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Sovranità e Costituzione: nodi storici e prospettive contemporanee

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Introduction: The "invented" sovereignty / *Introduzione: la sovranità "inventata"*

ULRIKE MÜSSIG

The research programme of the Advanced Grant ReConFort (Reconsidering Constitutional Formation) examines the interdependencies between constitutional process and public discourse for selected historic case studies[1]. By its title «Sovereignty and Constitution», that is to say *legitimation* and *legal transformation of the whole political order*, this special issue of the *Journal of Constitutional History* joins company with ReConFort's research results[2] and enriches them by further historic and contemporary perspectives. What the enclosed contributions have in common is the core normative principle that public authority in all its forms, be it monarchical, democratic, or aristocratic, central, regional, or departmental, must somehow be limited and regulated within the bounds of impartial law[3].

Since the Bodinian state sovereignty hazarded an imperfection to explain the legal binding at the very moment of concluding the social contract, it is the well-known and often-criticized «paradox of constitutionalism»[4] that unlimited and absolute constituent sovereignty sets the path for establishing the legal regime of a limited government[5]. «Sovereignty and Constitution», needless to say, may be seen as logical twins, but in real life involving real people, their relationship is not without controversy or tensions. These tensions and their solutions, the imperfections and the coming to terms with them, and the indecisiveness and the consequent rolling were points of special interest for the comparative constitutional research of ReConFort. It has not engaged with abstract political notions, and never claimed to produce a comprehensive theoretical treatise about constitutional concepts in their formal diversity as institutional devices. Its starting point was the functional understanding of constitutions as evolutionary achievements, rising from the interplay of the text with its contemporary societal context, the political practice, and the respective constitutional interpretation. Its focus lay on the functions of the discourses in and around the Polish *Sejm* (1788-92), the Belgian

National Congress (1830-1), the Frankfurt Parliament (1848-9), and on the road that led to the Italian *Parlamento Subalpino* (1848-61)[6]. All these historic cases studies share constitutional formation in the stress field of external hegemonic powers: Polish partitions, Belgian secession from the United Kingdom of the Netherlands, German Restoration under the "big four" of the Congress of Vienna, Franco-Austrian rivalry over Italian territories.

What were the *political polemics in concrete situations of conflict* that the claims for constituent sovereignty were "invented" for?[7] Why sovereignty? What was the intended function in constitutional debates? Like a glimpse behind the scenes of abstract perceptions in the political history of ideas, it is the aim of ReConFort's functional approach to offer answers to these challenges. How was sovereignty argued with to push through the constitutional transformation of the whole political order into a legal order?

It was the quest for legitimation[8], inherent in the analysed constitutional discourses in debates, public media, and the correspondence of protagonists[9], that culminated in the doctrine of constituent sovereignty as the core idea of modern constitutionalism subsequent to the American and French revolutions. All claims for constituent sovereignty met as legal starting point ("Big Bang argument" or as a kind of a legal *primum movens*) of the process of juridification of sovereignty, as all constitutions (be it modern or historical since the late eighteenth century) agreed in the core normative principle that political order is codified as a legal order[10]. National sovereignty is synonymous with the juridification of sovereignty by means of the constitution. This is connected to normativity as the goal of the modern constitutional concept[11]. It was only with the differentiation between the sacrosanct and dispositive law that the legal term of the constitution of the eighteenth century managed to justify the self-commitment of political power without the concept of the state contract (*Staatsvertrag*), as the latter restricted binding obligations only to extant law.

Analysing the conflicts in the Polish discussion of the May Constitution, the challenges for the Belgian National Congress as the sole representative of the nation, and the legitimization process of "representative government" under the Albertine Statute made it clear that sovereignty was "invented" to constitute public authority, since there was hardly any state left before the second Polish partition, not yet an established state in the "legal second" of the Belgian declaration of independence, nor before the realization of Italian national unification. Of course, the national differences remain, and the functional approach neither negates nor ignores them. Within the Polish May Constitution of 1791, for example, national sovereignty was not "invented" in order to create or constitute a new political order. Rather, it serves as an Archimedean point (*Punctum Archimedis*) between the old aristocratic Republic and the opening towards a general political body.

What can be explained about ReConFort within this introduction is its curiosity beyond conventional narratives. Its functional analysis of key passages as semantic paradigms in the interplay of constitutional formation and public participation may be criticized as a heretical shift «beyond constitutionalism»[12]. And there might

be reasons to do so, as constitutionalism and also its history have been centred in the "constitutional state" (*Rechtsstaat*) since the Enlightenment. However, only by crossing beyond the national anchoring in a nationally or territorially bound public authority can we open our eyes to the indecisiveness of constitutional texts, far beyond being a precise logbook for political experts. Such a shift neither questions the efforts of traditional institutional historiography or history of political ideas, nor is it merely a methodological gadget. Rather, it meets the challenges in a globalized and pluralistic world, exceeding the capacities of traditional authorities of national states[13]. It is also beneficial with regard to European integration. Why is sovereignty called for in modern Europe? Brexit, populism, and Euroscepticism have brought it back to stage and into the centre of debates, generally relying on the national limits of traditional state-related sovereignty concepts. What these fear-based opponents of European integration do not realize is the Lisbon Treaty's "invention" of a Union sovereignty, and what the pro- and pan-European enthusiasts do not dare to verify is the indecisiveness of this declared Union sovereignty. It cannot be taken for granted that the "United States of Europe" was the goal of the integration process. Functioning as «a constitutive theory of public authority»[14] throughout the common European constitutional history, the sovereignty of the examined historical constitutional discourses was "invented" to legitimate juridification by constitution. The same is true for the European integration, be it in a "Westphalian"-mannered Union of European States or in the coherently-structured model of the aforementioned United States of Europe. The Lisbon Treaty's "invention" of a Union sovereignty explains the integration process on Union level as juridification. It is exclusively the law that solves any conflict. No bargaining about the binding character of the European Court of Justice's judgements, or about the "impartiality" of the law on the basis of the judges' independence!

This is the context in which this volume assembles the papers of ReConFort's midterm conference, «On the Way to Juridification by Constitution», hosted by the University of Passau and the Carl Friedrich von Siemens Stiftung, Munich, in September 2016. This collection is enhanced by contributions of affiliated researchers and the inaugurate lecture of The Right Honourable Lord Reed, given to ReConFort's conference on the «Constitutional Precedence as Keystone of Modern Constitutionalism» hosted in the Royal Flemish Academy of Belgium for Science and the Arts at 14 March 2016.

The claims for Westminster Parliament's formal sovereignty, which have become especially relevant in light of Brexit, originated in the common lawyers' protest against Stuart absolutism in the seventeenth century, and were all based chiefly in Sir Edward Coke's argumentative use of the supremacy of common law «since time immemorial»; today, the rule of common law still supplements the British unwritten constitutional system[15]. The latter connects Lord Reed's Brussel lecture on «Re-thinking the UK Constitution» to John Allison's Munich paper on «The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective». Both of these eminent personalities in the field of common law shared their expertise

with the ReConFort team, the first from the practical background as a Scottish Supreme Court judge who would dissent in the Miller case[16] only a few months after his ReConFort lecture, and the second from the academic background of editing the most recent edition of Dicey's influential *The Law of the Constitution* (2013). The legitimization of the common law as a limitation on monarchical judicial sovereignty was narrated by Sir Edward Coke, also referring to the origins of Parliamentary sovereignty in its recognition as highest common law court. According to Dicey's later assessment, Coke's arguments were «pedantic, artificial and unhistorical»[17]. Coke was wrong, but he was wrong in the brilliant way that continues to influence English and British law. My own contribution to this special issue, «Tales about Sovereignty», aims to express not only Coke's pedantry but also his creativity; this extends beyond the overall functional approach of ReConFort but also complements it, pointing to sovereignty as the legitimizing topos in constitutional debates.

After these British perspectives, which themselves do not belong to the core working programme of ReConFort, Luigi Lacchè's lecture in the Carl Friedrich von Siemens Stiftung on «The Sovereignty of the Constitution. A Historical Debate in a European Perspective / *La sovranità della costituzione. Un dibattito storico in una prospettiva europea*» returns to ReConFort's fundamentals. His approval and further development of ReConFort's ideas on a broader comparative scope stand out, not only as he is the *spiritus rector* of this journal, but also due to the generosity of his support for the ReConFort team, for which words fail to express adequate thanks. The present volume was his idea, and his commitment to test political-constitutional thoughts in nineteenth-century Europe on their functionality in constitutional discourse constantly encouraged me in all challenges and setbacks. His analysis of the political-constitutional thought of the doctrinals (*Doctrinaires*) covers the competing "absolutist" (and monistic) idea of the concentration of power in a unique, indivisible, and inalienable "point of reference" and the "cooperative" ideas of political moderation and constitutional equilibrium. Lacchè's assessment of the competing ideas identifies "compromise strategies" and the "neutralization of sovereignty" in the debates conducted throughout the nineteenth century.

