

Sovereignty doctrines in the constitutional debates around the Cádiz *Cortes*: Transition of monarchical sovereignty to national sovereignty?

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1. Introduction

Subsequent to the research results of *Re-ConFort I (National Sovereignty, A Comparative Analysis of the Juridification by Constitution)*, national sovereignty is in the limelight of this English translation of Andreas Timmermann's study of Spanish "sovereignty doctrines" of the early nineteenth century¹. Seen from its communicative impact on constitutional debates, national sovereignty was (and is) often used to explain a legal starting point of the constituting process (the so-called "big bang-argument"). References to national sovereignty can be found throughout the pan-European process of juridification of sovereignty by means of the constitution, in other words the process by which political legitimation is turned into legal legitimation². In this regard, the establishment of the *Cortes* of Cádiz in 1810, culminating in the Cádiz debates and the constitution of 1812, was a vital juncture, as it developed

a transitional model of monarchical sovereignty into national sovereignty, to the extent that the constitution was capable of mitigating political conflicts with legal and procedural regulations. Practical tasks and conflicts were thus coopted within a system of offices, competences and law, without the need of the fiction of a holder of sovereignty³.

This second aspect coincided with the development of the normativity of the modern constitutional concept, which arose out of the revolutions at the end of the eighteenth century. Yet legal limitation, coincident with the primacy of the constitution, was not the conscious goal of the protagonists of the Cádiz constitution. Rather, their aim was to overcome the absolute Napoleonic claim to monarchical sovereignty, by "inventing" national sovereignty as counterpart. The nation was no longer the collective term for all those who live within the borders of the territorial state or under the centralised monarchical administration, but for the first time

appeared as a singular self-sustaining political subject, as a legal point of reference for the organization of the state, no longer equated with the person or position of the king⁴. This modern meaning of "nation" first appeared in Jean-Jacques Rousseau's *Essai sur la constitution de la Corse* (1764)⁵. However, Rousseau's national *volonté générale* was not what the deputies in Cádiz had in mind when their constitutional debates were dominated by the anti-Napoleonic context. By virtue of the recourse to national sovereignty, the general and extraordinary convention of Cádiz (*Cortes generales y extraordinarias*) claimed the constituent power (*el poder constituyente*) for itself, since all authoritarian power supposedly had fallen back to the nation represented by the Cortes after the dismissal of the legitimate Spanish king⁶. The reference to national sovereignty in Tit. 1, Art. 3⁷ did not reject the monarchy *per se*, rather its exclusive claim to constituent power: «*La soberanía reside esencialmente en la Nación, y por lo mismo pertenece a esta exclusivamente el derecho de establecer sus leyes fundamentales*» («Sovereignty is essentially vested in the nation, and therefore the nation has the exclusive right to decide on the fundamental laws»)⁸. In the «political revolution» (*revolución política*)⁹, supported by clerics and lawyers and directed against both Spanish absolutism and French occupation, the nation served as a topos to communicate Spanish independence, without referring to the abdicated king and the suppressed people. Whilst sovereignty before and during the constitutional debates is often described in contemporary literature as a little elites' burlesque¹⁰ or as an oligarchic «stage spectacle»¹¹, it obtained the strength of a legal construct of supreme

power, which did not derive itself from anything that came before.

This intellectual transition from monarchical sovereignty to national sovereignty, establishing the monarchy as constituted power (*el poder constitucionalizado*) whereby the king had lost his personal entitlement to rule and did not alone embody the nation, was further intensified by the romantic pathos of the war of liberation, which contributed to the emphasis on sovereignty in Cádiz. The unease with the old stratification of Spanish society into strictly regimented ranks, together with the political desire to overcome the *Antiguo regimen*, provided fertile ground for reform. It was in this context that, in 1812, the constituent assembly in Cádiz copied the wording of the constitutional fathers of the French September Constitution of 1791, by connecting equality before the law with national sovereignty; due to the spatial unity of the state territory and the wish to exercise the public authority uniformly, the deputies argued, the law had to apply to all the people equally. The citizen as an individual with rights, rather than privileged families, corporations, ranks or territorial entities with their own rights and differentiated in ranks, and should be the addressee of the state actions¹². This connection of national sovereignty with equality was not meant in a radical democratic sense, but instead was influenced by late scholastic concepts, and combined the suprallegal limitations of the royal government with the historical legitimization by the old fundamental laws of the monarchy (*las antiguas leyes fundamentales de la Monarquía*).

II. *From the natural law basis of the Cádiz debates to Francisco Martínez Marina's Theory of the Cortes*

1. *Historical context*

It has long been recognized that Spanish liberalism is complex and multi-faceted, and scholarly attention has been influenced by the disputes over liberal or Marxist interpretations of the atmosphere of the early nineteenth century as revolutionary in a political sense (*Revolución política*)¹³ or a bourgeois one (*Revolución burguesa*)¹⁴. This is largely due to the prevailing image of Spanish history as being rooted in a Catholic conservatism and strict sociopolitical stratification within an overwhelmingly agrarian society that only belatedly shifted towards modern urbanism. In the English-speaking world, this preconception was backed by the British experiences during the Peninsular War (1807-14), in which the enthusiasm for the venture, and particularly the «military glory» that would result from dealing Napoleon a defeat on Continental European soil, was accompanied by a kind of disillusionment about Spanish soldiers, politicians, and the citizenry as a whole, who the Duke of Wellington, leading the British campaign, criticized for their entrenched social inequalities and their consequent lack of entrepreneurial spirit¹⁵. Yet these very issues acted as the impetus behind a rising reformative drive, and a catalyst for both liberal and conservative pushes for political change, since the Spain which Wellington and his expeditionary British force encountered was a country in forced transition. In March 1808, following rioting, King Charles IV abdicated and was replaced by his unpopular son, Ferdinand VII who himself almost

immediately was forced in Bayonne to abdicate in favor of Napoleon. It had been Napoleon's declared goal to renew the Spanish monarchy under French preponderance and dominance and to legitimate the Napoleonic usurpation of the Spanish throne. On 23 May 1808, after Bayonne, he convened an assembly of notables of the Spanish nation, though only ninety-one representatives appearing when asked to do so. On 20 June 1808, they were presented a constitutional draft elaborated by Napoleon and his envoy, Hugues-Bernard Maret (later the duc de Bassano), which led to the constitutional authorization on 6 July 1808. In this draft, the hereditary monarchy and Catholicism as a state religion were fixed. The *Cortes* were intended to represent the estates and were therefore divided into three benches, comprising the clergy, the aristocracy, and the people. Rather than a Bourbon monarch, Napoleon instead appointed his brother Joseph as king of Spain, including the territories of its empire. This constitution, based on monarchical prerogatives of the "intruder king" (*rey intruso*), was widely rejected by the people as a sign of French foreign rule. While Ferdinand was a lightning rod for Spanish popular discontent, the French invasion and occupation that removed him from power was even more reviled. On 22 May 1809, the provisional Spanish government (*Junta Suprema Central y Gubernativa*)¹⁶, in the name of Ferdinand VII, agreed to reinstate the *Cortes* as the legally legitimate representation of the monarchy¹⁷. The *Cortes* were inaugurated on 24 September 1810¹⁸. Cádiz, which served as its meeting place, was the only unoccupied territory in Spain to withstand the French siege and bombardment from 6 February 1810 to 25



The promulgation of the Constitution of 1812, oil painting by Salvador Viniegra

August 1812, largely due to the seaside protection provided by the British Royal Navy¹⁹.

The result of such a martial anti-Napoleonic context of the Spanish constitutional process was the peculiarity of the nascent liberalism to be forged together not only with the resistance to the Spanish Bourbons but with all those who sought to politically combat the French influence on the country. Thus, the *Cortes* of Cádiz assembled a large number of Spanish liberals as well as orthodox conservative delegates. Their mission was, firstly, to act as the legitimate government-in-exile of Spain and, secondly, to draw up a constitution that would define political legitimacy in the coming years. In this, at least, they had the common goal of modernizing Spain.

In order to do so, however, they faced significant challenges. The first and most obvious was the French siege, preventing the *Cortes* from exercising any authority over Spain that it claimed to have. The

Cortes' reference to the sovereignty of the nation in this situation is paradigmatic for the second and most eminent challenge for the constitutional debates on the road to the so-called *La Pepa* constitution, adopted on Saint Joseph's Day (19 March) 1812. The delegates were facing the problem not just of determining what positions the majority in the *Cortes* would take on the question of state organization, but of defining what those positions meant in the constitution. At the heart of this challenge was a general disagreement over the terminology of "sovereignty" and "the nation", with the meaning of the latter influencing the meaning of the former. This was further complicated by the involvement of delegates from Spain's American territories, many of whom had been influenced by the example of the United States, and whose vested interests in the question of the nation were naturally different to those of the European Spanish delegates. In the political-constitutional

context, "nation" denoted the territory and the entirety of the people living in it. These people were subject to the same legal system, whose unlimited and indiscriminate validity expressed the national sovereignty²⁰. However, the nation also had a cultural meaning, as a body of existence not bound by territory but by a «sense of belonging». This emotional «imagined community»²¹ particularly came to the fore in the context of the War of Liberation against the French, and can be equated with patriotism. For the liberals of the *Cortes*, this was combined with the belief that defending against an external threat also required care to be taken about internal administration and the enactment of internal laws. Therefore, the liberty of the nation (or, rather, of the citizen of the nation) was not merely a matter relating to the defeat of the French but also the establishment of a government that would protect that liberty on a domestic basis²².

This dual meaning of "nation" in the Cádiz debates was superimposed on the fact that, on the larger scale of the insurrection against the French, Spanish patriots remained largely apolitical. This meant that their defence of Spain against foreign invaders was not tied to any particular state political system; theirs was not a fight for liberal Spain but for Spain regardless. This was one reason why, though the *Cortes* was successful in crafting a constitution in 1812, by 1814 it lacked sufficient support to be able to withstand the restoration of Bourbon absolutism. Another reason for this was that, though the *Cortes* was dominated by the aforementioned questions of nation and sovereignty from its very inception, it never came to a uniform agreement as to the answers to these questions. This was a result of the intellectual background of the

sovereignty doctrines, originating both in Spain and elsewhere, that were used, debated, and discussed in the *Cortes generales y extraordinarias* of Cádiz.

2. *The Spanish natural law basis*

Natural law theories base sovereignty on the initial, original contract bringing society into existence (*pactum societatis*). The contracting parties are, as Locke said, free, equal and independent in their natural status, where nobody is subjected to the political power of somebody else²³. The loss of individual sovereignty takes place voluntarily and is based on the *consensus iuris* of the contracting powers. In this way, people become a legal-political entity; in turn, sovereignty is vested in them as a whole rather than the individuals who comprise it²⁴. For the School of Salamanca, Francisco Suárez (1548-1617) characterized such a legal-political category, which he named "community" (*communitas*), by contending that it emerges not only by gathering of a great amount of people, but requires that the people «additionally join together in a federation, with the focus of one goal and under one leadership»²⁵. To the extent that communities were no longer interpreted as an expression of God-given harmony and part of Creation as a whole, but rather as self-sufficient entities, early modern theorists began to imbue the community with the highest power, referring to the natural law. As a result, the state became a construct of this idea; it was a community targeted on human cohabitation (*societas civilis*), as well as a sovereign power that achieved the community purpose (*majestas, summum*

imperium, summa potestas or supremitas). The state as the subject of the highest power was identified with a representative ruler's personality; depending on the form of government, this personality was expressed through an individual, such as a monarch, or a collective²⁶.

As people are individually incapable of exercising sovereignty on their own, they must transfer it to one or more persons. For this, it is necessary that the *a priori* unconnected "crowd" and "mass" of human beings without legal capacity (*multitudo*) is thought to be a subject, capable of making the transition into a legal community, facing the thereby legitimized «authority» afterwards²⁷. The people are collectively the holders of the «claim for accomplishing of the sovereign contract and keep a right of escheat of the mandated majestic right». This is due to the fact that they maintain their own personality in the process of constituting the state, and continue as subjects to limit the rights of the monarch²⁸. The obligation of the sovereign contract for the future is based due to the natural law interpretation on the idea that the character of the subject population is immutable. In effect, the people *currently* subject to communal sovereignty maintain the same characteristics and personality as those who *originally* subjected themselves to communal sovereignty. In this way, the contract could stay unaffected by the change from the unconnected individuals into the single conglomerate of "the people". Ultimately, the assumption that the people remain a homogenous, consistent, and reliable body and legal entity is only a fiction, albeit one that remained influential. A continuation of this fiction was the corporative state, in which the entirety of the people is repre-

sented in exercising their political rights through a corporative assembly, although the mandates were limited to the representatives of the estates.

There were efforts to overcome the corporative natural law understanding of the statal juridification of society. In particular, the sovereignty of Westminster parliament had a very specific impact²⁹. The legal battles between the common lawyers and Stuart absolutism are examined in depth in the essay *Coke's "Tales" about Sovereignty*, while the current state of research with regards British sovereignty discourse is masterfully demonstrated elsewhere in this volume by Lord Robert Reed and John W.F. Allison³⁰. The appeal of the "English brand" in Spain remains a research desideratum, but it seems certain that there was a Spanish and a Spanish-American reception of English ideas. At the very least, the adaptation of legislative power was concentrated in the hands of the parliament as «essentially and radically in the people, from whom their delegates and representatives have all that they have»³¹.

