unchecked and undivided form of government, in fact this requirement of indivisibility applies only to the form of *legislation*, rather than the entire apparatus of government. Pettit overlooks Rousseau's firm distinction between the *sovereign*, which is unchecked and indivisible, and the *government*, which is not. While sovereign power, expressed through legislation, must be exercised directly by the people, other forms of governmental power, particularly executive power, may be delegated.[72] Thus in contrast with Hobbes, Rousseau's theory of sovereign indivisibility does not imply undivided government; Rousseau's stipulation of sovereign indivisibility applies only to legislative power, rather than to the totality of state power as in Hobbes' account.[73] This reflects the fact that while sovereign indivisibility in Hobbes refers to the need for social order, for Rousseau it refers to the quality and concept of political freedom. And indeed, post-revolutionary French republicans adjusted Rousseau's theory by locating sovereignty not in the 'people', understood as an

[71] Rousseau, *supra* n. 63, Book IV, Chapter 1.

[72] Rousseau, *supra* n. 63, Book I. Indeed, in his constitutional plans for Poland and Corsica, he seems to envisage public power being dissipated and even checked across different sites. J.J. Rousseau, *Projet de Constitution pour la Corse* (Nautilus 2000); J.J. Rousseau, 'Considerations on the Government of Poland', in F. Watkins, *Jean-Jacques Rousseau: Political Writings* (Thomas Yelsen 1953). *See also* D.L. Williams, 'Modern Theorist of Tyranny? Lessons from Rousseau's System of Checks and Balances', 37 *Polity* (2005) p. 443.

[73] Steinberger notes a terminological confusion in this respect: Rousseau and Hobbes mean quite different things when they use the term 'sovereign'; for the former, it is an 'authorizing' constituent entity; for the latter, an instrumental, governing body. P. Steinberger, 'Hobbes, Rousseau and the Modern Conception of the State', 70 *The Journal of Politics* (2008) p. 595. Indeed, relatedly, Lemaire notes a commonplace contemporary confusion between the divisible and dissipated nature of sovereign attributes and powers – which may be divided, pooled or shared over different sites – and the unitary nature of the sovereign itself. Lemaire, *supra* n. 3, p. 173-174.

active ruling agent, but rather more abstractly, in the 'nation'.[74] As Malberg noted, this stemmed from a concern to prevent 'sovereign' authority being located in *any* definite body or authority, of whatever sort, even a plenary legislature of the 'people'.[75] Insofar as 'sovereignty' was located in an ethereal abstract entity, the result was simply to prevent any particular, instantiated person or body – even the 'real' people, in its flesh and blood form – from arrogating sovereign authority to itself: Robespierre insisted that for any assembly to posit itself as a repository of sovereign power constituted despotism.[76] Indivisible national sovereignty prevents *any* constituted authority from arrogating itself 'sovereign' power.

There is a clear continuity between the Rousseauian idea of legislative power as being necessarily indivisible, and the contemporary doctrine of universalism with its rejection of identitarian classifications and distinctions. Although Rousseau's principle of sovereign indivisibility operates at a more abstract level than Hobbes' conception, it has important implications for the form and concept of legislation. Since the general will is effectuated through legislation, laws must be general in their object and application. The general will, Rousseau insists, cannot speak 'to some particular and determinate object', or 'pronounce on a man or a fact.'[77] Thus when the 'whole people' legislates in relation to the 'whole people', 'it is considering only itself'; then, the law 'considers subjects *en masse* and actions in the abstract, and never a particular person or action';[78] 'true' legislation 'unites universality of will with universality of object'.[79] Crucially, while legislation can only make general classifications, Rousseau also suggests limits on the types of classifications that can legitimately be enacted. He says:

> The social pact establishes equality among the citizens in that *they all bind themselves under the same conditions and must all enjoy the same rights.* Hence … the sovereign recognises only the whole body of the nation and makes no distinction between any of the members who compose it.[80]

[74] *See* Declaration of the Rights of Man and of the Citizen, 1789, Art. 3: 'The principle of sovereignty resides essentially in the nation. No section of the people, nor any individual, may arrogate to itself its exercise' ('*Le principe de la souveraineté réside essentiellement dans la nation. Aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice*'). This rhetorical shift of emphasis stemmed from a concern to eschew populist tyranny or class-based factionalism: the 'people' might be understood as a discrete, embodied social class whereas the 'nation' represented a more transcendent, abstract corpus. Lemaire, *supra* n. 3, p. 56.