Further contributions in the ReConFort context are provided by Bodie Alexander Ashton and Ida Ferrero. The first joined the ReConFort team as professional academic editor in 2016; his article here explains the «constitutional patriotism» (*Verfassungspatriotismus*) that prevailed in early nineteenth-century Württemberg as based in the 1514 Treaty of Tübingen and the 1819 Ludwigsburg Constitution. These constitutional documents provided the Württemberg population with a narrative of identification, which was essential in permitting the kingdom to successfully integrate new subject populations from formerly autonomous imperial cities and annexed provinces. Ida Ferrero contributed to the conference on «The International Influence of the Norwegian 1814 Constitution, 1814-1920», held in Oslo in November 2015; since then, she has joined the project in spirit and has helped to identify further cross-border transfers of constitutional discourse that would otherwise have remained unknown to me. Her article

about the pre-unification Italian interest in the Eidsvoll Constitution, «Rethinking the Electoral and Constitutional System: The Works of Palma and Brunialti on the Norwegian Constitution / *Per una riforma del sistema elettorale e costituzionale: i contributi di Palma e Brunialti sulla costituzione norvegese*», is based on the materials accessible in the library of the Faculty of Law of the University of Turin since its modernization by Cesare Alfieri di Sostegno, who was the first *Magistrato della Riforma*. This Italian "exclamation mark" completes the ReConFort background to this volume.

Further Italian contributions, by Matteo Zamboni, Luigi Nuzzo, and Giacomo Demarchi, have a wide historical and geographical outreach beyond the core ReConFort research tasks. Matteo Zamboni was invited to the ReConFort summer school for early career researchers at Passau in 2016; his work complements that of Giuseppe Mecca, «Constitutionalization of the Nation Unification», which will be published next year in the second volume of the series of ReConFort results monographs, *Reconsidering Constitutional Formation II Decisive Constitutional Normativity*[18]. Zamboni's paper on «The Treatment of Italians abroad in the Legal Opinions of the *Consiglio del contenzioso diplomatico* of the Italian Ministry of Foreign Affairs (1861-1907)» is followed Luigi Nuzzo's contribution, «*Quel che resta della sovranità. Concessioni e governo del territorio a Tianjin*», before Giacomo Demarchi, with his article «*Sovranità, autonomia, democrazia:* El Estado integral *spagnolo del 1931 come laboratorio del regionalismo contemporaneo*», builds bridges between Andreas Timmermann's research on the «Concepts/ideas of sovereignty in the constitutional discourses of the Spanish Cadíz constitution» and the contemporary Spanish constitutional struggles in light of the Catalan bid for autonomy.

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Il programma di ricerca concernente lo ERC Advanced Grant ReConFort (*Reconsidering Constitutional Formation*) esamina le interdipendenze tra processo costituzionale e discorso pubblico rispetto ad alcuni casi selezionati[19]. Con il suo titolo «Sovranità e Costituzione», in altre parole *legittimazione* e *trasformazione legale dell'intero ordine politico*, questo numero speciale del *Giornale di Storia Costituzionale* si collega ai risultati[20] della ricerca ReConFort e li arricchisce con ulteriori prospettive storiche e contemporanee. Quello che i contributi qui raccolti hanno in comune è il principio normativo centrale che la pubblica autorità in tutte le sue forme, sia essa monarchica, democratica, o aristocratica, centrale, regionale o dipartimentale, debba in qualche modo essere limitata e regolata entro i limiti di un diritto imparziale[21].

Sin da quando la teoria della sovranità dello stato di Bodin ha ipotizzato un'imperfezione per spiegare il vincolo legale che sorge nel momento esatto della conclusione del contratto sociale, esiste il celebre e spesso criticato «paradosso del costituzionalismo»[22], cioè che una sovranità costituente illimitata e assoluta dà avvio al percorso per la costituzione del regime legale di un *limited government* (governo limitato dal diritto)[23]. «Sovranità e Costituzione», va da sé, possono essere visti come gemelli logici, ma nella vita reale che coinvolge persone reali, la loro relazione non è scevra da controversie o tensioni. Queste tensioni e le loro soluzioni, le imperfezioni e il ve-

nire a patti con esse, e le indecisioni e le conseguenti oscillazioni sono stati punti di speciale interesse per la ricerca costituzionale comparata di ReConFort. Essa non si è confrontata con nozioni politiche astratte, e non ha mai preteso di produrre un trattato teorico onnicomprensivo sui concetti costituzionali nella loro diversità formale come strumenti istituzionali. Il suo punto di partenza è stato la comprensione funzionale delle costituzioni come conquiste evolutive, emergenti dall'interazione del testo con il suo contesto sociale contemporaneo, la pratica politica e la rispettiva interpretazione costituzionale. Essa è focalizzata sulle funzioni dei discorsi che hanno riguardato e si sono tenuti nello *Sejm* polacco (1788-92), nel Congresso nazionale belga (1830-1), nella Dieta di Francoforte (1848-9), e sul percorso che ha portato al Parlamento Subalpino italiano (1848-61)[24]. Tutti questi casi studio storici condividono una formazione costituzionale avvenuta nel campo di tensione di poteri egemonici esterni: le partizioni polacche, la secessione belga dal Regno Unito dei Paesi Bassi, la restaurazione tedesca disegnata dai "quattro grandi" del Congresso di Vienna, la rivalità franco-austriaca sui territori italiani.

Quali erano le *polemiche politiche in situazioni concrete di conflitto* per le quali furono "inventate" le richieste di sovranità costituente?[25] Perché sovranità? Quale era la funzione intesa nei dibattiti costituzionali? Come guardando da dietro le quinte di percezioni astratte nella storia politica delle idee, lo scopo dell'approccio funzionale di ReConFort è quello di offrire una risposta a queste sfide. Come furono costruite le argomentazioni sulla sovranità per portare avanti la trasformazione costituzionale in ordine giuridico dell'intero ordine politico?

Fu la ricerca di legittimazione[26], inerente ai discorsi costituzionali analizzati nei dibattiti, nei media pubblici e nella corrispondenza dei protagonisti[27], che culminò nella dottrina della sovranità costituente come idea centrale del costituzionalismo moderno susseguente alle Rivoluzioni americana e francese. Tutte le richieste di sovranità costituente si presentavano come punto di partenza legale ("tesi del Big Bang" o come una sorta di *primum movens* giuridico) del processo di giuridificazione della sovranità, poiché tutte le costituzioni (siano esse moderne o storiche fin dalla fine del diciottesimo secolo) concordavano sul principio normativo centrale che l'ordine politico è codificato come un ordine giuridico[28]. La sovranità nazionale è sinonimo della giuridificazione della sovranità attraverso la costituzione. Ciò è connesso alla normatività come scopo del moderno concetto costituzionale[29]. Fu soltanto con la differenziazione tra diritto sacrosanto e diritto dispositivo che il termine giuridico di costituzione nel diciottesimo secolo riuscì a giustificare l'autoregolamentazione del potere politico senza il concetto di contratto di stato (*Staatsvertrag*), in quanto quest'ultimo limitava le obbligazioni vincolanti solo al diritto vigente.

Analizzare i conflitti nella discussione polacca sulla Costituzione di maggio, le sfide per il Congresso nazionale belga come solo rappresentante della nazione, e il processo di legittimazione del "governo rappresentativo" sotto lo Statuto Albertino ha reso chiaro che la sovranità fu "inventata" per costituire l'autorità pubblica, in quanto vi era a malapena uno stato rimasto prima della seconda partizione polacca, uno stato non ancora stabilito nel "secondo giuridico" della dichiarazione belga di

indipendenza, o prima della realizzazione della unificazione nazionale italiana. Certamente, le differenze nazionali rimangono, e l'approccio funzionale non le nega, né le ignora. Nella Costituzione polacca del maggio 1791, per esempio, la sovranità nazionale non fu "inventata" per creare o costituire un ordine politico nuovo. Piuttosto serviva come punto di Archimede (*Punctum Archimedis*) tra la vecchia repubblica aristocratica e l'apertura verso un corpo politico generale.

Ciò che può essere spiegato di ReConFort in questa introduzione è la sua curiosità oltre le narrazioni convenzionali. La sua analisi funzionale di passaggi chiave intesi come paradigmi semantici nella interazione tra formazione costituzionale e partecipazione pubblica può essere criticata come svolta eretica «oltre il costituzionalismo»[30]. E potrebbero esserci ragioni per farlo, in quanto il costituzionalismo e anche la sua storia sono stati incentrati sullo "stato costituzionale" (*Rechtsstaat*) fin dall'Illuminismo. Comunque, solo andando oltre l'ancoraggio nazionale ad una autorità pubblica vincolata nazionalmente o territorialmente, riusciamo ad aprire gli occhi sulla indecisione dei testi costituzionali, ben al di là dall'essere un compendio preciso per esperti politici. Tale svolta non mette in dubbio gli sforzi della storiografia istituzionale tradizionale o della storia del pensiero politico, né è meramente un gadget metodologico. Piuttosto risponde alle sfide in un mondo globalizzato e pluralistico, che vanno al di là delle capacità delle autorità tradizionali degli stati nazionali[31]. Reca inoltre beneficio all'integrazione europea. Perché si chiede sovranità nell'Europa moderna? Brexit, populismo, ed euroscetticismo l'hanno riportata alla ribalta e rimessa al centro dei dibattiti, generalmente facendo riferimento ai limiti nazionali di concetti di sovranità legati allo stato tradizionale. Quello che i pavidi oppositori dell'integrazione europea non realizzano è l'"invenzione" nel Trattato di Lisbona di una sovranità dell'Unione, e quello che gli entusiasti pro europei e pan-europei non osano verificare è l'indecisione di questa dichiarata sovranità dell'Unione. Non si può dare per scontato che gli "Stati Uniti d'Europa" siano stati lo scopo del processo di integrazione. Funzionando come «a constitutive theory of public authority»[32] (una teoria costitutiva di pubblica autorità) durante la storia costituzionale comune europea, la sovranità dei discorsi costituzionali storici esaminati fu "inventata" per legittimare la giuridificazione attraverso la costituzione. Lo stesso concetto vale per l'integrazione europea, sia essa una Unione di Stati europei alla maniera di "Vestfalia", o sia essa un modello coerentemente strutturato dei summenzionati Stati Uniti d'Europa. L'"invenzione" nel Trattato di Lisbona di una sovranità dell'Unione spiega il processo di integrazione a livello dell'Unione come giuridificazione. È esclusivamente il diritto che risolve ogni conflitto. Nessuna negoziazione sul carattere vincolante delle sentenze della Corte di Giustizia Europea, o sull'"imparzialità" del diritto in base all'indipendenza dei giudici!