Together with the transition from the Christian to the secular interpretation of the natural law term of sovereignty, this resulted in the explanation of popular sovereignty as an actual exercise of fictive consent, thus precluding the formulation of any inhibiting element to the state power. The sovereign state power became legitimized on its own, becoming the master of its own competences by deciding on and expanding them arbitrarily³². This absoluteness of constituent sovereignty was communicated in France (1791) as well as in Spain (1812) in order to overcome corporative representation. Representing national sovereignty, as the *Cortes* in Cádiz claimed, was incom-

patible with any imperative mandate granted by autonomous corporations. Nevertheless, the transition from corporative to parliamentary representation was neither uniform nor immediate, either in European Spain or its imperial territories; delegates to the *Cortes* of Cádiz from Hispanic America had been imposed with instructions as late as 1810.

3. *The people as sovereign*

Francisco Martínez Marina's starting point in his analysis of natural law and its impact on the development of Spanish liberalism was to examine individual liberty within the *ab initio* natural status as *a priori* subject to the paternal power and the family. Nevertheless, sovereignty of the people, as the epitome of sovereignty of all individuals, is uniform and inalienable. The transfer of every individual part of the sovereignty only occurs temporarily, and is both revocable and limited. The same is true of the simultaneous concession of liberty. Hence, Martínez Marina claimed that the natural rights and the sovereignty stay preserved *in potentia*, to be revived in case of excessive limitations and the absence of legal protection, especially in form of legal remedies. This is the origin of the right of resistance in the natural law (*derecho de la justa defensa y resistencia a la opresión*) and the reason Martínez Marina ascribes this revival to the sphere of liberty rights³³. The supreme power is not owned by those being entrusted with its exercise, be it a single person like a monarch, or a group of people in terms of a corporation, since neither God nor natural law entrusted them with it, but instead the

people. In a hereditary monarchy such as Spain, the power to govern is based on the fundamental law (*ley fundamental*), which regulates succession and extent³⁴. The purpose of the transfer lays in the ensuring of general welfare (*bien común, bien general*), and in the pursuit of the maximal benefit for the citizen and their prosperity. This meant that the self-interest and arbitrariness of the government could be avoided³⁵. For Martínez Marina, this kind of popular sovereignty is established to oppose every kind of abuse of power, while at the same time guaranteeing the balance of powers, as well as the organization and safety of the state³⁶.

4. *Difference from Rousseau's and Hobbes' ideas of sovereignty*

Martínez Marina did not distinguish between the terms sovereignty of the people (*soberanía popular*) and national sovereignty (*soberanía nacional*). Both terms were partially used interchangeably in the same context³⁷. Certainly, he rejected Jean-Jacques Rousseau's concept of popular sovereignty as little more than a modern remaking of Thomas Hobbes' permanent, irrevocable, therefore absolute disposal of all rights, which denied any individual freedom to rest with the citizens. To Martínez Marina,

[t]he basis in the system of Rousseau is the same as of Hobbes. Consequently, there exists in the community itself a highest, unlimited, political power. It is the result of the complete disposal of every individual with all options and with all rights without any reservation towards the community³⁸.

Rousseau's conception of the general will argued that all people making themselves available to the community thereby create a situation of equality and a perfect union; as no one would have a vested interest in complicating anybody else's condition, there would be no further claim by outside parties to influence that condition. In surrendering some liberty, each person also benefits³⁹, since this expropriation is in favour of the whole community; consequently, every member's position is strengthened⁴⁰. Ultimately, everybody puts person and power under the control of the general will, which places itself above any antagonistic self-interest that exists between individuals and, in the process, becomes universal. The general will is the only source of law, which cannot be unjust – as nobody can be unjust to himself⁴¹.

Rousseau's general will was the archetypal product of the French Enlightenment. In Spain, however, it clashed with the two dominant schools of thought that influenced both Fernando Martínez Marina and most of the liberals of the "generation of 1812". On the one hand, it did not agree with Christian natural law, which generally saw the common good (*bien comun*) as being an objective reality within the nature of things, independent from individual decision-making processes or a hypothetical general will⁴². Neither did it sit comfortably with the concept of parliamentary representation, which based the political decision-making upon the antagonistic interests of individuals and groups, and the corresponding process of adversarial negotiation and compromise that would accomplish such decisions. It was exactly a parliamentary representation by independent delegates, represent-

ing different and antagonistic interests, that the national sovereignty in the Cádiz constitution required. In addition to this anti-Rousseauian content, the Spanish liberal understanding of national sovereignty included the deliberate recourse to a conservative traditionalism (*historismo racional*)⁴³.

5. National sovereignty as conservative concept?

The liberal doctrine of national sovereignty is based on the idea that all powers in a state derive from the nation. In the Spanish case, this meant that only the nation had the right, embodied by the constituent *Cortes*, to create a fundamental law (Art. 3, half-sentence 2 of the 1812 constitution)⁴⁴. The exclusive competences of the king were also subject to the supervision and control of popular representation⁴⁵. This demonstrates the character of the direct relationship between the people (or rather, collectively, the nation) and the state authorities. The king may have remained the first and most noble citizen by dint of his role as head of state, but even this description betrays the fact that he could no longer rely on heavenly-anointed absolutism as the well-spring of his legitimacy; his rights derived from his citizenship, and his power from his position in the state hierarchy, rather than from birthright⁴⁶.

Though the Cádiz delegates by and large embraced liberalism, and the resulting constitution was certainly a liberal document, they were still influenced by other precedents. Indeed, Martínez Marina referred repeatedly to the doctrine of Juan

de Mariana (1536-1624), the Scholastic and historian whose works were widely known since the late Scholastic period. De Mariana assumed that state power would be exercised both by the monarch and the people together, even after the transition to popular representation⁴⁷. This dualism was represented by most of the conservative delegates in Cádiz, and deviated from the liberal understanding that sovereignty was inalienably and inseparably exclusive to the nation⁴⁸. Because of this, the historiography tends to view Martínez Marina as having taken a conservative stance. This is also suggested by the fact that he referred repeatedly to the delegation of the supreme authority (*autoridad suprema*) to one or more people, by which Martínez Marina distanced himself from the idea of the inalienable and inseparable sovereignty of the nation⁴⁹.

Such an assessment presumes that the Cádiz debate on national sovereignty was consistent and consequent in all aspects. Yet this was not the case. Indeed, Martínez Marina and other moderate liberals engaged in dynamic and complex formulations regarding the nature of the state, and they did not apply a singular methodology. On the one hand, Martínez Marina stressed dualism between king and people as having historical roots, which he argued especially in his *Ensayo histórico-crítico* and in the *Teoría de las Cortes*; often he treated the dualism as being more democratically favourable to the *Cortes* and the communities than was justifiable. Even Montesquieu, who influenced him on the interpretation of the maxim of moderation⁵⁰, gains greater importance in Martínez Marina's historic argumentation. His idea of adjustment and balance of different

societal and political functions was more suggestive of a separation of sovereignty, rather than unity.

On the other hand – and this seems to be the most relevant aspect – Martínez Marina's later works on state theory and philosophy steadfastly defended the principle of national sovereignty, including its liberal consequences. In his 1813 treatise, *Principios naturales de la moral (Natural Principles of Morality)*, he argued that

[t]he sovereignty as unlimited and highest power belongs and lays naturally and essentially at the nations. Herein exists the centralization of all essential principles and fundamental laws of public freedom in sovereign, independent states and especially in representative forms of government. There is no legitimate power, but the power which is based on the sovereignty of the people⁵¹.

To Martínez Marina, the derivation of all public (especially monarchical) competences was as explicit as the commitment to Article 2 and 3 of the Cádiz constitution: «The king rules according to the laws and has to adapt the public opinion and the general will, which he performs, while he is exercising the highest power. The authority of the nation is higher in the hierarchy than the authority of the kings»⁵². Both statements were connected to the aspects of «inalienability» and «inseparability» that were central to liberal sovereignty doctrine. In the end, regardless his inconsistent formulations and the influence of the Spanish legal tradition of the Scholastics, Martínez Marina represented the positions of the liberal majority in Cádiz.

III. *The sovereignty of the nation as controversial issue in the constituent assembly*

The determination in Art. 3 of the constitution, «that the sovereignty belongs essentially to the nation and only the nation has the right to pass a fundamental law», points to the most important questions discussed in the Cádiz constituent assembly: What was meant by the term “nation”, as opposed to the term “people”? What did it mean to say that sovereignty was “essentially” vested in the nation? In what way, if any, could other groups or individuals than “the nation”, especially the king, be part of this sovereignty? The term “nation”, defined in Art. 4 of the constitution in the sense of an association «of all individuals it consists of»⁵³, was in currency in the theoretical literature of the second half of the eighteenth century, referring to the Spanish monarchy and the contribution of the individual subjects to the welfare of society⁵⁴. As in the case of the (until then monarchical) sovereignty, the decisive aspect that developed the terminology of the constitutional protagonists in Cádiz was the shift in sovereignty’s reference point, from its embodiment in the monarchy to the nation. At the same time, this shift of constitutional terminology away from individuals (from whom the monarchy and nation exist) indicates a movement towards bourgeois usage, which coincided with a series of Spanish economic reform theories that were by this stage becoming more and more important. These, like in the case of Bernardo Ward’s “economic plan”, aimed to mobilize the societal elements that could be considered bourgeois⁵⁵.

1. *The term “nation” (Art. 3 in conjunction with Art. 1)*

The fact that the constituent assembly explicitly used the term *nación* (nation) to denote the holder of sovereignty, as opposed to the frequently-used term *pueblo* (people), suggests that it intended to distinguish one from the other. On the other hand, these different terms could have the same meaning, though the legal definition provided in Art. 1 of the constitution does not clarify this either way. Therefore, the term “Spanish nation” can be understood to mean “the community of all Spanish people of both hemispheres”, thus the European and the oversea provinces of the kingdom⁵⁶. There was nothing here to suggest that the nation should be considered as the people in a natural, sociological sense; it was not required to be the epitome of common descent, historical past, culture, or language. Art. 5 of the constitution, which concerns itself with territory, defines the term “*españoles*” (Spaniards) in connection with nation (Art. 1). This comprised the entire population of dominion of the kingdom (*dominio*), either born or settled there, including all freemen or released slaves and their children, as well as foreign migrants to whom the *Cortes* granted the formal rights of citizenship. Thus, the Spanish nation was not merely a construction of the white European population, but also the indigenous peoples of the Spanish colonial empire (*indígenas*), as well free inhabitants whose descendants in one or both lines originated in Africa (*castas, castas pardas, pardos*)⁵⁷. However, according to Art. 18 ff. (*De los ciudadanos españoles*), not all Spanish people were deemed citizens. In order to be so, both parents had to descend from a Spanish

province (in either hemisphere). Consequently, Spanish people descending from African bloodlines did not have the rights of citizenship (Art. 22), though they could subsequently gain those rights under very strict conditions. The American delegates mostly rejected this regulation⁵⁸.

It has been suggested that the constituent assembly interpreted "nation" according to Art. 3 in conjunction with Art. 1 of the constitution, as the people as a whole in its concrete and willful existence – either, as the conservatives argued, as a community under a highest authority or, as interpreted by the liberals, as the sum of individuals, who build a state. In any case, nation has not yet been interpreted as a moral category that differs from the people and is a superior unit⁵⁹. This is indicated, on the one hand, by the fact that this criterion only later differentiates the national sovereignty from the sovereignty of the people and, on the other hand, by the comparable usage of both terms in the French National Assembly of 1791⁶⁰. In the French National Assembly of 1789 and of 1791, the terms "people" and "nation" were used interchangeably. Neither developed the theoretical differentiation between "the people" (*peuple*) as the whole of the citizenry in the individualized meaning of Rousseau, where every individual (but not the nation) could claim a real proportion of the sovereignty, and "the nation" (*nation*), which possessed (in an abstract meaning as an inseparable and impersonal unity) the whole power of the state. The equation continued in the understanding of representation, in which delegates represented "the whole nation", meaning the people as whole⁶¹.

Conversely, some propose that at least the liberal delegates in the *Cortes* under-

stood "nation" as an entity standing above and differing from all individuals, but did not know yet how to separate both terms. It was only because they started from the concept of the nation in the modern sense that the *Cortes* deputies were able to differentiate between Spaniards and Spanish citizens, in the same manner that French liberals in 1791 differentiated "active" and "passive" citizens⁶². A third explanatory approach for both terms is based less on the literal interpretation of Art. 1 and 3, and more on the self-conception of the *Cortes* as it existed within the context of the time and with its background. The assembly of Cádiz represented a popular, romantic meaning the idea of "a nation", but not a juridical-political meaning of "the people". Provisional measures, like the appointment of several substitutes for the delegates, and revolts among the American colonial populations against the Spanish centre, were incompatible with actual representation. Thus, «the people were not represented by the delegates in juridical-political standard; the nation was represented in a romantic meaning by everybody»⁶³. This conclusion, though probably an exaggeration, may go some way to explaining why the constitutional fathers had a preference for the term "nation" and the principle of national sovereignty. In this, too, the intellectual preparations for a later constitutional legal application of the term "nation" may have played a part, as they had during the time of the Bourbon reforms in the eighteenth century⁶⁴.