[75] Lemaire, *supra* n. 3, p. 73.

[76] The vesting of sovereignty in such an abstract entity raised the theoretical conundrum of whether, or how, this sovereign power could be manifested or represented without being alienated. *See* generally Lemaire, *supra* n. 3, p. 64-67.

[77] Rousseau, *supra* n. 63, Book II, Chapter 4.

[78] Rousseau, *supra* n. 63, Book II, Chapter 6.

[79] Rousseau, *supra* n. 63, Book II, Chapter 6.

[80] Rousseau, *supra* n. 63, Book II, Chapter 4.

Therefore, just as political freedom requires citizens to form an indivisible sovereign corpus and to be ruled under a single sovereign will, equally it requires that they be subject to a single, generally applicable set of laws that observe no classifications or distinctions within the sovereign people. In turn, this elucidates the link between the singularity and indivisibility of sovereign power in Rousseau's theory, and the anti-differentialist universalism of post-revolutionary French-republican thought. Just as political freedom requires that citizens live under the same sovereign will, legislation, as the expression of that will, cannot divide the citizenry in categories or ranks. In a sense then, Rousseau's theory of political freedom maps directly to a formalist concept of egalitarianism understood as anti-differentialism. In turn, it is possible to identify a continuity between Rousseau's republican theory of sovereignty and the anti-differentialist, anti-communalist focus of the indivisibility principle in French constitutional doctrine.

Accordingly, while the first generation of republicans were prepared to concede some degree of local autonomy as circumstances allowed, they interpreted sovereign indivisibility only as requiring the unity of legislative power and not as demanding an undivided government in all dimensions and competences.[81] This explains in part why, although many of the revolutionary generation tolerated some degree of administrative decentralisation or local autonomy, virtually none contemplated federalism: it was opposed primarily as an instance of legislative pluralism, which undermined their abstract, unitary understanding of citizenship.[82] This aversion to legislative pluralism was espoused not only by Rousseau and the Jacobin strand he influenced, but also by liberal Enlightenment thinkers who similarly associated legal pluralism with the feudalism and privileges of the *ancien régime.* Voltaire, for example – in many respects, Rousseau's liberal nemesis – opined: 'what kind of barbarism is it that citizens must live under different laws?'.[83] Thus, legislative centralism and uniformity were considered as the counterfoil of hereditary and local privileges. This idealism was given its most celebrated expression in the Civil Code of 1804, which successfully displaced the hodgepodge of feudal, customary and locally differentiated pre-revolutionary laws.[84] And this idea is reflected, today, in the fact that the residual core of the indivisibility doctrine consists of a strict principle of formal, anti-differentialist equality.

Accordingly, the indivisibility principle can in fact be linked with a specifically republican and Rousseauian concept of political freedom which is defined, in

[81] *See* generally Lemaire, *supra* n. 3, Chapters 1-3.

[82] Lemaire, *supra* n. 3, Chapters 1-3.

[83] Voltaire, 7 *Oeuvres de Voltaire Dialogues* V (Pourrat 1838).

[84] *See* generally J.H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press 2007) Chapters 1-3.

particular, by its insistence on the general applicability of legislation, rather than by political and administrative centralism *per se*. Since Hobbes and Rousseau mean quite different things by the indivisibility or singularity of the sovereign, in turn this debunks the idea that the French-republican account of indivisibility stems from a generic early-modern understanding of sovereignty.