Questo è il contesto nel quale questo volume raccoglie i papers presentati alla conferenza di medio periodo del progetto ReConFort, intitolata «*On the Way to Juridification by Constitution*», ospitata dall'Università di Passau e dal *Carl Friedrich von Siemens Stiftung*, di Monaco, nel settembre 2016. Questa raccolta è arricchita dai contributi di ricercatori affiliati e dal

discorso inaugurale del *Right Honourable* Lord Reed, tenuto durante la conferenza di ReConFort sulla «*Constitutional Precedence as Keystone of Modern Constitutionalism*» ospitata dalla *Royal Flemish Academy of Belgium for Science and the Arts* il 14 marzo 2016.

Le richieste di sovranità formale del Parlamento di Westminster, che sono diventate particolarmente rilevanti alla luce della Brexit, hanno avuto origine nelle proteste dei *common lawyers* contro l'assolutismo degli Stuart nel diciassettesimo secolo, e sono state tutte basate principalmente sull'uso argomentativo di Sir Edward Coke della supremazia del *common law* «since time immemorial» (da tempo immemorabile); oggi la regola del *common law* ancora alimenta il sistema costituzionale britannico non scritto[33]. Quest'ultimo concetto collega la conferenza di Lord Reed a Bruxelles su «*Re-thinking the UK Constitution*» al paper di Monaco di John Allison su «*The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective*». Entrambe queste personalità eminenti nel campo del *common law* condividono la loro competenza con l'*équipe* di ReConFort, il primo dal punto di vista pratico di un giudice della *Scottish Supreme Court* che solo alcuni mesi dopo la sua conferenza ReConFort avrebbe dissentito nel caso Miller[34], e il secondo dal punto di vista accademico di curatore della più recente edizione dell'autorevole volume di Dicey, *The Law of the Constitution* (2013). La legittimazione del *common law* come limitazione della sovranità giudiziaria del re fu narrata da Sir Edward Coke, anche in riferimento alle origini della sovranità parlamentare riconosciuta come la più alta corte di *common law*. Secondo affermazioni successive di Dicey, gli argomenti di Coke erano «pedantic, artificial and unhistorical»[35] (pedanti, artificiali e astorici). Coke aveva torto, ma aveva torto in un modo brillante che continua ad influenzare il diritto inglese e britannico. Il mio contributo a questo numero speciale, «*Tales about Sovereignty*», mira a descrivere non solo la pedanteria di Coke ma anche la sua creatività; ciò va oltre l'approccio funzionale complessivo di ReConFort, ma lo completa, indicando la sovranità come topos legittimante nei dibattiti costituzionali.

Dopo queste prospettive britanniche, che di per sé stesse non appartengono al programma di lavoro centrale di ReConFort, la conferenza di Luigi Lacchè al *Carl Friedrich von Siemens Stiftung* su «*The Sovereignty of the Constitution. A Historical Debate in a European Perspective* / La sovranità della costituzione. Un dibattito storico in una prospettiva europea» torna ai fondamenti di ReConFort. La sua approvazione e gli sviluppi successivi delle idee di ReConFort in un più ampio ambito comparato spiccano, non soltanto perché Luigi Lacchè è lo *spiritus rector* di questa rivista, ma anche per la generosità del suo supporto al team di ReConFort, per il quale mi mancano le parole per esprimere un ringraziamento adeguato. Il presente volume è stata una sua idea, e la sua dedizione a testare la funzionalità di pensieri politico-costituzionali nel discorso costituzionale dell'Europa del diciannovesimo secolo, mi ha costantemente incoraggiata in tutte le sfide e le battute di arresto. La sua analisi del pensiero politico-costituzionale dei dottrinari (*Doctrinaires*) copre idee concorrenti: da un lato quelle "assolutiste" (e moniste) di concentrazione del potere in un unico, indivisibile e inalienabile "punto di riferimento", e dall'altro quelle "cooperative" di moderazione poli-

tica e di equilibrio costituzionale. L'individuazione di Lacchè di idee concorrenti identifica "strategie di compromesso" e la "neutralizzazione della sovranità" nei dibattiti condotti durante tutto il diciannovesimo secolo.

Ulteriori contributi nel contesto di ReConFort sono forniti da Bodie Alexander Ashton e Ida Ferrero. Il primo si è unito al team di ReConFort come editore accademico professionale nel 2016; il suo articolo spiega qui il «patriottismo costituzionale» (*Verfassungspatriotismus*), prevalente nel Württemberg del primo diciannovesimo secolo, basato sul Trattato di Tubinga del 1514 e sulla Costituzione di Ludwigsburg del 1819. Questi documenti costituzionali fornivano alla popolazione del Württemberg una narrativa di identificazione che era essenziale per consentire al regno di integrare con successo nuove popolazioni sottomesse di città imperiali precedentemente autonome e di province annesse. Ida Ferrero ha contribuito alla conferenza su «*The International Influence of the Norwegian 1814 Constitution, 1814-1920*», tenutasi ad Oslo nel novembre 2015; fin da allora si è spiritualmente unita al progetto e ha fornito il suo aiuto per identificare ulteriori trasferimenti transfrontalieri di discorsi costituzionali che mi sarebbero altrimenti rimasti sconosciuti. Il suo articolo relativo all'interesse nell'Italia preunitaria per la Costituzione Eidsvoll, «*Rethinking the Electoral and Constitutional System: The Works of Palma and Brunialti on the Norwegian Constitution* / Per una riforma del sistema elettorale e costituzionale: i contributi di Palma e Brunialti sulla costituzione norvegese», è basato su materiali accessibili nella biblioteca della Facoltà di Giurisprudenza dell'Università di Torino fin dalla sua modernizzazione operata da Cesare Alfieri di Sostegno, che fu il primo Magistrato della Riforma. Questo "punto esclamativo" italiano completa il quadro di ReConFort in questo volume.

Ulteriori contributi italiani ad opera di Matteo Zamboni, Luigi Nuzzo, e Giacomo Demarchi, hanno un'estensione storica e geografica ampia che va oltre l'essenza degli oneri di ricerca di ReConFort. Matteo Zamboni è stato invitato a partecipare alla *Summer School* ReConFort per giovani ricercatori tenutasi a Passau nel 2016; il suo lavoro completa quello di Giuseppe Mecca, «*Constitutionalization of the Nation Unification*», che sarà pubblicato il prossimo anno nel secondo volume della serie monografica che pubblica i risultati del progetto ReConFort, *Reconsidering Constitutional Formation II Decisive Constitutional Normativity*[36]. Il paper di Zamboni su «*The Treatment of Italians abroad in the Legal Opinions of the* Consiglio del contenzioso diplomatico *of the Italian Ministry of Foreign Affairs (1861-1907)*» è seguito dal contributo di Luigi Nuzzo, «*Quel che resta della sovranità. Concessioni e governo del territorio a Tianjin*», precedentemente Giacomo Demarchi, con il suo articolo «Sovranità, autonomia, democrazia: El Estado integral spagnolo del 1931 come laboratorio del regionalismo contemporaneo», costruisce ponti tra la ricerca di Andreas Timmermann su «*Concepts/ideas of sovereignty in the constitutional discourses of the Spanish Cadíz constitution*» e le lotte costituzionali della Spagna contemporanea alla luce del tentativo autonomista catalano.

[1] ReConFort, Reconsidering Constitutional Formation. Constitutional Communication by Drafting, Practice and Interpretation in 18th and 19th century Europe, 7th Framework Programme, "Ideas", ERC-AG-SH6 - ERC Advanced Grant - The study of the human past, Advanced Grant No. 339529.

[2] U. Müßig (ed. by), *Reconsidering Constitutional Formation I National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Cham, Springer, 2016. In particular, U. Müßig, *Juridification by Constitution: National Sovereignty in Eighteenth and Nineteenth Century Europe*, in the same, pp. 1-92. The second volume of ReConFort results is forthcoming: U. Müßig (ed. by), *Reconsidering Constitutional Formation II Decisive Constitutional Normativity, From Old Liberties to New Precedence*, Cham, Springer, 2018.

[3] See the essays in P. Dobner and M. Loughlin (ed. by), *The Twilight of Constitutionalism*, Oxford, Oxford University Press, 2010.

[4] M. Loughlin and N. Walker (ed. by), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford, Oxford University Press, 2008.

[5] D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford, Oxford University Press, 2016, p. 2.

[6] U. Müßig, *Reconsidering Constitutional Formation. Research Challenges of Comparative Constitutional History*, in «Giornale di Storia Costituzionale», n. 27, 2014, p. 107 (fn. 2), and the discourses in U. Müßig, *Recht und Justizhoheit: Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich*, Berlin, Duncker & Humblot, 2009², pp. 91-2, 141-2, 205-6, 208-11, 279-80.

[7] Borrowing from the title of E. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, New York, Norton, 1989.