However, while this might explain why and how the assembly chose its terminology, it does *not* explain what meaning the assembly imparted to those terms. Certainly, the arguments of the Cádiz liberals can be

cited for each of these interpretations. All they suggest, though, is that there was no uniform and consolidated idea of what the nation was. Rather, the only indications of a common line of interpretation come from the discussions surrounding an alternative proposal that was made by the conservatives. This proposal attached importance to the determination within the constitution that the nation was not an actual conglomeration of the Spanish people, but an association «under a certain constitution or monarchical government and their legitimate sovereign». Herein lay the internal cohesion of the union, connecting the people in terms of a true association (*asociación*)⁶⁵. The liberal majority rejected this proposal on the grounds that the nation should not be linked to a certain form of government or state. Further, there was disagreement over the meaning of the term “*reunión*” in Art. 1 of the constitution. Some understood the *reunión* to be a “moral person” (*persona moral*)⁶⁶ or, rather, a “moral entity” (*ente moral*)⁶⁷, which differed from the population and other nations. Along the same lines, the nation was classified as a “moral body” (*cuerpo moral*), which is based on the self-determined agreement and association of free people⁶⁸. The justification for this can be found in Rousseau. The *reunión* was not a connection of different territories, but of the human will (*voluntades*). Thus, *reunión* signifies the general will (*voluntad geral*), which would form the basis of the state constitution⁶⁹.

However, the interpretation of the nation as a superior entity, differentiated from the individual, does not seem to have been the prevailing view within the liberal delegates. Not only did it conflict with their common reservations about the doctrines

of Rousseau, but also with the wording of Art. 1 of the constitution itself. Art. 1 called for the «reunion of all Spanish people of both hemisphere» and, in this way, identified both a territorial point of connection («both hemispheres») and a personal one («all Spanish people»). With reference to this wording, the nation was defined as a connection of individuals in their sum or “mass”. In other words, the nation was the association of individuals living together with all citizen of communities of the whole territory⁷⁰. The relevant criterion was formal nature and, apparently, borrowed from Sieyès: The nation is a union of those who, according to their own decision, live under the same law and are represented by the same legislative power⁷¹. Even more divergent from the nation as a moral entity and an ideational category were the conservative liberals, who tried to avoid any references to the merging of individuals in the natural state. Instead, the basic unit of society was the family, and the creation of communities resulted from the unification of familial groups⁷².

The special perspective and interests of the Spanish-American delegates explains why they stressed the territorial aspects and attached importance to dualism, exemplified by the wording «the association of Spanish people of both hemispheres». Due to this view, the nation was primarily defined in a geographical context, as a «nation of both worlds» (*la Nación en ambos mundos*)⁷³. Following this approach, the deputy Ramón Feliú understood the Spanish nation in a natural law context as an association of different provinces assembled by individual towns, with those towns in turn constituted by their inhabitants⁷⁴. Each of these entities should be sovereign

of its own, like an *individuum*. This, however, would have caused the dissolution of the uniform term of sovereignty; even if sovereignty was formally described as «one and indivisible» (*la soberanía una é indivisible*), it would have been existing out of «actual and bodily different entities». The provinces were the result of the sovereignty of the single townships (*soberanía de los pueblos*) and, from the sovereignty of the single provinces, the sovereignty of the whole nation resulted (*soberanía de toda la nación*). Consequently, the representation of the nation should only be possible if each of these single entities, which together build the sovereignty of the nation (or rather of the kingdom), are represented equally, proportional to the number of the single sovereign provinces⁷⁵. In a different context, José Mejía Lequericas also argued in the same vein that the towns of the kingdom in their sum constitute nothing else than the nation⁷⁶. Like Feliú, the Spanish-American Lequericas aimed to strengthen the claim for equal representation in relation to the provinces of the mother country. In essence, the claim already contained the starting point, substantiated with natural law, for the separation of the oversea provinces: Every province on its own could claim sovereignty and the sovereignty of the Spanish nation was only an addition of this original rights. This argumentation was at the same time compatible with a federal model, which conceded sovereignty to the single entities of the federation, like in the United States, and which prevailed later in the larger Spanish-American states, such as Mexico and Argentina. By contrast, this approach was not compatible with the unitary concept of the Spanish delegates in Cádiz, who equated theoretically federalism with

republicanism and were politically afraid of the consequences of a secession. The concern about the American “*provincialismo*” – besides the concern about the loss of the parliamentary majority of European Spain – resulted in the overseas provinces not being granted the same representation in the constituent assembly; this was only resolved for the later ordinary *Cortes*⁷⁷.

In this context, it was also understandable why the Spanish-American delegates in Cádiz preferred to refer to the conception of nation as the epitome of quasi-familial associations. To this point there were connections to Martínez Marina and the conservative liberals. In particular, it was possible to connect this approach with the aforementioned territorial aspect, thereby concluding that the nation was an association of provinces and towns. This association was held together by the king as head of the state who, as a moderating authority, balanced concurring interests and put the members of the community (union) into their rightful place⁷⁸. By the same reasoning, if the king were absent as a unifying element (*punto de union*), the communities would be susceptible to an outpouring of unmoderated and parochial passions, as well as serious conflicts of interest⁷⁹. Here, again, we return to the aforementioned formulation that had dominated Spanish literature of the eighteenth century and made its way into Art. 4 of the 1812 constitution: if the union «of all individuals it consists of» refers either to the monarchy or the nation⁸⁰, it appears in this Christian-paternalistic approach to be an association of family members. Certainly, the references to individuals and guiding laws indicate similarities with the modern concepts espoused by the liberal majority in the *Cortes*.

In reality, though, the nation was founded on a spiritual connection, namely the community feeling (*unánimes sentimientos*) of the smaller and larger members of the association alike, as determined by a common faith. In this context, the traditional role of the “father or king” as the guardian of the law differs from the role of a constituted power in the liberal state sense, in which it performs a derived, defined and allocated function in the state structure as an institution of the constitution⁸¹. From the point of view of the European delegates in the constituent assembly the recourse to the Spanish legal tradition and the connection of the single elements of the monarchy via the personal loyalty to the king resulted in a relativization of the term “nation”. Unlike a Spanish national state (*Estado nación*) as a uniform entity (*ente nacional*), a monarchical union was founded on a number of autonomous administrative units that had already been implemented as pre-national entities⁸². Not least because of this, the American delegates placed significant importance on a reasonable institutional scope for overseas self-administration. They intended that every province would be administered by its own governmental junta (*Junta Gubernativa*) or deputation of provinces (*Diputación de Provincia*), and every community would have its own local council (*cabildo*) as a representative body⁸³.

At the same time, the American delegates saw the oversea population as having a privileged relationship with the kingdom (*naturaleza*). This was based on the special status of the original Spanish settlements and colonies in America, whereby the inhabitants (*naturales*) owed loyalty only to their community and the Spanish king in return for the special rights granted by the

crown. The self-conception and the terminology of those “*naturales de los reinos de España*” goes back to the special position of certain Castilian communities, who since the fifteenth century had enjoyed a preeminent position in the exercise of office and the usage of clerical privileges⁸⁴. From the perspective of the American delegates, then, the claim for treatment equal to that of European Spain and its provinces, and awareness of a certain historical role, were two sides of the same coin. The political conclusion of the American delegates, due to their “provincialism”, was that every autonomous part of the whole, which belonged to the Spanish monarchy, must be considered as equally constitutive as the others. However, if the monarch was missing as a combining element (*punto de union*), the result of the collapse of the unified state, including the contractual basis, became more probable, as some of the American delegates reminded the *Cortes*⁸⁵. On the other hand, they tried to allay the concerns about federal tendencies and a federal state. But their choice of words consistently demonstrated the influence of the North American constitutional model, insofar that the commitment to the state union was mingled with federal or republican argumentation lines used in Philadelphia by the Founding Fathers of the United States, as well as by the constitutional interpreters who authored the *Federalist* papers. One notable example is the occasional references to «factions» (*fracciones, facciones*)⁸⁶, where the cited New-Spaniards curiously adapted the Anglo-Saxon linguistic usage to the Spanish conception of a moderate monarchy. Anxiety regarding disputes between the parties had been a primary motivator for the development of the

North American federal system, because the Constitutional Convention of 1787 believed that the feared over-empowerment of strong groups could best be overcome by a decentralized state structure. Another example of Philadelphia's influence on the Spanish-American delegation is the use of the term «republic» (*república*), which the European Spanish delegates assiduously avoided even in its classical sense⁸⁷.

2. *Divided or indivisible sovereignty?*

In the 1812 formulation of the Spanish constitution, sovereignty lay «essentially» (*esencialmente*) with the nation. This was a deviation from the French model of 1791, which the Spanish constitutionalists otherwise used as a template. Instead it reflected the programmatical debate in the constituent assembly as a whole, and contained the explication (but no limitation) of the term of sovereignty. The conservative delegates argued that the constitution should include strong provisions for the king, and a weakened version of Art. 3; Sovereignty was supposed to lay «originally» (*originalmente o radicalismo*) with the nation, but actually and effectively with the king⁸⁸. In contrast with the term «originally», the liberal majority of the constituent assembly intended to stress «that this [right of sovereignty] is inalienable and the nation cannot separate itself from it»⁸⁹. In other words, the liberals tried to underline that sovereignty was “inherent” to the nation, that it was “immanent”, and indeed was its original characteristic⁹⁰.

More controversial than the question of the inalienability was the question of the

indivisibility of sovereignty. This prompted a stark division between the liberals and the conservatives. The majority of conservative delegates advocated the dualism between monarch and people that had been promoted by Juan de Marianas, and argued this during the 1812 Cádiz debates through the publication and distribution of several pamphlets⁹¹. The most important proponent of this theoretical position was Gaspar Melchor de Jovellanos, who relativized the principle of national sovereignty in the interpretation of the *Cortes* of Cádiz, as it was expressed in the ceremonious promulgation on 24 September 1810. According to Jovellanos' argumentation, the extraordinary *Cortes* performed the sovereignty and particularly the substantial part of the legislation, in its role as the representative of the nation. This was the crucial point to Jovellanos' claim that it would be heresy to claim that sovereignty lay with the nation; the monarchs in Spain had always been sovereign, but this did not necessarily mean that sovereignty itself was indivisible⁹².

The conservative critics had two objectives. Theoretically, they turned against the abstract-rational idea that the people or nation, as a superior ideational category or the sum of the individuals, could concentrate unlimited and irrevocable authority on themselves through the auspices of empowered representatives. In political terms this would signify that the authority of the king would be weakened, and Ferdinand VII would be totally dependent on parliamentary demands after his return from the exile⁹³. The proposed solution to this problem was “divided sovereignty” (*soberanía compartida*), whereby sovereignty was not interpreted as an absolute but as a relative term. On an abstract level, the nation was

considered sovereign and its power superior to all political organs (*supremacia*), because it was theoretically both the starting and reference point for the authority of the state. The nation obtains at least “virtually” the full sovereignty (if not “essentially”)⁹⁴. *De facto* and in political terms, only the monarch and another body equipped with legislative and executive competences were sovereign, as only a real «highest and independent rule» (*imperio superior y independiente*) ensured governmental action. This also meant that the remaining legislative competences, which were performed by the parliamentary representatives of the nation, set only external limits to comprehensive authority and were restricted to a simple fraud control⁹⁵.

This position should not be considered as a plea in support of Bourbon absolutism, for its proponents advocated real limits to be placed on monarchical power by the *Cortes*. However, they sought to do this through traditional constitutional measures, whose limitations and regulations, which had been abolished through the practice of absolutism, they intended to restore⁹⁶. Such a doctrine of “divided sovereignty” – connected with the juxtaposition of a “virtual”, theoretical authority of the nation on the one side and the «highest and individual rule» of the king on the other – became the basis of the restoration only a few years later and the revival of the monarchical principle after 1814; even though the Spanish kings performed their legislation in a traditional capacity, they accepted the old costumes of the nation as their fundamental law. Since Teutonic times, the kings had never been monolithic deciding figures, but made important decisions in conjunction with the nobles of the nation⁹⁷. This idea of the di-

vision of sovereignty persisted even to the royal statute of 1834⁹⁸. Finally, a further differentiation was a useful reaction to the positions of the liberals, as well as the exceptional circumstances of the liberation war. Jovellanos considered it possible that a different body could be temporarily entrusted with the exercise of sovereignty, in the event that there was an external influence on the sovereign ruler (and thus on the holder of state power) that thus hindered his ability to exercise it himself. This, he felt, would only be a temporary measure that did not bring into question the actual allocation of sovereignty itself⁹⁹. The temporarily-exercised executive and legislative authorities would be surrendered to the ruler after the influence that necessitated their reallocation was overcome, as effectively happened in 1814. With the reality of the popular uprisings against Napoleonic rule, and the absence from Ferdinand, this was argued differently. The liberals saw herein the confirmation of the true, inalienable and indivisible sovereignty of the nation. Many conservatives, though, saw the role of the *Cortes* as being a shift of power that was dependent only on circumstances; once the war ended, it would immediately revert to its prewar situation. This meant that every initiative to adopt a new constitution, which amounted to a permanent reorganization, could be considered illegal¹⁰⁰.