Republican indivisibility and the crisis of French universalism

Insofar as republican universalism manifests itself as a rejection of infra-state groups or identities, this helps to makes sense, intellectually, of the indivisibility principle understood as a doctrine of social rather than territorial organisation. Correspondingly, it explains the location of the principle in a much broader republican ideology. As Bui-Xuan notes, the 'universalist logic' precludes cultural or group-specific rights precisely because they 'would juridically consecrate the segmentation of society as a function of … language, religion or ethnic origin'.[85] Arguably, a range of French political and legal doctrines are unified by and flow from this basic ideological premise. Similar to the indivisibility principle, *laïcité*, for example – the French doctrine of constitutional secularism – is commonly understood as precluding any legislative accommodation of religious rights understood as group-specific claims.[86] Thus Laborde notes it has been understood in the same light as Brian Barry's egalitarian critique of multiculturalism: as a republican foil to a differentialist politics of cultural determinism.[87] According to the republican logic, the idea of religious communities exempting themselves from religiously neutral and generally applicable legislation undermines both the indivisibility of the republic – understood in its social dimension – as well as the abstract, universalist character of citizenship. Indeed *laïcité* was interpreted by the *Conseil Constitutionnel* as precluding 'the use of religious beliefs as a criterion through which to gain exemption from rules governing the relationship between private individuals and public entities'.[88]

Thus *laïcité*, formalist equality and indivisibility all coalesce around a single republican doctrine, affirming the singularity of the French people, understood as an abstract and disembodied corpus of citizens whose juridical status is defined independently of their contingent characteristics, beliefs and origins. And perhaps

[85] Bui-Xuan, *supra* n. 46, p. 11

[86] C. Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press 2008) p. 173.

[87] B. Barry, *Culture and Equality: an Egalitarian Critique of Multiculturalism* (Harvard: Harvard University Press 2001). *See also* C. Laborde, 'Secular Philosophy and Muslim Headscarves in Schools', 13 *The Journal of Political Philosophy* (2005) p. 305.

[88] *Conseil Constitutionnel*, no. 2004-505DC, 19 November 2008.

the main practical implication of this orthodoxy is the denial of various forms of legislative accommodation for religious and cultural minorities. This orthodoxy commands an impressively wide consensus: it cannot be explained solely, at least, as a pretext for majoritarian cultural nationalism.[89]

However, this ideology of republican universalism has been under sustained assault for a number of decades. And while the indivisibility doctrine has clear roots in French-republican thought, correspondingly the dilution of the principle tracks a broader crisis within the ideology of universalism itself.

The tensions and contradictions within republican indivisibility, and its Rousseauian underpinnings, are apparent from the post-revolutionary period onwards. I have noted that although the concept of indivisibility originated in an understanding of political freedom as requiring participative self-government by the 'people', the post-revolutionary understanding of 'national', as distinct from popular sovereignty, served to keep the people at arm's length in constituted governance.[90] But more specifically, my argument is that this mirrors the contradictions and tensions of a broader doctrine of universalism, which, in contemporary French thought, simiarly operates as a 'negative' doctrine – which serves simply as a pretext for denying identitarian, infra-state and minoritian claims, while losing any connection to a republican doctrine of participative political freedom.

Of course, insofar as the ideology of republican universalism was translated as an anti-differentialist, egalitarian doctrine, this was never pursued in practice with any consistency. Religious and cultural differentialism was formalised in various legislative guises in the colonial context, especially during the Third and Fourth Republics.[91] More generally, since it translates primarily as a rejection of minority claims, whether cultural or religious, the universalist doctrine can be understood as an instrument for buttressing the dominant non-political culture – and thus simply as an insidious, majoritarian communalism, clothed in republican verbiage. In contemporary French discourse, 'universalism' is understood as precluding legislative recognition of cultural difference, based implicitly on the assumption that republican norms and institutions are themselves culturally neutral.[92] Claims to group-specific rights are seen as subversive of republican citizenship, as representing a dreaded *communautarisme*. But this obscures the cultural specificity

[89] Indeed it was the centre-right Sarkozy who was most receptive, initially at least, to the Anglo-American terminologies of diversity and affirmative action. *See* e.g. N. Sarkozy, *La République, les Religions, L'Espérance* (Cerf 2004) and J. Baubérot, *La Laïcité expliquée à Monsieur Sarkozy* (Albin Michel 2008).

[90] Lemaire, *supra* n. 3, p. 75.

[91] A. Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa 1895-1930* (Stanford University Press 1998).