[8] Cf. T. Paine, *Rights of Men: Being an Answer to Mr. Burke's Attack on the French Revolution*, London, 1792, pp. 15, 134.

[9] Cf. the open access database currently under construction: *ReConFort Open Database*, <http://sources.reconfort.eu>, September 2017.

[10] Lee, *Popular Sovereignty* cit., p. 1.

[11] Hence the focus of the second volume of ReConFort research, *Decisive Constitutional Normativity* cit.

[12] N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2012.

[13] Cf. N. Walker, *Sovereignty in Transition*, Oxford, Oxford University Press, 2003.

[14] Lee, *Popular Sovereignty* cit., p. 10.

[15] «The rule of law meant essentially the rule of common law». A.V. Dicey, *An Introduction to the Study of the Law of Constitution*, J.W.F. Allison (ed. by), Oxford, Oxford University Press, 2013, p. 197. Cf. also T.R.S. Allan, *Law, Liberty, and Justice, The Legal Foundations of British Constitutionalism*, Oxford, Clarendon Press, 1993, p. 4.

[16] *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*, UK Supreme Court, 24 January 2017.

[17] Cf. Dicey, *The Law of the Constitution* cit., p. 18 (esp. fn. 140).

[18] G. Mecca, *In keeping with the Spirit of the Albertine Statute. Constitutionalization of the National Unification*, in U. Müßig (ed. by), *Reconsidering Constitutional Formation II Decisive Constitutional Normativity* cit.

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[19] ReConFort, Reconsidering Constitutional Formation. Constitutional Communication by Drafting, Practice and Interpretation in 18th and 19th century Europe, 7th Framework Programme, "Ideas", ERC-AG-SH6 - ERC Advanced Grant - The study of the human past, Advanced Grant No. 339529.

[20] U. Müßig (ed. by), *Reconsidering Constitutional Formation I National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Cham, Springer, 2016. In particolare, U. Müßig, *Juridification by Constitution: National Sovereignty in Eighteenth and Nineteenth Century Europe*, in Ivi, pp. 1-92. Il secondo volume dei risultati di ReConFort sta per uscire: U. Müßig (ed. by), *Reconsidering Constitutional Formation II Decisive Constitutional Normativity, From Old Liberties to New Precedence*, Cham, Springer, 2018.

[21] Vedi i saggi in P. Dobner and M. Loughlin (ed. by), *The Twilight of Constitutionalism*, Oxford, Oxford University Press, 2010.

[22] M. Loughlin and N. Walker (ed. by), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford, Oxford University Press, 2008.

[23] D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford, Oxford University Press, 2016, p. 2.

[24] U. Müßig, *Reconsidering Constitutional Formation. Research Challenges of Comparative Constitutional History*, in «Giornale di Storia Costituzionale», n. 27, 2014, p. 107 (nt. 2), e i discorsi in U. Müßig, *Recht und Justizhoheit: Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich*, Berlin, Duncker & Humblot, 2009², pp. 91-2, 141-2, 205-6, 208-11, 279-80.

[25] Prendendo a prestito dal titolo di E. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, New York, Norton, 1989.

[26] Cf. T. Paine, *Rights of Men: Being an Answer to Mr. Burke's Attack on the French Revolution*, London,

1792, pp. 15, 134.

[27] Cf. il database open access al momento in costruzione: *ReConFort Open Database*, <http://sources.reconfort.eu>, settembre 2017.

[28] Lee, *Popular Sovereignty* cit., p. 1.

[29] Quindi il focus del secondo volume della ricerca ReConFort, *Decisive Constitutional Normativity* cit.

[30] N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2012.

[31] Cf. N. Walker, *Sovereignty in Transition*, Oxford, Oxford University Press, 2003.

[32] Lee, *Popular Sovereignty* cit., p. 10.

[33] «The rule of law meant essentially the rule of common law» (La *rule of law* significava essenzialmente la *rule of common law*). A.V. Dicey, *An Introduction to the Study of the Law of Constitution*, J.W.F. Allison (edited by), Oxford, Oxford University Press, 2013, p. 197. Cf. anche T.R.S. Allan, *Law, Liberty, and Justice, The Legal Foundations of British Constitutionalism*, Oxford, Clarendon Press, 1993, p. 4.

[34] *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*, UK Supreme Court, 24 January 2017.

[35] Cf. Dicey, *The Law of the Constitution* cit., p. 18 (specialmente nt. 140).

[36] G. Mecca, *In keeping with the Spirit of the Albertine Statute. Constitutionalization of the National Unification*, in U. Müßig (ed. by), *Reconsidering Constitutional Formation II Decisive Constitutional Normativity* cit.

Coke's 'Tales' about Sovereignty

ULRIKE MÜSSIG

I. *Introduction*

1. *Context of constitutional struggles of seventeenth-century England*

In English legal history, the seventeenth century marks the peak of conflicts between monarchical prerogative and Parliament, rooted in the common law courts' procedural control over prerogative courts[1]. It is common knowledge that the Bill of Rights, with its constitutive principle of Parliament's sovereignty, stands at the end of this line. What is hardly known, though, is the fact that the English concept of sovereignty is based on Parliament's historical self-understanding as highest court of justice and, therefore, as the highest common law court[2]. The main issue on the road to the establishment of the Bill of Rights in 1689 was the determination of who had the final say in a situation of emergency (necessity). Necessity (*necessitas*) was the Stuart monarchs' justification for taxes and forced loans without parliamentary approval; when Parliament decided to stand against the king openly by issuing the Militia Ordinance in 1642, it also did so by appealing to the authority of "necessity".

The historical bases for this sovereignty concept can be traced back to the control of courts by prerogative writs. On the legal battlefield against Stuart absolutism, this found its antagonists in Lord Chief Justice Edward Coke and Lord Chancellor Ellesmere. The underlying conflict over judicial sovereignty dates back to the sixteenth century and sets the initial scene for the following paper. Coke's "tales" have three acts: Firstly, procedural control as part of monarchical judicial sovereignty (residuary royal prerogative of justice); secondly, the precedence of (common) law over monarchical judicial sovereignty; finally, Parliamentary sovereignty as the highest interpretative authority over the general consensus incorporated in the common law. These components all contributed to the grand finale of Coke's legal work.

2. *The prerogative courts in general*

In 1534, the Church of England broke away from Rome, and Henry VIII declared himself its supreme head[3]. Just as the confessional bonds between Canterbury and Rome were cut, so too were the judicial ties. All legal remedies in ecclesiastical issues became "in-house" business, to be dealt with at Star Chamber and the Court of High Commission[4]. Since they evolved from the judicial sovereignty of the King's Council, the latter, along with the Court of Chancery, were referred to as prerogative courts. In English court history, the common law courts' evolution from the King's Council in the twelfth century left judicial sovereignty with the king – the residuary royal prerogative of justice, which he made use of in cases where the actions of common law seemed inadequate[5]. The monarchical prerogative of justice was exercised by the Lord Chancellor, by appointees (in the Star Chamber and the Court of High Commission), or by the king or queen himself or herself[6]. This denomination demonstrates that Star Chamber and Court of High Commission, just as Chancery, were not based on common law, but on royal prerogative[7], and that the monarch or the monarch's politically-dependent appointees decided in these prerogative courts at their discretion[8].

a. *The Court of Star Chamber*

The Star Chamber derived its name from the *camara stellata*, a room in Westminster Palace, whose ceiling was decorated with stars and where the Privy Council congregated for judicial matters from 1347 onwards[9]. For over a century, the Council of the Star Chamber was nothing more than a council congregation at a special venue[10]; during the reign of Henry VIII, Lord Chancellor Thomas Wolsey (in office 1515-29) established the judicial duties as the main task of the Council and promoted the basic division from governmental affairs. With the break from Rome, the judicial duty of the Star Chamber was consolidated under Lord Chancellor Thomas Cromwell from 1540 onwards[11]. Meetings were no longer viewed as Privy Council sessions, but as judicial congregations. Here, the councilmen exercised the royal prerogative of the judiciary as appointees dependent on the monarch[12].

At first, civil cases dominated the chamber's business. Later, from the time of the Stuart monarchs (beginning in 1603 with James VI and I, and continuing with interruption until the death of Queen Anne in 1714), more criminal cases came up, which the king delegated to his appointees only for sentencing, due to the shortcomings of common law in regards to serious crimes[13]. From the monarchical point of view, Star Chamber's advantage lay in the fact that it was unaffected by the *Magna Carta*'s requirement to involve jurors in proceedings[14]. This made its proceedings not only shorter, compared to common law courts, but also open to monarchical influence, especially in cases of sedition against the crown or parochial misdemeanours, where jurors would not necessarily follow the crown's line[15]. The Star Chamber, therefore, soon became known for its arbitrary sentences.

b. *The Court of High Commission*

The Court of High Commission was set up in 1580 by Elizabeth I (1533-1603), daughter of Henry VIII, to enforce the English Reformation (Art. VIII, *Acts of Supremacy*

1558), especially exercising monarchical judicial ecclesiastical sovereignty in criminal cases[16]. As a disciplinary court on behalf of the monarch as head of the Church of England, the High Commission received instructions via letters patent to collect evidence in all cases of apostasy, heresy, heterodoxy, schism, and conspiracy against the state church[17]. As a result, the High Commission was strongly instrumentalized by monarchical church policy and, together with Star Chamber, was an expression of the crown's claim to lead the Church of England[18]. Both courts adopted the *ex officio* oath, an oath «of calumny to tell the truth in ecclesiastical causes»[19] that required the accused to answer any questions put to him truthfully[20]. The oath had its origins in medieval 'remote' England to compensate the lack of parochial judiciary structures for implementing the reforms of Innocent III (r. 1198-1216)[21]. Parliament had banned the oath on several occasions[22]. Indeed, the basis of common law opposition against the prerogative courts argued that this oath to tell the truth in ecclesiastical matters (*de veritate dicenda*) forced the accused, even before the first interrogation and the first notice of the crimes of which he was accused, to incriminate himself. Refusal to take the oath led to imprisonment for contempt of court[23].