3. *Patrimonial jurisdiction*

Apart from the debates in the *Cortes* on Articles 1 to 3 of the constitution, the indivisibility of national sovereignty was also subject to discussion regarding its con-

crete application, namely the allocation of the patrimonial jurisdiction (*señores jurisdiccionales*). The term “*señorío*” meant the entirety of all secular and clerical powers of the lords of manors (*señores, propietarios alodiales*). One of these powers was the jurisdiction over the people living on the lands, which had never been unlimited and was exercised differently in the various Spanish territories. The administration of justice in civil and penal cases had been exercised by the lords of manors on their territories since the *Reconquista*. The administration of justice involved the appointment of judges and the reservation of a decision in last instance. Valencia and Galicia, the most densely populated areas, had the highest density of secular and clerical *señoríos* in Spain¹⁰¹.

The *Cortes* of Cádiz repealed the patrimonial jurisdiction by decree on 6 August 1811, before the approval of the constitution¹⁰². This included the abolition of the personal charges and special privileges, as well as sovereignty (Arts. 4, 7). After the adoption of the constitution, patrimonial jurisdiction became incompatible with Art. 244 and Art. 248; furthermore, the constitution insisted that equal general law and ordinary public jurisdiction would apply to all people, with the exception of those within the clerical and military jurisdictions (Art. 249 f.)¹⁰³. The lords of manor did not offer any significant resistance to these reforms, because the repeal of the patrimonial jurisdiction had no effect on their property rights (*señorio territorial*). The previous rights, which had been ambiguous, were rather transformed in civil property titles. Rather than weakening them, these alterations had the effect of strengthening the legal positions of the lords of manors, compared to the

farmers working on the land¹⁰⁴. The great importance that the *Cortes* attributed to the protection of all competences related to assets emerged from the fact that the decree contained compensations for former legal owners for the loss of privileges (Art. 10 ff.).

Be this as it may, both the debates and the repeal of patrimonial jurisdiction provide evidence that conservative delegates already regarded traditional privileges as anachronisms. In this, moderate conservatives and liberals alike were in general agreement¹⁰⁵. Agreeing on how to proceed from this position, however, was a more difficult proposition. In the context of the repeal of the patrimonial jurisdiction, the conservative delegates supported – or at least did not actively reject – an incorporation of this jurisdiction to the competences of the crown, which was based on the sovereignty of the monarch. The jurisdiction in civil and penal cases was a competence of the king. Thus, if the people agreed by contract to the king’s right to rule, then the public principle that the personal sovereignty and the jurisdiction are united in the person of the ruler must also apply¹⁰⁶. Counter to this, the liberals justified the allocation of patrimonial jurisdiction to the *Cortes* – as it was determined by Art. 1 of the decree – with the argument that national sovereignty was indivisible. Only with the repeal of all privileges and the allocation of all authorities within the nation could civil liberty and equality of the law be ensured¹⁰⁷. Only the nation could represent general wellbeing, while every other possible allocation of sovereignty and competences would result in the public’s dependence on the variable will of empowered individuals. The repeal of the patrimonial jurisdiction and the separation from the administrative

competences of the king demonstrated that the liberals were motivated to take precautions against arbitrariness and the concentration of power. To ensure the separation of powers, which has been promulgated by the *Cortes* before, and the equilibrium between the competences of the bearers of the powers, the exercise of the jurisdiction was laid only in the hands of the judges, while the executive power was laid in the hands of the king¹⁰⁸. The representatives in the *Cortes* saw no contradiction in the inalienability and indivisibility of sovereignty on the one hand and the separation and mutual limitation of public authorities on the other. In fact, the second principle was considered to be a consequence of the first.

IV. *The early constitutional texts of Spanish America*

Apart from isolated local uprisings organized by conspiratorial revolutionaries, such as the unsuccessful revolts led by José María de España and Manuel Gual in Venezuela in 1797, or those by Francisco de Miranda that followed them, the city councils (*cabildos*, *ayuntamientos*) almost everywhere in Spanish America seized the initiative for emancipation. They tried, based on the model established by the first European Spanish revolutionaries in 1808, to convert the Creole elites to autonomous committees (*Juntas*). In the southernmost reaches of New Granada, the Creole «governmental Junta» of Quito was the first, ultimately unsuccessful, example. Between August and October 1809, the junta led the government of the Quito province, declaring itself not only to be «sovereign» (*la so-*

berana junta Gubernativa), but also claiming the title «majesty», which had previously been reserved only for monarchs. This set the tone for further developments in Spanish America¹⁰⁹. Emancipation soon found success in the Viceroyalty of Río de la Plata in 1810. In the same year, albeit with some setbacks, New Granada also followed suit. The reason for this political upheaval was the dissolution of the Spanish central junta and its replacement by the regency council, whose legitimacy was denied by the Creoles. In Buenos Aires, a public assembly of the city council (*cabildo abierto*) was held and, shortly afterwards, a provisional governmental junta (*Junta Provisional Gubernativa*) was formed, which tried to enforce its claim to power against the provinces; this was the so-called May Revolution. Like the governmental junta of Quito, the members of the May junta invoked the legal fiction that they were the representatives of the Spanish king in order to «keep the integrity of this part of the American empire» for the king and his descendants¹¹⁰. These statements were not only politically opportune, insofar that they legitimized the revolution, but they also reflected the basic experience of colonial history, if not Spanish history in general, that only the person of the king held the institutional body of the monarchy together and that only the king could protect the subject in last instance from arbitrariness. Only the viceroy, as the «reflection» or «alter ego» of the king, shared in this position. But the superior position of the viceroy was merely an attempt by the Spanish crown to solidify the personal attachment of the oversea subjects to the distant monarch¹¹¹. If the civil servants acted unjustly, the king did not, and resistance against local authorities did not necessarily imply resistance against

the monarch¹¹². The political goals of 1810, though, went beyond this, as can be seen by the demand to exercise the highest power until the assembling of a central junta for the whole viceroyalty (*Junta Central de Virreynato*)¹¹³. This demand, along with the parallel political developments in Spain as well as the actions of the central junta, which made its initial preparations to convene the constituent assembly, already lay the groundwork for the eventual independence of Argentina, six years later. Fundamentally, the issue to be resolved was the question of who was sovereign. Any mention of the king was little more than rhetorical; his renewed enthronement was only a secondary issue, as far as the more radical revolutionaries had not rejected it altogether¹¹⁴. Additionally, ever since the May Revolution, the provinces in the north of the Río de la Plata (which would ultimately become the states of Uruguay and Paraguay) successfully denied Buenos Aires' claim to govern them. In this way, as early as 1810 preliminary steps had already been taken to divide the Viceroyalty of Río de la Plata into several distinct nation-states.

The actions of the city councilors of Buenos Aires were emulated in early 1810 by those of Caracas. On behalf of all of the provinces of the Captaincy General of Venezuela, the city junta declared itself the 'highest committee, defending the rights of Ferdinand VII' (*Suprema Junta Conservadora de los Derechos de Fernando VII*). The committee formally recognized the legitimacy of the king, living in the French exile, but denied the authority of the provisional Spanish government, the governmental council of Cádiz (*Consejo de Regencia*). Characteristically for the Creole argumentation, the Venezuelan councilors

justified their revolutionary demands with reasoning grounded in traditional Spanish natural law. The junta demanded the exercise of sovereignty for Venezuelans, which had reverted to the people due to fundaments of the old Spanish constitution¹¹⁵. While individual provinces, such as Coro and Maracaibo, declared themselves loyal to the Spanish governmental council and denied their support to the Caracas junta, the remaining provinces of the Captaincy General followed Caracas' example, and the first constituent assembly of Venezuela was convened in March 1811. Much as the Spanish constituent assembly in Cádiz did shortly beforehand in 1810, his assembly declared its full sovereignty and the representation of the people, and combined this proclamation with the ceremonious declaration of independence of Venezuela on 5 July 1811¹¹⁶.

Against the background of these events, it is clear why the term "sovereignty" was attributed such importance in the early constitutional texts of the overseas Spanish territories. This applies especially to the first texts, in which state emancipation, which had not yet been guaranteed, was claimed with particular emphasis. Thus, the first constitution of Venezuela, with its various definitions of sovereignty, almost presents the entire modern history of the term's development: the constitutional fathers referred to the Christian-Scholastic tradition, insofar as the sovereignty (*soberanía*) or, more accurately, its synonym of the highest power (*supremo poder*) was vested originally with the «mass of inhabitants of the country» (*en la masa general de sus habitantes*) (Art. 144, first half-sentence). Owing to the idea of Christian natural law, the transference of state power

required that the still unconnected and legally non-competent “crowd” or “mass” of people became a subject capable of order, who could thereafter take the reins of control¹¹⁷. The Creoles agreed with the idea that only through the voluntary surrender of individual sovereignty would the people gain the legal-political quality that would make it possible to exercise the power that had previously belonged to the individuals. The society, once founded on the basis of a contract, would now possess the highest state power, which would be, in accordance with Bodin, «indispensable, inalienable and indivisible» (Art. 145, second half-sentence)¹¹⁸. The most major step towards the principle of representation and constitutionalism lay therein, that the commissioners or the representatives of the people (*apoderados y representantes*) – elected according to the constitution – exercised the highest state power (Art. 144, second half-sentence).

Like this first constitution of Venezuela (Art. 144, first half-sentence), most of the others also followed the aforementioned legal definition, which can be traced back to Algernon Sidney, that sovereignty lays “essentially” with its carrier, be this the people, the nation, or the inhabitants¹¹⁹. The terminology of the Spanish constitution of Cádiz was literally used in the constitution of Gran Colombia of 1821, as well as in the first Peruvian texts¹²⁰. This also applied to the proclamation that these nations «will never be property of a family or a person»¹²¹. As far as they were declaring the independence from the Spanish monarchy, the constitutionalists of Spanish America used this proclamation, which was originally envisaged on the Spanish peninsula to act as an instrument against the French

emperor and the newly-established Bonaparte dynasty in occupied Spain, against the motherland itself.

It is characteristic of the close connection in the history of ideas between the debates of the constituent assembly of Cádiz and the constitutional fathers in overseas Spanish territories that the most discussed theoretical question of the *Cortes* has been revived in New Spain, though it was answered differently. According to the constitution of Apatzingán, «the sovereignty lays originally in the people and is exercised by the people»¹²². The addition of the term «essentially» (*esencialmente*) in Art. 3 of the Spanish constitution created a certain connection with Revolutionary France (as opposed to Napoleonic France). In contrast, the accentuation of «originally» (*originariamente, radicalmente*) alluded to a more traditional character of the principle of national sovereignty. The Mexican delegates in Cádiz already favored this character, and it is therefore unsurprising that it was used in the first Mexican constitution soon afterwards¹²³. While the texts in Gran Colombia (1821) and Peru (1822/1823) used the progressive French (and Spanish) formula, there was also a third alternative that left the decision open, using both termini side by side. This was the decision of the constitutional fathers of the first Venezuelan republic, when they furnished the sovereignty with both attributes – «essentially and originally»¹²⁴. This corresponded with the original terminology of Algernon Sidney, which predated all of the Spanish debates¹²⁵.

The common indecisiveness between traditional and modern concepts on the one side and those that were more successful in Continental Europe or in North

America on the other side is reflected in a further attribute of the sovereignty: while the texts of the third decade of the nineteenth century (Gran Colombia, Peru) agreed with the Cádiz assembly's principle of national sovereignty, the earlier texts of the second decade left this question partly open. This way, the constitutional fathers of the first Venezuelan republic allocated the sovereignty sometimes to the «mass of inhabitants» (Art. 144, first half-sentence), sometimes to the nation (*soberanía nacional*, Art. 197, second half-sentence), and sometimes to the society as a whole (*soberanía de la sociedad*, Art. 143 and Art. 145, first half-sentence). In the first constitution of Mexico, sovereignty was exercised by the national representation (Art. 5), but in this early stage of the emancipation, there was no clear legal constitutional concept of sovereignty. Apart from the strong substantial effect of the Spanish legal tradition, the United States also acted as an example that tied sovereignty to the people («we the people»). Only after the states were consolidated as national entities could the nation be established as the carrier of sovereignty. In Spain's overseas territories, the foundation of the states occurred before the building of a nation, but the French National Assembly (1789-91) and the *Cortes* of Cádiz (1810-12) already founded national states, and claimed therein both representation (of the nation) and (national) sovereignty. By contrast, the lack of consolidation of the national entities in Spanish America and the uncertainty concerning the shape and form of constituting bodies, contributed to the indecisiveness of the terminology.