[92] *See* generally B. Durand, *La Nouvelle Idéologie Française* (Editions Stock 2010).

of those laws, policies and duties from which minorities are denied exemption or accommodation, and of the social framework within which republican laws and practices are instantiated – that is, it ignores the fact that abstract, universalistic principles – liberty, equality, fraternity and so forth – are likely to be interpreted and practised through the lens of a dominant and particularistic cultural identity.[93]

For some critics, then, 'rationalist universalism, rooted in the philosophy of the eighteenth-century Enlightenment, now looks more and more like a form of European ethnocentrism'.[94] While the principle of sovereign indivisibility is, in one sense, simply a metaphor for the concept of political freedom that consists in citizens being bound by and subject to identical laws, this maps on to an ideology of formalist egalitarianism that can serve as a pretext for majoritarian domination. And indeed in France, the terminologies and doctrines of universalism have effectively been marshalled and manipulated in defence of an organicist and culturally particularistic concept of political community; majoritarian cultural domination has proven adept at harnessing republican idioms and terminologies. For example, *laïcité* is increasingly interpreted as obliging citizens to exercise 'discretion' when manifesting their religious faith in public spaces and thus, it serves as a bulwark against minority religious expression in the public sphere.[95] Abstract universalism, in short, may serve partly to mask and legitimate majoritarian cultural domination.

Indeed, republican universalism speaks to two quite contradictory senses of indivisibility. On the one hand, republican legitimacy requires an abstract and culturally neutralist concept of citizenship, as the state seeks to legitimate itself in a social contract rather than a particularistic identity. However, a purely abstract notion of indivisibility threatens the empirical and social unity of the republic; thus a second version of the concept – manifested, for example, in the rejection of linguistic pluralism – aims to defend the empirical and social cohesion of an historically situated state. Indeed, historically, the indivisibility doctrine was constructed in tandem with a process of centralisation and nation-building that inevitably sought to check centrifugal tendencies. Thus abstract universalism and empirical unity may prove irreconcilable in real-life politics. But what the contemporary political uses of *laïcité* and indivisibility suggest is that these commitments are intertwined and confused with a majoritarian cultural politics that appropriates the culturally-neutralist terminology of republican universalism.

[93] *See* generally A. Phillips, *Multiculturalism without Culture* (Princeton University Press 2009).

[94] J. Jennings, 'Citizenship, Republicanism and Multiculturalism in Contemporary France', 30 *British Journal of Political Studies* (2000) p. 575.

[95] *See* e.g. E. Daly, *Laïcité* and republicanism during the Sarkozy presidency', 11 *French Politics* (2013) p. 182.

Universalism, then, becomes an insidious form of communitarianism: it manifests itself typically as a rejection of minority claims, but rarely, if ever, as a willingness to interrogate the cultural specificity of dominant institutions and practices.

Whatever the theoretical tensions of universalist ideology, arguably the official doctrine has been progressively weakened and compromised by the political and constitutional developments of recent decades. The failure of socialist economic initiatives in the early 1980s led the Left, under Mitterrand, to focus on culture as a site of emancipative ambition, prompting many conservatives and Gaullists to decry an alleged slide towards normative multiculturalism.[96] One of the major challenges to the traditional doctrine came in the guise of the gender parity law that was introduced for political parties in 2000, which was facilitated by a constitutional amendment.[97] Benhabib argues that the *parité* movement aimed to address the 'absence in the public sphere of a robust representation of differences' but 'without forfeiting ideals of republican universalism', to include women equally in public life but without conceding to an 'essentialised' or deterministic difference.[98] However, this naturally raises the question as to why de facto inequalities justified departures from difference-blind universalism in relation to gender, but not race and culture. *Laïcité*, in contrast, is commonly invoked to deny various claims to minority accommodation – for example, the use of religious dress or emblems by public servants.[99]

In a broader optic, Calvès notes that a 'trinity' of republican principles – 'national sovereignty, national indivisibility and equality before the law'[100] – has come under sustained assault in light a number of constitutional amendments, to such an extent that anti-differentialist universalism no longer accords with the practical realities of the French state. It is open to debate why on the one hand, republican universalism has lost its explanatory force and its credibility as an overarching normative theory, and on the other, why it has increasingly served as a pretext for a majoritarian cultural politics. Certainly, intractable de facto inequalities, constituted partly on racial lines, will naturally strain any formalist doctrine of anti-differentialist egalitarianism – one that was, in any event, always rejected by some of the left as an artifice of bourgeois domination. Hayward, in

[96] On the relationship between multiculturalism and republican universalism, *see* generally J.L. Amselle, *Vers un multiculturalisme français. L'empire de la coutume* (Aubiers 1996).