This practice was especially prevalent against the Puritans[24]. Already in 1584, John Whitgift had taken office as the Archbishop of Canterbury (1583-1604) from the moderate Edmund Grindal (r. 1575-83). Whitgift was a ferocious proponent of Elizabeth's anti-Puritan politics and empowered the High Commission as an instrument of these policies. Whitgift himself wrote: «[T]he whole ecclesiastical law is a carcasse [sic] without soul; yf [sic] it not be in the wants supplied by the commission»[25]. While Archbishop Whitgift defended the *ex officio* oath practice by claiming that a high level of disobedience often marked the attitude of the accused in religious matters, the opposing Puritans compared proceedings there with those of the Spanish Inquisition and sharply attacked the coercion to self-incrimination[26].

3. *Initial unease with prerogative courts*

In the beginning, the common lawyers' disapproval of the prerogative courts arose from their fears that they would circumvent common law[27]. Hamlet did not complain about «the law's delay»[28] for nothing in his famous monologue[29]; common law procedure by this time was characterised by the preponderance of technicality, particularly in relation to the *actiones*. While common law courts relied on witness accounts to shape a jury verdict, prerogative courts only allowed written evidence, with the relevant facts of the case being determined by the judges themselves. Furthermore, common law courts adhered to the principle of *in dubio pro reo*, whereas prerogative courts assumed the guilt of those accused.

The sympathies for speeding up of proceedings were twinned with a certain amount of tolerance for the new ecclesiastical jurisdiction, mainly because of the still slightly chaotic situation concerning both internal and procedural control of the clerical law during the reign of Elizabeth I (until 1603). In addition, the common law was familiar with equity, the Court of Chancery having been established for a long

time. The relationship between common law and prerogative courts was therefore not hostile from the outset. The verdict in *Caudrey's Case* (1591), and Coke's statement[30] as crown prosecutor about the need for prerogative courts[31] and the peculiarities of ecclesiastical law (regarding issues of heresy and schism)[32], did not foreshadow the legal battle to come. The Puritan priest Robert Caudrey had filed an action for trespass against one George Atton, who had illegally entered the parsonage during a clerical visitation authorized by the Act of Supremacy. However, Caudrey had lost his sinecure by High Commission verdict, as he had been preaching and holding church services not using the *Book of Common Prayer*, as demanded in the Queen's letters patent; therefore, it was relevant for the trespassing case in front of the common law courts whether the High Commission judgement had been legitimate or void. Questioning the High Commission's verdict in front of the common law courts was unsuccessful[33], and the common law courts were held to be bound to respect the judgements of the High Commission[34]. Coke pointed out the need for prerogative courts in regard to clerical cases and accepted their independence from the principles of common law, due to the nature of clerical law and the royal prerogative. In his closing statement against the plaintiff's arguments, Coke clarified the jurisdiction of the Court of High Commission[35] by pointing to the issues of heresy and schism[36]. This would change in the years to come, however, when Coke became one of the fiercest opponents against the prerogative courts. In his argumentative bag of tricks were the prerogative writs as the judicial means of the common law courts against the prerogative courts.

II. *Procedural control as part of monarchical judicial sovereignty (residuary royal prerogative of justice)*

1. *Prerogative writs in general, the writ of prohibition in particular*

To understand the prerogative writs in general, it is important to recognize that their origins remain murky; it is possible that they developed from the «wills of grace»[37] as described by Glanvill[38]. The term «prerogative writs» first appeared in the context of the habeas corpus writ in the *Richard Bourns Case* of 1620[39], to illustrate these as benevolence on part of the king[40]. In the 1759 case *R v Cowle*[41], the term was used collectively to describe the writs of prohibition, habeas corpus, mandamus, and certiorari[42]. Nowadays, the writ quo warranto is also counted on this list[43]. For the purposes of the present discussion, it is sufficient that the term «prerogative writs»[44] expresses the strong belief that monarchical judicial sovereignty should adhere to the law in material and procedural sense, as well as offering a legal means to the subjects in the event that a court exceeded the boundaries set forth in the law (rule of law)[45].

The exercise of this control over courts was viewed as part of the royal prerogative and was placed mainly with the Privy Council, but was later bestowed upon the Courts of King's Bench[46] as the king's court[47]. This led to a systematic control of the use of prerogative powers by the prerogative courts as of the beginning of the seventeenth century. The common law jurists who used the writs as an instrument of power against the prerogative courts would have therefore probably repudiated the term «prerogative writs»[48]. The writs were extraordinary le-

gal means[49] that were available to the courts themselves[50]. Therein they differed from other writs, which served as the court order gained by one party summoning the second party to appear before court[51]. While the prerogative writs had initially been developed for purposes of routine, they were now not available in the regular proceedings. Instead, they were deployed at the discretion of the court[52].

In the conflict between common law and prerogative courts, the writ of prohibition was of particular importance. Originally, this oldest of the prerogative writs was a mean utilized often by the parties to move proceedings from the clerical courts to the common law courts[53]. After the dissolution of canonical judiciary by the *Act of Supremacy* of 1534[54], however, the common law courts began to remember the writ of prohibition as a means to move legal proceedings from the clerical courts to the courts of the king[55].

2. *The writ of prohibition as legal instrument to remove proceedings from clerical courts*

During the later years of the reign of Elizabeth I, the writ of prohibition was used only cautiously by the common law courts. In the early proceedings, a certain opposition to the High Commission can be sensed, but it lacked a broader political dimension. The 1590 *Man's Case*[56] dealt with a prohibition that had been issued against a clerical court due to an illegitimate divorce decree; in *Love v Prin* (1599)[57], a personal injury case was taken away from the High Commission by a common law court with a writ of prohibition, as it was only a simple injury case, and the victim had not been a member of the clergy. In all of these proceedings, the jurisdiction of the prerogative and especially that of the clerical courts was doubted only sporadically in single cases; there was, in other words, no generalized rejection of prerogative authority. Rather, the case of *Baker v Rogers* (1599), in which a priest was relieved of his office for simony, showed that the common law courts did not question the authority of the High Commission for clerical matters. In this case, the common law court disallowed the prohibition, reasoning that it was bound by the decision of the High Commission regarding the question if simony had been committed and that it was not allowed to interfere in questions of clerical law[58].

Yet there were signs of prototypical resistance, even if these could not yet be generalized in a common law-prerogative antagonism. In the case *Collier v Collier* (1590/1), for example, the *ex officio* oath provoked a writ of prohibition[59]. This suggests that the High Commission and its procedure were being doubted in its very foundations. When the Court of High Commission interrogated the parties in the matter of unchastity, such a writ was decreed against it by the Court of Common Pleas, claiming that no one could be forced to give evidence against himself. As the *ex officio* oath was a characteristic of the High Commission, the conclusion that the liberty of refraining from self-incrimination would prohibit the use of the oath amounted to a frontal attack on the prerogative court. The Common Pleas' dissention was probably due to how fundamentally adverse the *ex officio* oath was to the principles of common law[60]. Significantly, in this particular case the counsel for the defence, formulating this argument against the *ex officio* oath, was none other than Edward Coke[61].

3. *Coke's* Institutes of the Laws of England *as Bible of seventeenth-century common law*

Coke's *Institutes of the Laws of England* (published 1628-44) was a ground-breaking legal textbook when it first appeared, and even today remains a book of authority. Partly, this was due to its forceful, articulate power. A particular example was Coke's explanation of why the Court of King's Bench, which Coke himself had presided over since 1613[62], gave its rulings without being influenced by the king[63]. The king, Coke reasoned, had transferred all his judicial powers to the courts, who would forthwith exercise this power in his name. Therefore, rulings in questions of the law were only allowed to be answered by these courts. The king was also not empowered to transfer this authority of judicial power for a second time to different institutions. The Court of King's Bench was also, pursuant to its historical function, the court concerned in legal matters regarding the king, but the king himself could not be the judge in his own proceedings. For Coke, the common law courts' authority not only included the correction of errors in legal proceedings, but also transgression in the extrajudicial sphere, such as breaches of the peace, oppression of subjects or other forms of misgoverning, so that every kind of public or private injustice could be reviewed by a court and punished. Coke's argumentation drew heavily on former legal authorities, such as Henry Bracton's *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*; 1264)[64], to provide evidence that his views were, in fact, consistent with long-standing legal tradition[65]. The importance of custom in the English legal system, and the legitimating justification "since former times", were almost unimpeachable arguments in English political discourse, and utilizing this for his own arguments was the goal Coke was striving for.

4. *The common law courts' use of writs of prohibition*

After it became clear that the reforms fought out between James I and the Church of England at the 1604 Hampton Court Conference had failed, the floodgates opened. In the same year, Lord Chancellor Ellesmere summoned the judges of the King's Bench and the Court of Exchequer, and interrogated them in the probably deliberate absence of the Court of Common Pleas judges, as to whether the latter could issue writs of prohibition when the case concerned was not pending before their court[66].