V. Conclusion

Indecisiveness over the terms "nation" and "sovereignty", and the inaccuracy with which both were used, has been a significant point of interest for the ReConFort project in its first two research phases. Early nineteenth-century Spain thus acts as an illustrative case study. In the conceptions of the School of Salamanca, which "passed" natural law from theologians to jurists, monarchical sovereignty was not of divine but human origin. The justification for this secularization¹²⁶ relied on the legal argument of the transition of sovereignty (*translatio imperii*); monarchical sovereignty came from God by means of the community of the human beings, whose social nature included their natural legislative power¹²⁷. It was the old dualism between monarch and estates that survived as a secularized model of the biblical covenant between God and his people. Irrespective of any French influences on Cádiz constitutionalism¹²⁸, the prevailing discourse patterns with regard to national sovereignty relied on the mutual power of people and king¹²⁹. Any idea of one homogeneous will embodied in the nation was bound to fail, as the *Cortes'* main focus was not on abstract egalitarianism of a human society born out of a natural state, but rather the real and pressing conditions and circumstances of a formal global power in the midst of both internal and external conflict¹³⁰. The metaphorical equivalence between the human organism and the political community in late Scholasticism¹³¹ led to the understanding of the nation as an organic unity¹³². People (*pueblo*) describe the population in different territories or kingdoms of both hemispheres, rather than an homogenous political entity. According

to the Scholastic doctrine of the seventeenth century, the Spanish nation consisted of the Castilian and Indian communities (*comunidades*), people (*pueblos*), republics (*repúblicas*), and the monarch¹³³, which still matched the particular preconditions that characterized nineteenth-century Hispanic-American constitutionalism¹³⁴. It could not be ignored that the Spanish nation was a conglomerate of different people (*pueblos que forman una sola nación*), nor that the representation of national sovereignty in the *Cortes* did not hinder the particular representation of the provinces¹³⁵.

This is in line with the preeminent role of tradition and history of the old Spanish law within the constitutional drafts in the *Cortes*, in order to avoid the general suspicion that they were headed to revolutionary goals. According to the preamble of 1812, the *Cortes* were convinced «after the most careful investigation and the most thorough contemplation» that the «already established fundamental laws of the kingdom [*las antiguas leyes fundamentales de la Monarquía*] as well as the fixed and permanent securing of the execution of the adequate orders and the measure provisions advanced the great goal of furthering the well-being and prosperity of the whole nation»¹³⁶. Even if this declaration in the preamble was meant to ease the transition from the traditional constitutional semantics of the *ancien régime* towards a constitutional understanding of a sovereign nation¹³⁷, the *Cortes* were also sensitive to the need not to appear dangerously revolutionary. In their «addresses to the king»¹³⁸ of 11 August 1811, 6 November 1811, and 24 November 1811, contained in the three *discurso preliminar*, the *Cortes* delegates therefore put their constitutional works in the

historical context that was not vulnerable «to the argument of revolutionary upheaval and dangerous novelty originating from the monarch»¹³⁹. In the first, August address, the *Cortes* maintained that, «[i]n its draft, the commission establishes nothing that is not yet to be found in the most authentic and celebratory manner in the different Spanish laws»¹⁴⁰. The same address declared that the constitutional commission had rejected «the draft of novelty»¹⁴¹, and reaffirmed that its works had been guided by Spain's present needs; it had neither «borrowed something from foreign nations, nor [...] been penetrated by reformative enthusiasm», rather adapting what „had become unfashionable since several centuries» and «what had been known and usual in Spain» in the «present draft»¹⁴². The context of the old traditions is obvious, even more so since the *Cortes* also reaffirmed Catholicism as «the one, true [...] religion» of Spain¹⁴³. With this lack of a separation of law and religion, the *Cortes* contradicted the cosmopolitan and religious principles of the Enlightenment¹⁴⁴, even if the constitutional commission in its address of December 24, 1811 proclaimed political freedom of speech and the press (Art. 371)¹⁴⁵ as «the true medium of the Enlightenment»¹⁴⁶.

Above all, the *Cortes* made clear that the sovereignty of the nation was derived from old traditions. These, they argued, were by no means incompatible with national sovereignty, but rather provided a natural legitimacy:

In order to prove this thesis, the commission must do nothing but refer to the decrees of the Fouero Zuzgo [the Gothic code] about the laws of the nation, the king and the citizen, about the mutual obligations to uphold the laws, about the

manner of delivering the same and to execute them. In the fundamental laws of this code, the sovereignty of the people is pronounced in the most authentic and celebratory manner that is conceivable¹⁴⁷.

To this end, the commission not only made use of the *Fuero Juzgo*, but also the old «fundamental laws of Aragon, Navarra and Castile», as well as the *Nueva Recopilación* legal code of the mid-sixteenth century¹⁴⁸. This historical legitimation, the commission felt, should hush every critic, since «[w]ho upon seeing such celebratory, such clear, such decisive decrees was still able to refuse to accept as an undeniable principle that the sovereignty originated from the nation and is inherent to it?»¹⁴⁹ In this sense, the German political scientist and historian Carl von Rotteck characterized the constitutional draft of the *Cortes* as a creation «born in the spirit of the new ages of reestablishment of the rights of the nation asserted by law against the monarch that it had been deprived of»¹⁵⁰.

Ultimately, it is tempting, though ill-advised, to join Rotteck and to dismiss the efforts of the *Cortes*, and the Cádiz debates, as failed ventures of little significance¹⁵¹. It is true that the principal objective of the liberal protagonists who gathered in 1808 was not reached – though the French were ultimately forced to withdraw from Spain, this was by a feat of arms rather than politics, and the return of Ferdinand to the throne heralded a new period of reaction and repression of liberal opposition. The preoccupation with definitions appears quaint given the circumstances of war and occupation, and one could be led to view the constitutionalists as abstractionists with little grasp of the realities of their situation. This reading would be both unreasonable and unfair.

It is true that the more overt liberalism evident in the Cádiz *Cortes* was short-lived. But the debates that raged in its chambers influenced later Spanish constitutions. The *Cortes* did not achieve revolution in the way the French National Assembly had done, but it did, at least, insinuate itself into the Spanish constitutional future. More immediately, it provided the nucleus for the development and maturation of a distinct Spanish-American constitutional discourse, influenced by but not a copy of the example of the United States, which would within a few short years redraw the map of South America. The debates surrounding “nation” and “sovereignty” may not have been decisively resolved in Cádiz, but they were far from meaningless abstractions.

- ¹ Adapted from A. Timmermann, *Die gemäßigte Monarchie in der Verfassung von Cádiz (1812) und die Grundlagen des liberalen Verfassungsdenkens in Spanien*, Aschendorff, Münster, 2007, Chapter 6: Die Souveränitätslehren. If not indicated otherwise, references to *ReConFort I: National Sovereignty, A Comparative Analysis of the Juridification by Constitution*, Cham, Springer, 2016, refer to the Principal Investigator's contribution to that volume: U. Müßig, *Juridification by Constitution. National Sovereignty in 18th and 19th c. Europe*, pp. 1-92. This project has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no. 339529.
- ² These references can be found via the *ReConFort* open access database. *ReConFort Open Database*, *ReConFort*, <<http://sources.reconfort.eu>>, November 2017.
- ³ P. Häberle, *Zur gegenwärtigen Diskussion um das Problem der Souveränität*, in «Archiv des öffentlichen Rechts», n. 92, 1967, pp. 267, 270.
- ⁴ W. Leisner, *Volk und Nation als Rechtsbegriffe der französischen Revolution*, in W. Leisner, *Staat – Schriften zu Staatslehre und Staatsrecht*, J. Isensee (ed. by), Berlin, Duncker & Humblot, 1995, pp. 156 f.
- ⁵ «All people are to have a national character and if it were to be missing, it would have started by giving it one». J.-J. Rousseau, *Oeuvres complètes de Jean-Jacques Rousseau*, vol. III, Paris, Gallimard, 1964, p. 913. Rousseau continues to explain it as identification with the nation through both body and spirit, as well as will, a feeling of belonging as well as a readiness to die for the nation and – more relevant for legal historians – a need to obey all its laws and its commands. J.-J. Rousseau, *Oeuvres complètes de Jean-Jacques Rousseau*, vol. III, Paris, Gallimard, 1964, p. 943. Cf. also J.-R. Suratteau, *La nation de 1789 a 1799. Sens, idéologie, évolution de l'emploi du mot*, in M. Gilli (ed. by), *Région, Nation, Europe: Unité et Diversité des processus sociaux et culturels de la Révolution française*, Paris, Le Belles Lettres, 1988, p. 687.
- ⁶ The *Cortes* did not see itself as a representation of the as old estates, in the sense of the *ancien régime*, but as a popular representation and constitutive assembly. The proceedings of the *Cortes* debates (*Diario de las discusiones y Actas de la Cortes*, Cádiz, en la Imprenta Real, 1811) are digitized in the Bavarian State Library, and are cited here with the abbreviation *D.D.A.C.* The *Prospecto del Periodico Intitulado* is said to be published under the «sovereign authority and control of the constituent national congress» (*Diario de las Discusiones y actas de las Cortes, que se ha de publicar baxo de la soberana autoridad é inspeccion del Congreso Nacional*), and the *Prospecto* itself conceded that there was no mandate by electoral consensus: «al pueblo deben du autoridad» and «vuestro cuerpo soberano os prepara la constitucion».
- ⁷ «La soberanía reside esencialmente en la Nacion, y por lo mismo pertenece á esta exclusivamente el derecho de establecer sus leyes fundamentales»: «The sovereignty resides essentially within the nation».
- ⁸ D. Willoweit and U. Müßig, *Europäische Verfassungsgeschichte*, Munich, C.H. Beck, 2003, p. 430.
- ⁹ Cf. F. Martínez Marina, *Teoría de las cortes ó grandes juntas nacionales de los reinos de Leon y Castilla. Monumentos de su constitucion politica y de la soberanía del pueblo*, Madrid, Imprenta de Fermin Villalpando, 1813, vol. I, p. xl; M. Artola Gallego, *Los orígenes de la España contemporánea*, vol. 2, Madrid, Silex, 1975², p. 466.
- ¹⁰ «Como á todos los demas españoles, se les tapó la boca, se les hechó un candado á sus labios, por decir lo así. [...]». Cited in J.C. Carnicero, *El liberalismo convencido por sus mismos escritos, ó examen crítico de la constitucion politica de la monarquía española publicada en Cádiz y de la obra de Don Francisco Marina "Teoría de las Cortes" y de otras que sostienen las mismas ideas acerca de la soberanía de la nacion*, Madrid, Imprenta de D. Eusebio Aguado, 1830, p. 23.
- ¹¹ «espectáculo de gran escenografía». Cited in L.S. Agesta, *Historia del Constitucionalismo Español*, Madrid, Instituto de Estudios Políticos, 1964², p. 19.
- ¹² For Spain: F.X. Guerra, *Moderidad e independencias*, Madrid, Ediciones Encuentro, 2009, p. 355; for France: Leisner, *Volk und Nation als Rechtsbegriffe*, cit., p. 171; for the earlier constitutionalism in general: W. Reinhard, *Staat machen: Verfassungsgeschichte als Kulturgeschichte*, in *Jahrbuch des Historischen Kollegs 1998*, Munich: R. Oldenbourg, 1999, p. 105.
- ¹³ Fundamentally, M. Artola Gallego, *Los orígenes de la España contemporánea*, vol. 2, Madrid, Instituto de Estudios Políticos, 1975², p. 466. For this contemporary denomination of the revolutionary movement, that was directed against the Spanish absolutism and the French occupation cf. F. Martínez Marina, *Teoría de las cortes ó grandes juntas nacionales de los reinos de Leon y Castilla: Monumentos de su constitucion politica y de la soberanía del pueblo*, vol. 1, Madrid, Imprenta de Fermin Villalpando, 1813, p. xl.
- ¹⁴ J. Fontana, *La quiebra de la monarquía absoluta (1814-1820)*, Barcelona, Ediciones Ariel, 1971; J. Fontana, *La época del liberalismo*, Barcelona and Madrid, Critica, 2007.
- ¹⁵ D.T. Giles, "Such is Glorious War": *British Reflections on the Peninsular War in Spain (1808-1814)*, in «Bulletin of Spanish Studies», n. 91, 2014, p. 264; G. Lovett, *Napoleon and the Birth of Modern Spain*, vol. 2, New York, New York University