[97] *See* J.W Scott, *Parité: Sexual Equality and the Crisis of French Universalism* (University of Chicago Press 2006); L. Bereni, 'French Feminists Renegotiate Republican Universalism: The Gender Parity Campaign', 5 *French Politics* (2007) p. 191.

[98] S. Benhabib, Review of Joan Wallach Scott's *Parité: Sexual Equality and the Crisis of French Universalism* 23 *Hypatia* (2008) p. 220 at p. 222.

[99] *See* e.g. J. Baubérot, *La laïcité falsifiée* (La Découverte 2012).

[100] G. Calvès, "Il n'y a pas de race ici': le modèle français à l'épreuve de l'intégration européenne', 17 *Critique internationale* (2002) p. 173.

this vein, suggests that the indivisibility doctrine is simply the 'superimposition of a spurious unity on an empirical plurality'.[101] More specifically, Viard suggests that since the neoliberal turn of the 1980s, and the consequent crisis of the 'social republic', republican discourse has embraced a sort of cultural politics – evident in the veiling debates – which implicitly posits 'lived' attributes as a focal point of republican citizenship.[102] And paradoxically, again, this gives anti-differentialist republicanism an embodied, even ethnicised flavour. Perhaps it was no coincidence that the centre-right government launched a public debate on 'national identity', implicitly problematising immigrant identities, soon after the onset of the economic crisis in 2008.[103]

This crisis of universalism is reflected, of course, in the incremental dilution of the indivisibility doctrine, as described in the first section. The Rousseauian heritage of the indivisibility doctrine is undermined not by the asymmetrical or decentralised nature of the republican state, but only by the abandonment of legislative universality and uniformity. I have outlined how the indivisibility doctrine originates in a broader republican ideology that interprets legislative plurality – or indeed, legal pluralism of any sort – as inimical to authentic political freedom. But given the various accommodations that have been made in the name of *de facto* diversity and heterogeneity, this doctrine has little explanatory force in relation to contemporary French political life and constitutional forms; it seems almost quaint. Notwithstanding various compromises to the traditional territorial dimensions of republican indivisibility, the dogmatic core of the principle – the unity of legislative power coupled with a prohibition on legislative pluralism or differentialism – can still be traced to the Rousseauian inspirations of the doctrine. But with increasing, incremental compromises in anti-differentialist ideology, under the pressure of centrifugal and identitarian political forces both in metropolitan and overseas France, even this distinctive core of the doctrine is arguably being subsumed in a broader crisis of universalist thought.

Concluding remarks

I have argued, first, that the constitutional doctrine of republican indivisibility has come to be characterised chiefly by its emphasis on the unity of the abstract social corpus rather than the national territory as such, and second, relatedly, that it is linked to a broader ideology of republican 'universalism' that translates primarily

[101] J. Hayward, *Fragmented France: Two Centuries of Disputed Identity* (Oxford University Press 2007) p. 67.

[102] J. Viard, *Fragments d'identité française* (Aube 2010).

[103] E. Daly, 'Political liberalism and French national identity in the wake of the face-veiling law', 9 *International Journal of Law in Context* (2013) p. 366.

as a rejection of identity-based distinctions and classifications. Most importantly, I have argued that rather than being the corollary of a generic account of sovereignty, the French doctrine, with its various peculiarities, can be traced to a specifically republican understanding of political freedom. And to a great extent, this is reflected in the residual core of the doctrine, and specifically its emphasis on the indivisibility of the constituent 'people'. Although the doctrine has been pared down to an ostensibly symbolic affirmation of the indivisibility of the social corpus, as distinct from the state or the territory, I have argued that it is precisely this social dimension of the doctrine that lends it its ideological specificity. The constitutional doctrine of republican indivisibility is intrinsically linked, conceptually and theoretically, to the public philosophy of the French state. However, by the same measure, the tensions and contradictions in the principle are traceable to a crisis of French-republican universalism in the current phase of the Fifth Republic.

https://doi.org/10.1017/S1574019615000267 Published online by Cambridge University Press