The judges of the King's Bench and the Exchequer opposed Ellesmere's suggestion and unanimously resisted the attempt to pit the common law courts against each other[67]. Likewise Coke, who was asked upon the urging of Archbishop Bancroft in 1606 to testify before the Privy Council regarding the accusations[68] that the writ of prohibition was used by the common-law courts too often and in an unjustified, careless way, and issued on a poor basis of facts[69]. Attention should be drawn to the justification of the common law opposition by means of quotes of ancient Christian texts at the end of the report, presumably inserted into the report by Coke himself. The Biblical quote «*Laqueus confractus est, et nos liberti sumus*» («We have escaped like a bird from the snare of the fowlers»)[70], as

well as the apocryphal citation «*Et magna est veritas, et praevalet*» («The truth is great and will prevail»), show the common law judges viewed themselves as the apologists of the liberty guaranteed by the common law.

Several times, Bancroft bemoaned the *zeitgeist* against the clerical judiciary, evidenced by the massive use of prohibitions[71]. This had led to an erosion of the same even in cases such as heirloom and marriage cases, which had been among its core authorities[72]. He complained of a «scientific and conscious obstruction of the clerical courts» by the common law judges, who were misusing the writs of prohibition for their own purposes[73]. He especially saw the monarch's authority in parochial affairs questioned in the case of the Court of High Commission as a royal prerogative court[74]. To protect the clerical courts from these unjustified prohibitions, Bancroft suggested that only the Court of Chancery, represented by the distinguished person of the Lord Chancellor, and not the common law courts, should be allowed to issue these writs[75]. Apparently, Bancroft hoped to place the clerical prerogative courts under the control of another prerogative court, the Court of Chancery, to eliminate the interventions by common law jurists and to bring the conflict between common law and prerogative courts to an end.

Coke denied all allegations against the common law judges and emphasized that only a parliamentary law could change the legal situation in Bancroft's favour[76]. He countered Bancroft by claiming that prohibitions ensured the enforcement of authorities between clerical and secular courts in individual cases; issuing them was therefore not a question of complacency, but of justice, and could be issued following appeal by either side, including the claimant, who himself had chosen the clerical court as forum, as well as the respondent, who had already accepted the clerical court as forum, or even a third party[77]. Coke replied to the Archbishop's suggestion of making the Court of the Chancery solely responsible for prohibitions by pointing out that common law judges had always had the right of issuing prohibitions when the clerical judiciary interfered with the worldly one[78]. The corresponding passage in Coke's *Institutes* is titled *Articuli Cleri*, making a clear connection to the law banning the *ex officio* oath and limiting the jurisdiction of the clerical courts from the fourteenth century, again using historic arguments to provide a basis for his position.

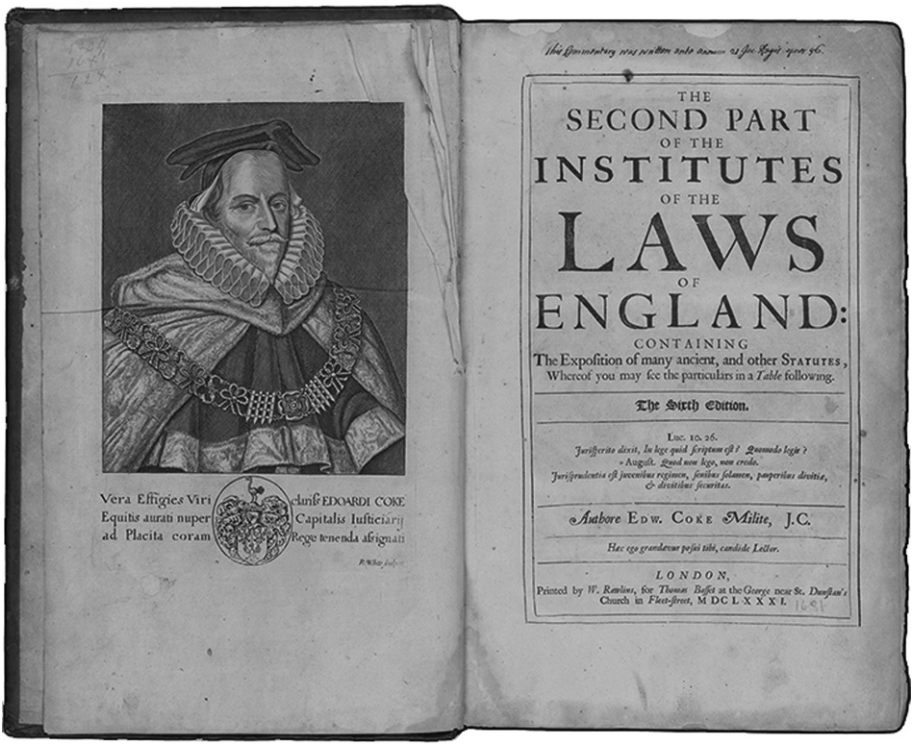
This clash made Coke one of the fiercest opponent of Bancroft[79]. It clearly shows the role of the prerogative writs in the conflict between common law and prerogative courts. The writs, especially the *writ of prohibition*, were used systematically, and not only in specific cases. As a result, the prerogative judiciary as a whole was called into doubt. The writs were used as a political instrument of power with the aim of fighting the prerogative courts, especially the High Commission, and to limit or even shatter its power[80]. The leading case in this attempt to curb the power of the High Commission was the *Nicholas Fuller's Case* (1607)[81]. The *Coke Reports* only show the reasoning of this case, but the actual procedural history and its political dimension go much further.

5. *The* Nicholas Fuller's Case *(1607) and the attempted divestiture of the High Commission*

Nicholas Fuller, a Puritan Member of Parliament and lawyer, attempted, on behalf of the Puritans, to have the Court of High Commission in itself declared illegal by the common law courts. Fuller was representing as defence counsel two men who had refused to take the *ex officio* oath and had been imprisoned for contempt of court. He made use of the writs of habeas corpus to achieve their release and questioned the right of the High Commission to imprison and penalize subjects[82].

The origins of the prerogative writ of habeas corpus (which, in English, translates to «you shall have the body») can be traced back to the previously mentioned famous clause of the *Magna Carta*, in which «no free man shall be arrested or imprisoned [...] except by the lawful judgement of his peers or by the law of the land»[83]; the term «habeas corpus» itself does not appear in the famous document[84]. Later, the writ of habeas corpus served exclusively to fight the imprisonment of certain privileged persons[85]. In the sixteenth century, the Court of King's Bench developed the variant *habeas corpus ad subjiciedum*, with which unlawful arrests could be fought. The writ included the order to present the incarcerated person along with the reasons for the deprivation of liberty before the court, so that the lawfulness of his incarceration could be determined[86]. In his *Institutes*, Coke further mentioned that this writ could be granted to persons without special court privilege[87].

After he had achieved the temporary release of his clients by the King's Bench, Fuller extended his attack on the High Commission in his closing statement. He deemed the court «popish» and unlawful, claiming that it did not serve Christ's justice, but that of the Antichrist; the *ex officio* oath would lead to the damnation of the souls of those taking the oath[88]. Before the Court of King's Bench could rule on the case of the men he was representing, the High Commission prosecuted Fuller himself for heresy, schism, and faulty teachings. He immediately refused to take the *ex officio* oath and gained a *writ of prohibition* in the King's Bench against the acts of the High Commission[89]. In its ruling, the Court of King's Bench claimed the authority to decide which cases were clerical and therefore belonged before the High Commission, according to the *1 Eliz. cap. 1* law. Accordingly, a simple attack on the authority of the court, as Fuller had presented in his closing statement, was to be ruled upon by the common law courts[90]. Only if the crime of heresy, schism, or something comparable was given was it under the authority of the clerical courts to act[91]. However, as soon as the charges before a clerical court included, among others, one of those that belonged before a common law court, issuing a *prohibition* was permitted[92]. Following this, Fuller was still sentenced to pay a fine of 200 pounds, and he was imprisoned for heresy, schism, and faulty teaching[93], but the common law judges had been able to establish their position regarding the order of competences between common-law and prerogative courts. Regarding the High Commission, they relied upon the *Ecclesiastical Appeals Act* of 1533[94], according to which the Church was subject to the crown and all power originated from the king[95]. By utilizing this, the common law judges not only wanted to achieve the subjugation



1681 edition of Institutes of the laws of England *by Edward Coke*

of the clerical courts under the king but also the control by common law courts. Whether this could, in fact, be taken from the law is doubtful[96]. Regardless, the conflict now gained a constitutional component[97].

A further assessment, edited by Coke[98], expressly denied the High Commission's power to arrest people. Such a competence could only be bestowed by an *Act of Parliament*, and the letters patent, which granted the High Commission certain powers in religious matters, were not sufficient for this. Even though the High Commission was established by the *1 Eliz. cap. 1* law, Coke argued that the monarch could not change the worldly or clerical law in such a manner that the clerical court was entitled to arrest people. Furthermore, Coke – together with the then-Chief Justice of the King's Bench, John Popham for the Whitehall Council[99] – proposed an answer under which circumstances clerical judges could conduct an interrogation under the *ex officio* oath. In their answer, both of these high-ranking common law judges deemed the oath itself to be permissible, but wanted to limit its use. The accused had to be informed before their interrogation what they were being accused of. Also, nobody – neither the layman nor a member of the clergy – could be forced by the oath to reveal their secret thoughts. Laymen could

only be questioned under the *ex officio* oath in two areas of the law (inheritance and marriage contracts), as there were often secret agreements in these areas, and because the honour of the accused, unlike in questions of infidelity, unchastity, usury, simony or heresy, was not impugned. Referring to *Hinde's Case*[100], decided in 1576, the authors reaffirmed the lack of authority to perform arrests. The arguments made by the common law judges were supported by the common law itself. This assessment constituted an expansive attack against the High Commission, stripping it of its most important method of attaining evidence against laymen. In these proceedings, use of the controversial oath was only allowed in questions of marriage contracts and heirloom questions, as intended by the *Articuli Cleri* statute; heresy and other clerical proceedings, which were the core authority and the primary purpose of the court, were therefore heavily impeded.