- Press, 1965, p. 791.
- ¹⁶ The central administration (*Junta Suprema Central y Gubernativa*) in Aranjuez, Extremadura, Seville and later in Isla de León near Cádiz had the command over the provincial administrations (*jun-tas provinciales*) set up to organize the guerrilla war and to coordinate the British aid. J.L. Brey Blanco, *Liberalismo, nación y soberanía en la Constitución española de 1812*, in I. Álvarez Véllez (ed. by), *Las Cortes de Cádiz y la Constitución de 1812: ¿la primera revolución liberal española?*, Madrid, Rústica, 2011, p. 72; F. Suárez, *Las Cortes de Cádiz*, Madrid, Rialp, 1982, p. 16.
- ¹⁷ A. Ramos Santana, 1808-1810. *La nación resume la soberanía*, in I. Czeguhn and F. Puértolas (ed. by), *Die spanische Verfassung von 1812. Der Beginn des europäischen Konstitutionalismus*, Regensburg, H. Gietl Verlag, 2014, p. 206.
- ¹⁸ Cortes generales y extraordinarias (ed. by), *Colección de los Decretos y Órdenes que han expedido las Cortes generales y extraordinarios desde su instalación en 24 de setiembre de 1810 hasta igual fecha de 1811*, vol. 1, Madrid, 1813, pp. 1-2; J. Gallardo y de Font, *Apertura de las Cortes de Cádiz en 24 de Septiembre de 1810*, vol. 1, Segovia, 1910, pp. 30-1: «[...] y declaran nula, de ningún valor ni efecto la cesión de la corona que se dice hecha en favor de Napoleón, no solo por la violencia que intervino en aquellos actos, injustos é ilegales, sino principalmente por faltarle el consentimiento de la Nación». This is almost literally repeated in the decree of 1 January 1811: «Declárense nullos todos los actos y convenios del Rey durante su opresión fuera ó dentro de España». in Cortes generales y extraordinarias, *Colección de los Decretos y Órdenes*, cit., p. 41.
- ¹⁹ Cf. also C. Archer (ed. by), *The Wars of Independence in Spanish America*, Wilmington, DL, Scholarly Resources, 2000, p. 23.
- ²⁰ M. Onaindía, *La construcción de la nación española*, Barcelona, Ediciones B, 2002, pp. 27, 29.
- ²¹ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London, Verso, 2006.
- ²² Guerra, *Modernidad e independencias*, cit., p. 235, for the understanding of the terms homeland (*patria*), people (*pueblo*), and nation (*nación*) in the Spanish journalism of the years of war 1808 and 1809.
- ²³ 'Men being, as has been said, by Nature, all free, equal and independent, no one can put out of this state Estate, and subjected to the Political Power of another, without his own Consent.' J. Locke, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus*, Peter Laslett (edited by), Cambridge, Cambridge University Press, 1967, 2nd treatise, Chapter 8, § 95, p. 348.
- ²⁴ F. Linares, *Beiträge zur Staats- und Geschichtsphilosophie*, Hildesheim, Olms, 1988, p. 17.
- ²⁵ F. Suárez, *Tractatus de legibus et legislatore Deo* (1612); German tr. *Abhandlungen über die Gesetze und Gott den Gesetzgeber*, Freiburg, Haufe, 2002, Chapter 6, n. 19, p. 143.
- ²⁶ O. von Gierke, *Das deutsche Genossenschaftsrecht*, vol. 4: *Staats- und Korporationslehre der Neuzeit, durchgeführt bis zur Mitte des siebzehnten, für das Naturrecht bis zum Beginn des neunzehnten Jahrhunderts*, Darmstadt, Wissenschaftliche Buchgemeinschaft, 1954, pp. 285 f., 451.
- ²⁷ F. de Vitoria, *Über die staatliche Gewalt*, 1528, Chapter 8, pp. 60 f. De Vitoria describes the mandating people as a «crowd», but later reverts to «people» (Chapter 11, pp. 70 f.).
- ²⁸ Gierke, *Das deutsche Genossenschaftsrecht*, vol. 4, cit., p. 292.
- ²⁹ Müßig, *Juridification by Constitution* cit., p. 46.
- ³⁰ R. Reed, *Re-thinking the UK Constitution*, and J.W.F. Allison, *The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective*, both in this volume.
- ³¹ A. Sidney, *Discourses concerning government* (1698), T.G. West (ed. by), Indianapolis, Liberty, 1990, Chapter 3, Section 44, p. 564: «The legislative power therefore that is exercised by the parliament, cannot be conferred by the writ of summons, but must be essentially and radically in the people, from whom their delegates and representatives have all that they have».
- ³² Reinhard, *Staat machen* cit., p. 105.
- ³³ F. Martínez Marina, *Teoría de las Cortes o grandes Juntas nacionales de los Reinos de León y Castilla* (1813), Prólogo, RN.32, *Obras escogidas*, vol. 2, Madrid, Atlas, 1968, p. 13; Part 2, Chapter 36, RN. 5, *Obras escogidas*, vol. 3, p. 44; F. Martínez Marina, *Principios naturales de la moral, de la política y de la legislación* (1824), Madrid, Impr. De los Hijos de Gómez Fuentenebro, 1933, Part 2, p. 322; in each case, Martínez Marina refers to Scholasticism.
- ³⁴ 'La soberanía y sus derechos emanan de la voluntad de los hombres, pues nie l cielo ha llovido soberanos, ni tampoco los produjo la tierra'. Martínez Marina, *Teoría de las Cortes*, Part 2, cit., Chapter 10, RN 1, *Obras escogidas*, vol. 2, p. 268; also Martínez Marina, *Principios naturales de la moral*, Part 2, cit., Chapter 2, p. 239; José Mejía Lequerica used the phrase of the same tenor in the session of the Cortes of 29 December 1820. *D.D.A.C.* cit., vol. 2, p. 169, and in A. Flores y Caamaño, *Don José Mejía Lequerica*, Barcelona, Casa Editorial Maucci, 1913, p. 205.
- ³⁵ Martínez Marina, *Teoría de las Cortes*, cit., Part 2, Chapter 36, Rn. 2, *Obras escogidas*, vol. 3, p. 43; Martínez Marina, *Principios naturales de la moral* cit., Part 2, Chapter 10, pp. 324 f.
- ³⁶ Martínez Marina, *Teoría de las Cortes* cit., Part 2, Chapter 10, p. 325.
- ³⁷ Ivi, Part 2, Chapter 6, pp. 276 f.; Part 2, Chapter 10, pp. 316 ff.; see

- also L. de Sosa, *Martínez Marina*, Madrid, Aguilar, 1950, pp. 130 ff.
- ³⁸ Martínez Marina, *Principios naturales de la moral*, cit., Part 2, Chapter 10, p. 321.
- ³⁹ 'Finally, each man, in giving himself to all, gives himself to nobody; and as there is no associate over which he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of the force for the preservation of what he has.' J.-J. Rousseau, *Du contrat social; ou Principes du droit politique* (1765); En. tr. *On the Social Contract*, G.D.H. Cole (ed. by), Mineola, NY, Dover, 2003, Book 1, Chapter 6, p. 9.
- ⁴⁰ 'The total alienation of each associate, together with all his rights, to the whole community; for, in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has the interest in making them burdensome to others'. *Ibid.*
- ⁴¹ 'On this view, we at once see that it can no longer be asked whose business it is to make laws, since they are acts of the general will; nor whether the prince is above the law, since he is a member of the State; nor whether the law can be unjust, since no one is unjust to himself; nor how we can both free and subject to the laws, since they are but registers of our wills.' Ivi, Book 2, Chapter 6, p. 24.
- ⁴² J. Alberti, *Martínez Marina: Derecho y política*, Oviedo, Caja de Ahorros de Asturias, 1980, pp. 172 f.
- ⁴³ See in depth Müßig, *Juridification by Constitution* cit., pp. 47 ff.
- ⁴⁴ Willoweit and Seif, *Europäische Verfassungsgeschichte* cit., pp. 429 ff.
- ⁴⁵ Because of this, the monarch was required to report to the *Cortes* in the case of a declaration of war or a peace agreement (Art. 171 section 3. M. Fernández Almagro, *Orígenes del régimen constitucional en España*, Barcelona, Ed. Labor, 1976, pp. 91, 106 f.
- ⁴⁶ Ivi, p. 92.
- ⁴⁷ Mariana held a progressive line in the late Scholasticism, while Francisco Suárez and Francisco de Vitoria assumed that the state power was exclusively transferred to the monarch and could only fall back to the people in exceptional circumstances; J. Varela Suanzes-Carpegna, *La teoría del Estado*, Madrid, Centro de Estudios Políticos y Constitucionales, 2011, p. 66.
- ⁴⁸ Conde de Terreno in the session of the *Cortes* on 16 November 1811, *D.D.A.C.* cit., vol. 10, p. 126: «The sovereignty is, as it has been said one thousand times, inalienable and inseparable».
- ⁴⁹ J. Varela Suanzes-Carpegna, *Tradición y liberalismo en Martínez Marina*, Oviedo, Caja Rural Provincial de Asturias, Facultad de Derecho de Oviedo, 1983, p. 33 f.; Varela Suanzes-Carpegna, *La teoría del Estado* cit., pp. 170 ff.
- ⁵⁰ U. Müßig, *Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty*, in *Historia et ius*, n. 3 (2013), paper 5.
- ⁵¹ Martínez Marina, *Principios naturales de la moral* cit., Part 2, Chapter 6, p. 276. Martínez Marina here equates sovereignty of the people (*soberanía del pueblo*) with national sovereignty (*soberanía nacional*). See also in the same, Part 2, Chapter 7, p. 285. The same, in the same place, 2. Teil, 7. Chapter, p. 285.
- ⁵² Ivi, 2. Teil, 6. Chapter, p. 277.
- ⁵³ «La Nación está obligada a conversar y proteger [...] los demás derechos legítimos de todos los individuos que la componen». J. De Esteban, *Las Constituciones de España*, Madrid, Boletín oficial del Estado, 2012, p. 46.
- ⁵⁴ B. Ward, *Proyecto económico, en que se proponen varias providencias, dirigidas a promover los intereses de España con los medios y fondos necesarios para su plantificación*, 1779, p. XXII: «[...] así también la opulencia de una Monarquía resulta de la unión de muchos esfuerzos de los individuos que la componen».
- ⁵⁵ H. Pietschmann, *Nación e individuo en los debates políticos de la época preindependiente*, in I. Alvarez Cueatero and J. Sánchez Gómez (ed. by), *Visiones y revisiones de la independencia americana*, Salamanca, Ediciones Universidad de Salamanca, 2012, pp. 81 f., 85.
- ⁵⁶ «La Nación española es la reunión de todos los españoles de ambos hemisferios». J. de Esteban, *Las Constituciones de España*, cit., p. 46; Art. 10 contains a list of the provinces belonging to the state territory (*el territorio español*).
- ⁵⁷ M.-L. Rieu-Millan, *Los diputados americanos en las Cortes de Cádiz*, Madrid, Consejo Superior de Investigaciones Científicas, 1990, p. 152. On the differentiations within the black population and the terms *castas*, *castas pardas*, and *pardos*, see the same, pp. 107 f.
- ⁵⁸ M. Fernández Almagro, *Orígenes del régimen constitucional en España*, cit., p. 96; D. Ramos, *Las Cortes de Cádiz y América*, in «Revista de Estudios Políticos», n. 126, 1962, p. 611; B. Clavero, *¡ Libros de Ultramar! el fruto podrido de Cádiz*, in «Revista de Estudios Políticos», 97, 1997, p. 58.
- ⁵⁹ F. Martínez Marina, *La Constitución española de 1812*, Madrid, Villalpando, 1813, p. 308.
- ⁶⁰ J. Cadart, *Institutions politiques et droit constitutionnel*, vol. 1, Paris, LGDJ, 1979, p. 189; H. Kurz, *Volksouveränität und Volksrepräsentation*, Cologne, Heymanns, 1965, pp. 116 f. (fn. 448) for the French constitution of 1791.
- ⁶¹ W. Leisner, *Volk und Nation* cit., pp. 157 ff., 165.
- ⁶² Varela Suanzes-Carpegna, *La teoría del Estado*, cit., pp. 250 f. The French constitution of 1791 is also cited here as a role model.
- ⁶³ E. Tierno Galván, *Prólogo*, in E. Tierno Galván, *Actas de las Cortes de Cádiz*, vol. I, Madrid, Taurus, 1964, pp. 10 f.
- ⁶⁴ Pietschmann, *Nación e individuo en los debates políticos de la época*