This view was transferred into the legal practice shortly afterwards by the Court of Common Pleas by means of a writ. The cause for this was *Edward's Case* of 1608[101], in which the layman Thomas Edward was being sued by a member of the High Commission, Dr John Walton, for various insults and slander against him. The court accepted the *ex officio* oath and interrogated him under the same. Coke and his judge colleagues issued a *prohibition* against the High Commission, holding the accusation of slander to be a temporal one that did not belong before a clerical court. Furthermore, in hearing its own case, the court had been guilty of the *Premunire*[102]. The reasoning mirrored Coke's and Popham's assessment, recalling that a layman could not be forced under the *ex officio* oath to reveal his secret thoughts. *Edward's Case* shows in exemplary fashion how common law courts used *prerogative writs*, especially the *writ of prohibition*, to enforce their view of the law regarding the order of competences in practice.

Fuller's Case and Coke's arguments encouraged the common law courts in issuing prerogative writs against the clerical courts[103]. Even though the focus was always on the *writ of prohibition*, which had been created for the use against the clerical judiciary, other writs, especially the previously mentioned *writ of habeas corpus*, were used outside of *Fuller's Case* in the conflict with the High Commission. In *Sir Anthony Roper's Case*, for example, Roper was initially imprisoned by the High Commission for not paying a vicar's claim to a pension; subsequently, a *writ of habeas corpus* was filed, and Roper was released, on the grounds that the High Commission had no competence over the payment of pensions[104]. Greater publicity was achieved by *Sir William Chancey's Case* of 1612[105]. Chancey was incarcerated in the notorious Fleet Prison for infidelity and violation of alimony obligation towards his wife. Following an application by his lawyer, the Court of Common Pleas issued a writ of habeas corpus for the release of Chancey on bail. Even though the High Commission had been ruling in comparable cases for quite some time, in the estimation of Coke and his colleagues it was still bound by the law and order of England, pursuant to which it did not have the authority to rule over misdemeanours such as those of which Chancey was being accused. Therefore, these were held to belong before the common law courts.

6. *The lee site of the Star Chamber*

In regard to the Star Chamber the available sources are scarcer; in spite of its notoriety, the resistance against this extraordinary civil and criminal court and also the use of writs in this context seem to have been less pronounced. There were only a few disputes between common law courts and the Star Chamber up to the end of Tudor rule in 1603[106], and the few were aimed at limiting the court's power. The 1566 *Onslowe's Case*[107] included a legal assessment by the common law courts according to which the Star Chamber did not have sentencing power in perjury cases; in a further assessment from 1591[108], the common law courts lamented the illegal arresting practice of the prerogative court. Even Coke, the protagonist of the common law judges' uprising against the prerogative courts, was conspicuously less ferocious in his critique of the Star Chamber as opposed to the High Commission[109]. In the discourses on the Star Chamber, printed in his *Institutes*, Coke recognizes that the common law did not suffice for especially severe crimes violating the king's peace and the royal laws and these, therefore, had to be adjudicated by the Star Chamber[110]. At the same time, however, Coke emphasized that the laws establishing the Star Chamber could in no way curtail the jurisdiction of the ordinary courts. Crimes that could be penalized adequately by common law courts thus did not belong before the Star Chamber[111].

Coke also criticized the manner of finding sentences at the court, which in cases of an equal balance of the votes granted the decisive vote to the Lord Chancellor. Allegedly this violated the rule of precedent *paribus sententiis reus absolvitur*. Still, Coke hardly rejected the Star Chamber as a whole. At a time he was already opposing the Court of High Commission, he wrote that Star Chamber «is the most honourable court, (our parliament excepted) that is in the Christian world, both in respect of the judges of the court, and in their honourable proceeding according to their just jurisdiction, and the ancient and just orders of the court»[112]. He also saw the Star Chamber's right to hand down severe penalties of honour and physical punishment in its long-established tradition, which dictated it to follow on its previous rulings balanced by the education and respectability of its members[113]. In practice, this was exemplified by the case of *Andrew v Ledsam* (1610). In this case, the writer Ledsam was sued by the lender Andrew in the Star Chamber, as Ledsam had taken a loan he could not repay by presenting fraudulent securities. The Star Chamber sentenced Ledsam to pay Andrew back double the amount, and both his ears were to be cut off. Edward Coke as Chief Justice of the Common Pleas and Thomas Fleming as Chief Justice of the King's Bench were asked of their opinion in this case. They saw the sum of the payment covered by the laws of the realm and simply requested to limit the physical punishment to the cutting of a single ear[114]. Similarly, in the *Countess of Shrewsbury's Case* (1613), Coke, a as a member of a committee, affirmed the legitimacy of the imprisonment of Countess Mary Talbot of Shrewsbury, on the grounds of perjury[115]. The countess' plea for noble privilege, which should have been relevant, was dismissed[116]. Furthermore, although Star Chamber also used the *ex officio* oath, which had prompted a wave of writs against the *High Commission*, the common law judges found no way of

handling this, even after Edward Coke had been appointed to the Court of Common Pleas[117]. Accordingly, there was never a ruling against the Courts of Star Chamber by the common law courts, even though the common law judges had developed a clear scepticism towards this prerogative court by the 1630s at the latest[118].

III. *Precedence of (common) law over monarchical judicial sovereignty*

1. *Dismounting the king as supreme judge in* Prohibitions del Roy *(1607)*

The common law instrumentalization of procedural control for limiting monarchical judicial sovereignty is associated with the cases *Prohibitions del Roy* in 1607 and *The Case of Proclamations* in 1611.

In the case of the *Prohibitions del Roy* in 1607[119], Archbishop Bancroft took the plea to the king to decree the ambit of the prerogative courts' competences himself. The king, Bancroft reasoned, could – based on his divine right – take on any and every legal case himself and decide, insofar that the judges were only his representatives. As his method of choice, James I would have intended the writ de non procedendo rege inconsulto[120]. This writ originates from the older legal sources of England and is viewed as prerogative writ[121]. It allowed the monarch to withdraw from the common law courts such cases in whose endings he may have had an interest[122].

Against this move towards unlimited and uncontrolled judicial monarchical sovereignty Coke, the Chief Justice of the Court of Common Pleas, formulated clear limits for the royal prerogative and his argumentation in *Prohibitions del Roy* (1607) denied the monarch the personal exercise of the judicial power:

> To which it was answered by me […] that the King in his own person cannot adjudge any case, either criminal […] or betwixt party and party […] but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgements are given, *ideo consideratum est per Curiam*, so that the Court gives the judgement[123].

According to the Chief Justice, the king was the highest judge in the community of the spiritual and worldly lords (Lords Spiritual and Temporal) in the Upper House of Parliament, where complaints against appeal judgments of the King's Bench over the Common Pleas were heard[124]. His presence in court, notably in the Star Chamber, «was to consult with the justices, upon certain questions proposed to them, and not *in judicio*»[125]. Coke pointed out that the king was not allowed to participate in the making of the judgment that will be rendered by the court according to law and custom of England but at counseling the judges: «and it is commonly said in our books, that the King is always present in Court in the judgement of law; and upon this he cannot be nonsuit: but the judgements are always given *per Curiam*; and the Judges are sworn to execute justice according to law and custom of England»[126]. By this argumentation Coke set the path for the functional differentiation between royal jurisdiction and ordinary jurisdiction.

Such a rhetorically tricky dismounting of the monarch as the supreme ordinary judge expelled the direct exercise of judicial sovereignty by mandated commissioners of the Star Chamber and High Court out of

justice and denounced it as non-justice, addressing it at a formal basis, though meaning it at a substantial basis. Neither the major nor the minor state seal enabled the monarch to deprive a court of a case nor to decide it by himself, the exception being any situation when his prerogative rights were concerned (*writ de non procedendo Rege inconsulto*)[127]. Against the decisions of the monarch, there was no appeal, meaning that the parties would thus be without any further rights once the King had rendered the verdict[128].

Coke opposed the differentiation between natural reason and artificial reason to the monarch's objection that the law was based on reason that he shared with the judges[129]. He justified the precedence of law over the monarchical prerogative with the technical reason of law, «which requires long study and experience, before that a man can attain to the cognizance of it». Of course, academic legal training began long after Coke, but the nucleus of his argumentation nevertheless demonstrated that legal professionalization was a vehicle for the independence of the courts[130]. Coke's rhetorical regret that «His Majesty was not learned in the laws of his realm of England» was followed by his differentiating statement that «causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by artificial reason and judgment of law». Coke's characterization of the artificiality of writs, *stare decisis*, and the precedents was no minor flourish[131]. Instead, Coke drew a magic circle around the Inns of Court, declaring that «the law was the golden met-wand», and thereby instrumentalized the rhetorical point in order to prepare his endgame: that judicial sovereignty and, with it, all prerogative courts should be under the law: «to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*»[132]. With this, the conflicts with the English prerogative courts led into the constitutional restriction of monarchical sovereignty, as embodied in the *Bill of Rights* of 1689. This was partly to do with Parliament's self-understanding as the final authority derived from its concept as a High Court of Justice and its safeguard for "reason", as embodied in common law.