- preindependiente, cit., especialmente pp. 51 f., 77 f.
- ⁶⁵ Pedro Inguanzo y Rivero, Session of the Cortes of 25 August 1811, *D.D.A.C. cit.*, vol. 8, p. 19, with the alternative proposal for Art. 1: «La nación española es la reunión de los españoles de ambos hemisferios, bajo de una constitución o gobierno monárquico, y de su legítimo soberano».
- ⁶⁶ José Espiga, Session of 28 August 1811, *D.D.A.C. cit.*, vol. 8, p. 46.
- ⁶⁷ Ivi, p. 90.
- ⁶⁸ Juan Nicasio Gallego, Session of 29 August 1811, *D.D.A.C. cit.*, vol. 8, p. 68.
- ⁶⁹ José Espiga, Session of 25 August 1811, *D.D.A.C. cit.*, vol. 8, p. 20.
- ⁷⁰ Conde de Terreno, Session of 28 August 1811, *D.D.A.C. cit.*, vol. 8, p. 65; the same, Session of 16 November 1811, the same place, vol. 10, p. 126: «La nación en masa e soberana»; further, Joaquín Lorenzo Villanueva, Session of 30 August 1811, *D.D.A.C. cit.*, vol. 8, p. 92.
- ⁷¹ Conde de Terreno, Session of 28 August 1811, *D.D.A.C.*, vol. 8, p. 65; also E. J. Sieyès, *Was ist der dritte Stand?*, in E. Schmitt and R. Reichardt (ed. by), *Politische Schriften 1788-1790*, Munich and Vienna, Oldenbourg, 1981, pp. 73, 78 ff. Together with *Essai sur les privilèges* (1788) and *Vues sur les moyens d'exécution dont les Représentans de la France pourront disposer en 1789* (1788), *Qu'est-ce que le Tiers-État?* (1789) was the most influential pamphlet on the eve of the French Revolution.
- ⁷² Antonio Oliveros, Session of 25 August 1811, *D.D.A.C. cit.*, vol. 8, p. 23; Diogo Muñoz Terrero, Session of 30 August 1811, *D.D.A.C. cit.*, vol. 8, p. 92.
- ⁷³ This was the choice of terminology of the delegate from Puerto Rico, Ramón Power, in his report to the city council of San Juan on 1 February 1812, in P. de Angelis, *Ramón Power*, Bayamón, El Progreso, n.d., p. 88.
- ⁷⁴ R. Feliú, Session of 11 August 1811, *D.D.A.C.*, cit., vol. 2, p. 346: «[...] las provincias de una misma nación, los pueblos de una misma provincia se tienen hoy unos respecto de otros, como se tienen unos respecto de otros todos los hombres em el estado natural».
- ⁷⁵ «[...] proporcional á los elementos que se compone, es decís proporcional á la suma de soberanías de sus provincias». R. Feliú, Session of 11 August 1811, *D.D.A.C. cit.*, vol. 2, p. 347.
- ⁷⁶ J. Mejía Lequerica, Session of 3 August 1811, *D.D.A.C. cit.*, vol. 7, pp. 294 f.; see also Flores y Caamaño, *Don José Mejía Lequerica*, cit., p. 311: «[...] qui son los pueblos de España, sino los miembros cuya suma forma el cuerpo de la Nación española».
- ⁷⁷ M. Chust, *La cuestión nacional americana en las Cortes de Cádiz (1810-1814)*, Valencia, Centro Francisco Tomás y Valiente UNED, 1999, pp. 57 f., 62.
- ⁷⁸ See also the Mexican delegate, J.E. de Cardenas y Romero (Tabasco), *Memorias presentadas a las Cortes de Cádiz el 24 de julio de 1811*, n.p., n.d., p. 36: «Si alguna provincia particular, si algún Pueblo o corta familia pretende distinciones que no le corresponda, y solicita mayorías y privilegios sobre otras, perturba visiblemente la unión, transtorna el orden, y debe por tanto el monarca moderarle su deseo, y contenerla en los límites de la equidad y justicia».
- ⁷⁹ Cf. another New Spaniard, José Miguel Guridi y Alcocer, in the session of the Cortes of 18 January 1812, *D.D.A.C. cit.*, vol. 11, p. 330.
- ⁸⁰ B. Ward, *Proyecto económico* cit., p. xxii.
- ⁸¹ Cardenas y Romero, *Memorias presentadas a las Cortes de Cádiz* cit., pp. 35 f.: «Un Estado monárquico como el que hemos jurado, debe ser una vastísima familia de unánimes sentimientos en todas las grandes y pequeñas porciones que la componen y en cada uno de sus individuos regulados por leyes sabias, cuyo cimiento incontrastable sea la única verdadera religión, que hemos jurado también conservar y sostener a costa de cualesquiera sacrificios; y estando a la cabeza un padre o rey, cuyo ejercicio sea el que se observan ilesas dichas leyes». For a more modern interpretation of this, see also J. Mejía Lequerica, Session of the Cortes of 3 August 1811, *D.D.A.C. cit.*, vol. 7, p. 294 f., also in Flores y Caamaño, *Don José Mejía Lequerica* cit., p. 312. All the subjects form "one single family", related by mutual compassion.
- ⁸² Chust, *La cuestión nacional americana* cit., p. 63.
- ⁸³ See the widespread memorandum of the Mexican delegate José Miguel Ramos Arizpe, *Memoria presentada a las Cortes por D. Miguel Ramos Arizpe, sobre a situación de las Provincias de Oriente*, in J.M. Ramos Arizpe, *Presencia de Ramos Arizpe en las Cortes de Cádiz 1811*, Monterrey, Archivo General del Estado, 1990, p. 77.
- ⁸⁴ On the concept of *naturaleza*: T. Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America*, New Haven, Yale University Press, 2003, pp. 8, 64 ff.
- ⁸⁵ J.M. Guridi y Alcocer, Session of the Cortes of 18 January 1812, *D.D.A.C. cit.*, vol. 11, p. 330. Guridi y Alcocer concluded from the French invasion: «[...] se han roto los vínculos de la sociedad, y ha faltado el punto de unión que es el monarca. De aquí ha resultado que desenfrenándose las pasiones, nos veamos en el mayor choque de los afectos, conflicto de intereses, divergencias de las opiniones, y división de facciones y partidos».
- ⁸⁶ J.E. de Cardenas y Romero, *Memorias presentadas a las Cortes de Cádiz* cit., p. 36: «Aquí Señor, ya no hay provincialismo ni fracción, por decirlo así, de la unidad política». The meaning of the term "fracciones", familiar within the state doctrine of the United States, was known to the delegates from New Spain owing to the United States' adjacent position. Cf. *J.M. Guridi y Alcocer*, Session of the Cortes of 18 January 1812, *D.D.A.C. cit.*, vol. 11, p. 330, with the above-cited formulation on the missing of the

monarch as the moderate element: «[...] nos veamos en el mayor choque de los afectos [...] y división de facciones y partidos». For many references: A. Hamilton, J. Madison, and J. Jay, *Die Federalist-Artikel. Politische Theorie und Verfassungskommentar der amerikanischen Gründungsväter (1787/1788)*, Paderborn, Schöningh, 1994, Article 51 (Madison), p. 317: «In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful».

⁸⁷ J.E. de Cardenas y Romero, *Memorias presentadas a las Cortes de Cádiz* cit., p. 36, with reference to the contractual idea: «[...] la relación mutua que entre sí dicen los miembros de toda comunidad o república bien concertada».

⁸⁸ Juan de Lera, Session of 29 August 1811, *D.D.A.C.* cit., vol. 8, p. 77, with the proposal of the wording: «La soberanía reside radicalmente en la nación».

⁸⁹ Conde de Terreno, Session of 28 August 1811, *D.D.A.C.* cit., vol. 8, p. 66; cf. Juan Nicasio Gallego, Session of 29 August 1811, *D.D.A.C.* cit., vol. 8, p. 68.

⁹⁰ A. de Argüelles, Session of 29 December 1810, *D.D.A.C.* cit., vol. 2, p. 155: «La soberanía es inherente á la misma nación»; Manuel García Herrerros, Session of 30 December 1810, *D.D.A.C.* cit., vol. 2, p. 190: «La soberanía reside inherentemente en la nación»; also Conde de Terreno, Session of

28 August 1811, *D.D.A.C.* cit., vol. 8, p. 66.

⁹¹ Cf. P. Quevedo Quintano, *Exposición que el Excmo. Sr. Obispo de Orense hizo por escrito al tiempo de prestar su jura, iento de obediencia á la Constitución española, en la que se expresa del verdadero sentido en que debía prestarlo, y efectivamente lo prestó*, Mallorca 1812; J.J. Colón, *España vindicada en sus clases y autoridades*, 1811, preamble, pp. VI and XI on the intention of the author to defend the sovereignty of the monarch.

⁹² G. M. de Jovellanos, *Memorias en que se rebaten las calumnias divulgadas*, *Obras publicadas e inéditas*, Coruña, 1811, vol. I, p. 620.

⁹³ Both considerations were combined in the statement of Francisco Mateo Aguiriano y Gómez, Bishop of Calahorra, in the Session of 28 August 1811, in *D.D.A.C.* cit., vol. 8, p. 58 ff.; and Juan de Lera, Session of 29 August 1811, *D.D.A.C.* cit., vol. 8, p. 76 f.; on this position, see also J.L. Ollero de la Torre, *Un riojano en las Cortes de Cádiz*, Logroño, Instituto de Estudios Riojanos, 1981, pp. 79 ff.

⁹⁴ Jovellanos, *Memoria en que se rebaten las calumnias divulgadas* cit., vol. 1, pp. 619, 621; in the same sense also the usage of the term *soberanía radical* or *poder radical*, see J. de Leira, Session of 29 August 1811, *D.D.A.C.* cit., vol. 8, pp. 76 f.

⁹⁵ Jovellanos, *Memoria en que se rebaten las calumnias divulgadas* cit., vol. 1, pp. 619 f.; and appendix: *apéndices a la memoria en defensa de la Junta Central*, n. 12, pp. 597 f.

⁹⁶ Ollero de la Torre, *Un riojano en las Cortes de Cádiz* cit., p. 87.

⁹⁷ *Observaciones sobre los atentados de las Cortes extraordinarios de Cádiz contra las leyes fundamentales de la Monarquía Española y sobre a nulidad de la Constitución que formaron P.D.M.R.*, 1814, third and fourth observations, pp. 7 f. With apparent deliberation, the authors reference the often-cited formula of Tacitus: «Entre los Germanos los Reyes ordenaban y decidían por sí

los asuntos communes y ordinarios, pero deliberaban con los Próceres de la Nación sobre los negocios graves» (p. 8).

⁹⁸ See Art. 24 ff. on the relation between king and Cortes, *Real Decreto* of 10 April 1834, in Esteban, *Las Constituciones de España* cit., pp. 100 f.

⁹⁹ Jovellanos, *Memoria en que se rebaten las calumnias divulgadas* cit., vol. I, appendix: *apéndices a la memoria en defensa de la Junta Central*, n. 12, p. 597; cf. J. de Lera, Session of 29 August 1811, *D.D.A.C.* cit., vol. 8, pp. 76 f.

¹⁰⁰ In this sense see Colón, *España vindicada en sus clases y autoridades*, cit., pp. 57 f.: The general wish of the Spaniards to free themselves from the foreign rule of the French did not legitimize the new laws and the «immature» reform.

¹⁰¹ According to B. R. Hamnett, *Spanish Constitutionalism and the Impact of the French Revolution, 1808-1814*, in H. Mason and W. Doyle (ed. by), *The Impact of the French Revolution on European Consciousness*, Gloucester, Sutton, 1989, p. 75, the Cortes reported that in Valencia only one-eighth of the 500 townships had courts that were not appointed by the lords of manors; in Galicia, according to the Cortes' estimates, 380 towns or villages were administered by secular authorities, and 239 by clerical lords of manors, but only 35 were subject to the direct administration.

¹⁰² *Cortes generales y extraordinarias. Colección de los Decretos y Órdenes que han expedido las Cortes generales y extraordinarios desde 24 de mayo de 1812 hasta 24 de mayo de 1812*, vol. I, Madrid 1813, pp. 182 ff.

¹⁰³ Art. 244: «Las leyes señalarán el orden y las formalidades del proceso, que serán uniformes en todos los tribunales; ni las Cortes ni el Rey podrán dispensarlas»; Art. 248: «En los negocios comunes, civiles y criminales no habrá más que un solo fuero para toda a clase de personas». Esteban, *Las Constituciones*

- de España* cit., p. 79.
- ¹⁰⁴ Art. 5 of the decree of 6 August 1811. See also W. L. Bernecker and H. Pietschmann, *Geschichte Spaniens: Von der frühen Neuzeit bis zur Gegenwart*, Stuttgart, Kohlhammer, 2005, p. 220; Hamnett, *Spanish Constitutionalism and the Impact of the French Revolution* cit., pp. 72, 75 f.
- ¹⁰⁵ One example was the Bishop of Calahorra, Francisco Mateo Aguiriano y Gómez. See Ollero de la Torre, *Un riojano en las Cortes de Cádiz* cit., pp. 65 ff.
- ¹⁰⁶ Felipe Anér de Esteve, Session of the Cortes of 7 June 1811, *D.D.A.C.* cit., vol. 6, pp. 217 f.; Bernardo Nadal, Bishop of Mallorca, Session of the Cortes of 21 June 1811, *D.D.A.C.* cit., vol. 6, pp. 381 f.
- ¹⁰⁷ A. de Argüelles, Session of the Cortes of 6 June 1811, *D.D.A.C.* cit., vol. 6, p. 197, 199; Antonio Oliveros, Session of 10 June 1811, *D.D.A.C.* cit., vol. 6, pp. 271, 273; on the liberal positions in the debate: C. Ramos Ruiz, *Don Agustín de Argüelles, Su intervención en las Cortes de Cádiz*, Madrid 1913, pp. 19 f.
- ¹⁰⁸ A. Oliveros, Session of 10 June 1811, *D.D.A.C.* cit., vol. 6, pp. 268, 272.
- ¹⁰⁹ *Instalación de la soberana Junta Gubernativa*, 10 August 1809, in J. Malagón, *Las Actas de Independencia de América*, Washington D.C., Unión Panamericana, 1955, p. 48: «La Junta como representativa del monarca tendrá el tratamiento de majestad». For further information, see E. Keeding, *Das Zeitalter der Aufklärung in der Provinz Quito*, Cologne, Böhlau, 1983, pp. 472 ff.
- ¹¹⁰ «[...] conservar la integridad de esta parte de los dominios de América a nuestro Amado Soberano el Sr. D. Fernando VII., y sus legítimos sucesores». *Reglamento de la Junta Provisional Gubernativa*, 5 May 1810, in A.E. Sampay, *Las Constituciones de la Argentina (1810-1972)*, Buenos Aires, Editorial Universitaria de Buenos Aires, 1975, p. 84; for Quito, see *Instalación de la soberana Junta Gubernativa*, 10 August 1809, in Malagón, *Las Actas de Independencia de América* cit., p. 48.
- ¹¹¹ H. Pietschmann, *Die Einführung des Intendantensystems in Neu-Spanien im Rahmen der allgemeinen Verwaltungsreform der spanischen Monarchie im 18. Jahrhundert*, Cologne, Böhlau, 1972, p. 65 f.
- ¹¹² D.E. Worcester, *Bolívar*, London, Hutchinson, 1978, p. 3.
- ¹¹³ *Reglamento de la Junta Provisional Gubernativa*, in Sampay, *Las Constituciones de la Argentina* cit., p. 84.
- ¹¹⁴ E. Ruiz-Guiñazú, *Epifanía de la libertad: Documentos secretos de la Revolución de Mayo*, Buenos Aires, Editorial Nova, 1952, p. 14.
- ¹¹⁵ *Acta de Instalación de la Junta Suprema de Venezuela del 19 de abril de 1810*, in A.R. Brewer-Carías, *Las Constituciones de Venezuela*, Caracas, Academia de Ciencias Políticas y Sociales, 1997, p. 157: «Ejerciendo dos derechos de la soberanía, que por el mismo hecho há racaido en el Pueblo, conforme a los mismos principios de la sabia constitución primitiva de la España».
- ¹¹⁶ *Declaración solemne de la Independencia por el Congreso de Venezuela*, in Malagón, *Las Actas de Independencia de América* cit., p. 143; also printed in Brewer-Carías, *Las Constituciones de Venezuela* cit., pp. 171 ff.
- ¹¹⁷ F. de Vitoria, *Über die staatliche Gewalt* cit., chapter 8, pp. 60 f.
- ¹¹⁸ «[...] la soberanía de la sociedad, que es imprescindible, inenajenable e indivisible en su esencia y origen». Brewer-Carías, *Las Constituciones de Venezuela* cit., p. 196.
- ¹¹⁹ Sidney, *Discourses concerning government* cit., Chapter 3, Section 44, p. 564.
- ¹²⁰ Art. 2 of the Colombian text: «La soberanía reside esencialmente en la Nación». In Brewer-Carías, *Las Constituciones de Venezuela*, cit., p. 275; literally identical wording is found in the *Bases de la Constitución Política de la República Peruana*, 17 December 1822, Art. 2, first half-sentence, in Cámara de Diputados, *Constituciones políticas del Perú 1821-1919*, Lima, Imprenta Torres Aguirre, 1922, p. 28; also later: *Constitución política de la República peruana*, 12 November 1823, Art. 3, first half-sentence, in the same, p. 36.
- ¹²¹ Gran Colombia: Art. 1 of the constitution of 1821; Peru: Art. 2 of the constitutional basis of 1822 and Art. 2 of the constitution of 1823.
- ¹²² *Decreto Constitucional para la libertad de la América Mexicana*, 22 October 1814, in F. Tena Ramírez, *Leyes fundamentales de México 1808-1998*, Mexico City, Editorial Porrúa, 1998, p. 33: «Por consiguiente la soberanía reside originariamente en el pueblo, y su ejercicio en la representación nacional» (Art. 5, first half-sentence).
- ¹²³ O.C. Stotzer, *Grundlagen des spanisch-amerikanischen Verfassungsdenkens*, in «Verfassung und Recht in Übersee», n. 2, 1969, pp. 321, 323.
- ¹²⁴ Art. 144, first half-sentence of the constitution of 1811, in Brewer-Carías, *Las Constituciones de Venezuela* cit., p. 196.
- ¹²⁵ «The legislative power [...] must be essentially and radically in the people». Sidney, *Discourses concerning government* cit., Chapter 3, Section 44, p. 564.
- ¹²⁶ In relation to the change of religious covenant-*concept* see G. Oestreich, *Die Idee des religiösen Bundes und die Lehre vom Staatsvertrag*, in H. Hoffmann (ed. by), *Die Entstehung des modernen souveränen Staates*, Cologne, Kiepenhauer & Witsch, 1967, p. 128; the preamble implies this specific covenant in the sense of an ability of Cortes to transfer government in accordance with divine will to the king: «by the grace of God and the constitution of the Spanish monarchy». Cited in *Constitution of the Spanish Monarchy, Promulgated at Cádiz on the 19th of March, 1812*, Philadelphia, G. Palmer,

- 1814, p. 4.
- ¹²⁷ Cf. E. Reibstein, *Johannes Althusius als Fortsetzer der Schule von Salamanca: Untersuchungen zur Ideengeschichte des Rechtsstaates und zur altprotestantischen Naturrechtslehre*, Karlsruhe, C.F. Müller, 1955, p. 94; S. Castellote, *Der Beitrag der Spanischen Spätscholastik zur Geschichte Europas*, in M. Kremer and H.-R. Reuter (ed. by), *Macht und Moral – politisches Denken im 17. und 18. Jahrhundert*, Stuttgart, Kohlhammer, 2007, pp. 26 f. (*Francisco de Vitoria*).
- ¹²⁸ L. Sánchez Agesta, Introducción, in A. de Argüelles, *Discurso preliminar*, part I, Lisbon, Na Typografia Rollandiana, 1820, p. 59; A. Timmermann, *Die Nationale Souveränität in der Verfassung von Cádiz (1812)*, in «Der Staat», n. 39, 2000, p. 572; A. Masferrer, *La soberanía nacional en las Cortes gaditanas: su debate y aprobación*, in J.A. Escudero López (ed. by), *Cortes y Constitución de Cádiz. 200 años*, vol. 2, Madrid, Espasa, 2011, p. 646; A. Torres del Moral, *La soberanía nacional en la constitución de Cádiz*, in «Revista de Derecho Político», n. 82, 2011, p. 66.
- ¹²⁹ Varela Suanzes-Carpegna, *La teoría del estado* cit., p. 179.
- ¹³⁰ Ivi, p. 182.
- ¹³¹ Maravall identifies the influence of humanism as a condition for the perception of a political community. J.A. Maravall, *Estudios de Historia del Pensamiento Español*, Madrid, Ediciones Cultura Hispánica, 1973, p. 58.
- ¹³² Varela Suanzes-Carpegna, *La teoría del estado* cit., p. 211.
- ¹³³ J.A. Maravall, *Teoría española del Estado en el siglo XVII*, Madrid, Instituto de estudios políticos, 1944.
- ¹³⁴ Cf. *inter alia* I. Álvarez Cuartero and J. Sánchez Gómez (ed. by), *Visiones y revisiones de la independencia americana*, Salamanca, Ediciones Universidad de Salamanca, 2007; A. Annino, M. Ternavasio, *El laboratorio constitucional iberoamericano*, Madrid, Iberoamericana, 2012; M. Chust and A. Serrano (ed. by), *Debates sobre las independencias iberoamericanas*, Madrid, Ahila-Iberoamericana, 2007.
- ¹³⁵ Per the Chilean representative, Leyva, during the debate on 26 September 1811 regarding Art. 91 of the Cádiz constitution: *D.D.A.C.*, *ibid.*, vol. 8, p. 459 (fn. 193); «[...] I do not agree, that the representatives of the congress do not represent the pueblos, that elected them. That the congregation of representatives of the pueblos that form one single nation represent the national sovereignty does not destroy the character of particularly representation of their respective province». Cf. also «Si las Cortes representan a la Nación, los cabildos representan un pueblo determinado»; cit. from: *Diario de sesiones ibid.* (fn. 220), 10 de enero de 1812, p. 2590 («If the Cortes represent the nation, the councils represent a determined people»).
- ¹³⁶ Willoweit and Seif, *Europäische Verfassungsgeschichte*, cit., p. 430; Concerning the “leyes fundamentales” as “fundamental laws”, cf. K.H.L. Pölit, *Die Constitutionen der europäischen Staaten seit den letzten 25 Jahren*, Leipzig, Brockhaus, 1820, Part III, p. 36. Concerning the literal model of the edition elaborated by Karl Friedrich Hartmann, see his work (published anonymously), *Die spanische Constitution der Cortes und die provisorische Constitution der Vereinigten Provinzen von Südamerika; aus den Urkunden übersetzt mit historisch-statistischen Einleitungen*, Leipzig, Brockhaus, 1820), as well as the later analysis of it: H. Mohnhaupt, *Das Verhältnis der drei Gewalten in der Constitution der Cortes*, in U. Müßig (ed. by), *Konstitutionalismus und Verfassungskonflikt*, Tübingen, Mohr Siebeck, 2006, pp. 79-99, esp. 82. This also mentions the translation mistake in the preamble as recorded by Pölit, which distorted the meaning – instead of: ‘daß die alten Grundgesetze [...] den großen Zweck [...] nicht erfüllen können’ (‘that the old fundamental laws [...] may not accomplish the great goal’), it should read ‘[...] erfüllen können’ (‘[...] can accomplish’). Concerning the function and meaning of the “fundamental laws” cf. also H. Mohnhaupt, *Von den “leges fundamentales” zur modernen Verfassung in Europa. Zum begriffs- und dogmengeschichtlichen Befund (16.-18. Jahrhundert)*, in «Ius Commune», n. 25, 1998, pp. 121-58.
- ¹³⁷ S.M. Coronas González, *Las Leyes Fundamentales del Antiguo Régimen (Notas sobre la Constitución histórica española)*, in «Anuario de Historia del Derecho Español», n. LXV, 1995, pp. 127-218; R.P.Fr. Magin Ferrer, *Las Leyes Fundamentales de la Monarquía Española, según Fueron antiguamente, y según conviene que sean en la época actual*, I-II, Barcelona, 1845.
- ¹³⁸ Taken as a whole, the addresses allow for comprehensive conclusions to be drawn about the intention of the constitutional commissions of the Cortes. These are printed in the *Discurso preliminar* of Hartmann, *Die spanische Constitution der Cortes* cit., pp. 3-106. The analysis and assessment here follow Mohnhaupt, *Das Verhältnis der drei Gewalten* cit., p. 79.
- ¹³⁹ Ivi, cit., pp. 79-99, esp. 89-90.
- ¹⁴⁰ Address of 11 August 1811, in Hartmann, *Die spanische Constitution der Cortes* cit., p. 4.
- ¹⁴¹ F. von Grunenthal and K.G. Dengel, *Spaniens Staats-Verfassung durch die Cortes aus der Urschrift übertragen und herausgegeben von Friedrich von Grunenthal und Karl Gustav Dengel*, Berlin, 1819, p. III.
- ¹⁴² Hartmann, *Die spanische Constitution der Cortes* cit., p. 5.
- ¹⁴³ ‘The religion of the Spanish people is and remains for ever the one, true, roman-catholic and apostolic religion. The people protect it by means of wise and just laws and forbids the exercise of any other.’ Art. 12, *Constitution of 1812*, in Willoweit and Seif, *Europäische Verfassungsgeschichte*

- cit., p. 432.
- ¹⁴⁴ Concerning this conflict between political and religious freedom, cf. J.M. Portillo, *La Libertad entre Evangelio y Constitución. Notas para el Concepto de Libertad Política en la Cultura Española de 1812*, in J.M. Iñurrategui Rodríguez, J.M. Portillo Valdés (ed. by), *Constitución en España: Orígenes y Destinos*, Madrid, Centro de Estudios Constitucionales, 1998, pp. 139-77.
- ¹⁴⁵ Art. 371: "Todos los españoles tienen libertad de escribir, imprimir y publicar sus ideas políticas [...]"; text version in A.F. García (edited by), *La Constitución de Cádiz (1812) y Discurso Preliminar a la Constitución*, Madrid, Editorial Castalia, 2002, p. 169; cf. I.F. Sarasola, *Opinión pública y "libertades de expresión" en el constitucionalismo español (1726-1845)*, in «Giornale di Storia costituzionale», n. 6/2, 2003, pp. 200-5.
- ¹⁴⁶ Address of the Cortes to the King, 24 December 1811, in Hartmann, *Die spanische Constitution der Cortes* cit., p. 101.
- ¹⁴⁷ Hartmann, *Die spanische Constitution der Cortes* cit., p. 8.
- ¹⁴⁸ Address to the King, 11 August 1811, in Hartmann, *Die spanische Constitution der Cortes* cit., pp. 4, 17, 34; cf. also Grunenthal and Dengel, *Spaniens Staats-Verfassung* cit., pp. X-XI.
- ¹⁴⁹ Hartmann, *Die spanische Constitution der Cortes* cit., p. 8. Cf. Mohnhaupt, *Das Verhältnis der drei Gewalten* cit., pp. 91-2.
- ¹⁵⁰ C. von Rotteck, *Cortes und Cortes-Verfassung in Spanien*, in C. von Rotteck and C. Welcker (ed. by), *Staats-Lexikon oder Encyclopädie der Staatswissenschaften*, vol. 3, Altona, Hammerich, 1836, p. 57.
- ¹⁵¹ I. Burdiel, *Myths of Failure, Myths of Success: New Perspectives on Nineteenth-Century Spanish Liberalism*, in «The Journal of Modern History», n. 70/4, 1998, pp. 892-912.