2. *The subjection of any power to the rule of law in the* Case of Proclamations *(1611)*

Following the petition of the Commons of 7 July 1610[133], which was directed against the royal proclamation of a new court and against the decree of responsibility before extraordinary courts, James I (1603-25) demands the advice of the judges. Their answer is formulated by Coke in *The Case of Proclamations* (1611), which retains a celebrated place in English constitutional history as a minor *carta* of liberty[134]. According to him, the arbitrary will of the monarch had no legal force whatsoever. Mandates issued by the king to the judges could not mitigate the fact that they were bound by the law. There was no prerogative to change the common law or statute since, as John Fortescue had established nearly two centuries earlier, «in the kingdom of England the kings make not laws, nor impose subsidies on their subjects, without the consent of the Three Estates of the realm»[135]. Contemporaries of *The Case of Proclamations* (1611) were already familiar with this concept, fol-

lowing Fortescue's idealization of the English monarchy in his *In Praise of the Laws of England* (ca. 1470). By deliberately echoing the *Magna Carta*, which retained its reputation as the primary text of English law, it was stated that a judgment was subject only to the law, and that the king only had the powers that the law allowed him, as «even the judges of that realm are all bound by their oaths not to render judgement against the laws of the land (*leges terre*), even if they should have the commands of the prince to the contrary»[136]. The subjection of any power to the rule of law did not allow any dispensation from law nor any judgement outside the law.

For the correct interpretation of the *Case of Proclamations* (1611), one has to bear in mind the contrast between individual royal decisions (proclamation) and the law (laws of the land = common law) that was formed by Coke[137]. This differentiation between royal proclamations and parliamentary law becomes particularly evident in the final paragraph of the *Case of Proclamations* (1611), where Coke declared royal proclamations to be outside any legal category: «also the law of England is divided into three parts, common law, statute law, and custom; but the king's proclamation is none of them». In this passage, then, the legal force of royal proclamations was explicitly negated. The monarchical prerogative was predetermined by the law, and Coke resolved «that the King hath no prerogative, but that which the law of the land allows him». The monarch was thus unable to order a penalizing verdict before the Star Chamber or the Court of High Commission, nor mandate the commissioners to decide contrary to statutory law, since «if the offence be not punishable in the Star-Chamber, the prohibition of it by proclamation cannot make it punishable there»[138].

The precedence of the law over the monarchical judicial power as it was expressed in the *writs of prohibition* against the prerogative courts as well as in the precedent cases of *Prohibitions del Roy* (1607) and *the Case of Proclamations* (1611) was rooted in the supremacy of the law. This, Coke made categorical by the reference to its unaltered usage since time immemorial, combined with the technical superiority of its artificial reason.

3. *Coke's supremacy of the law due to immortality and reason*

a. *The concept of immortality*

As old law, common law is perceived to be "good law". Its age is considered as the legitimation of the common law and guarantees its quality. As Fortescue argued:

> [T]he realm has been continuously regulated by the same custom as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them […] [no other laws] are so rooted in antiquity. Hence there is no gainsaying nor legitimate doubt but that the customs of the English are not only good but the best[139].

This praise of the English law to which Fortescue's oeuvre owes its name deemed the proof of the quality of the common law to reside in its unaltered usage since the oldest ages. In other words, continuous general custom[140] legitimizes the unwritten common law[141]. According to Christopher St. German (about 1460-1541), the general custom equals the consensus of all:

the king, his predecessors, and all his subjects[142].

b. *The lawyers' artificial reason*

On the other hand, the common law is lawyers' law, which, as St. German pointed out, was «unknown outside the Inns of Court»[143]. Common law was characterized by its technicality and professional sophistication in a realm of knowledge populated only by a legal elite, yet its practitioners insisted that its legitimacy could be traced back to a broad and general popular consensus[144]. This could only be achieved by judicial consent being taken to represent popular consent, thus signifying that the authority of the collective knowledge of the judiciary replaced popular consent as a legitimating power[145]. Hence, the legitimation replaces the authority of the general custom[146] by means of the artificial reason to which the function of an interpretation measurement (the best interpreter of laws) is attributed, rather than a legislative consensus[147]. Here, we return to Coke's argumentation in the *Prohibitions del Roy* (1607) and in *The Case of Proclamations* (1611).

Like an artist, the lawyer exercises his legal capabilities. The reasonableness of the law is perceived as its character and nobody is deemed legally knowledgeable who has not understood that first: «The reason of the law is the life of the law, for though a man can tell the law, yet if he knows not the reason thereof, he shall soon forget his superficial knowledge». To this statement in the first part of his *Institutes*, Coke adds the need for sustainable professionality. The reason of the law, after all, cannot simply be understood in passing: «But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but also many others, for *cognitio legis est copulata et complicata*, and this knowledge will long remain with him»[148]. «Artificial reason» is the collective knowledge of the common law judges and Coke seems to allude to the scholastic interconnection of human and divine ratio proposed by Thomas Aquinas: «*ratio est radius divini luminis*». The metaphorical contrast between the «darkness of ignorance» and the «light of legal reason» elevates legal training «by reasoning and debating of grave learned men»[149] as *ratio legis* and cements thereby the monopoly of interpretation for the learned lawyers and their superiority over the legally untrained monarch, since judgement could only be given «according to the law, which is the perfection of reason»[150]. This legitimation of the common law by means of judicial reasonableness[151] corresponds to the authority of the general custom amended through the ages: «if all the reason that were dispersed into so many heads were united into one, yet would he not make such a law as the law of England is, because by many successions of ages it hath been fined and refined by so many learned men»[152].

It is by making use of this conception of reason that Coke justified the supremacy of the common law. The common law was the result of the perfection of reason, commanding what had to be done while excluding what did not. The highest degree of reasonableness, being divine wisdom, was completed in the human spirit in the form of judicial wisdom. Common law, therefore, was the judicial understanding of the divine reasonableness and hence of divine

origin: «without question *lex orta est cum mente divina*, and this admirable unity and consent in such diversity of things proceeded from God the fountain and founder of all good laws and constitutions»[153]. Here, one is also reminded of Coke's invocation of the Bible to justify common law resistance against the prerogative courts, as noted earlier.

At the heart of Coke's conception of the law was that common law was the embodiment of artificial reason, and artificial reason was superior to the natural reason of the monarch. Made most explicit in *Prohibitions del Roy* (1607), this required that monarchical judicial sovereignty was also subject to the common law[154]. The argumentation in the *Case of Proclamations* of 1611 negated any kind of monarchical prerogative not granted by the common law, asserting that «it was resolved, that the King hath no prerogative, but that which the law of the land allows him»[155]. Coke had already denied the monarch the personal use of the judicial sovereignty in *Prohibitions del Roy*[156]. The supremacy of the law over the prerogative excluded the monarch from the personal exercise of the judicial power apart from the equitable need for correction. The independence of the common law courts, founded on the supremacy of the law, was not based on the institutionalization of the granting of law, but on the general consensus of longstanding custom[157]. The twelve judges of the ordinary common law courts (four each on the King's Bench, the Common Pleas, and the Exchequer) were the highest counselors of the king and hence majestic figures. This meant that their unimpeachable character often reflected that of the monarch. In 1626, for example, Chief Justice Ranulph Crew was dismissed by Charles I (r. 1625-49) during the confrontation with the common law judges on tax increases without parliamentary approval; this effectively ended any kind of support for the crown in the judiciary, which would prove disastrous for Charles in the coming years[158].

4. *Common law resistance against the equitable adjustment by the Court of Chancery*

The association of the royal prerogative with extraordinary competences was also shown during the struggle for an equitable correction of the common law verdicts by the Court of Chancery. The reason-based strictness and adherence to precedence did not allow for common law to correct and alleviate judgements within the jury-centred common law courts. The correcting function was jurisdictionally separated in the equity courts (Court of Chancery and Star Chamber for criminal equity)[159]. The judicial discretion inherent in the correcting function (discretionary powers of the equity judge)[160] made equity synonymous to extraordinary royal power (whereby regal power was equated with extraordinary power and thus absolute power)[161]. The Lord Chancellor had to issue the writs in the name of the king (duty to provide justice) under the Great Seal for the claimant. As a member of the clergy, he was officially regarded as a man of conscience. Consequently, he had to decide in terms of equity in the name of the king when a common law remedy was inaccessible. The equitable powers of the Lord Chancellor originated in the time of Henry VI (1422-61) and do not have any parliamentary basis[162]. The Court

of Chancery was thus the highest prerogative court[163].

Coke, however, rejected this reasoning. It was inconceivable that the conscience of the Lord Chancellor[164] could be superior to the artificial reason of the common law judge[165], since the unsuccessful party before the common law courts could restart litigation before the Chancery, resulting in a remedy that was not intended by the common law[166]. This deprived common law verdicts of their decisiveness while both extending Chancery jurisdiction and restricting that of common law[167]. Similarly, the judges of the Exchequer Chamber in 1598[168] rejected a correction of the common law verdicts by the Court of Chancery, stating that «[i]t would be perilous to permit men after judgement and trial in law to surmise matter in equity and by this to put him who recovered to excessive charges. And by these means suits would be infinite and no one could be in peace for anything that the law had given him by judgment». Besides talking of the nightmare of never-ending proceedings, the Exchequer judges rejected equitable remedial corrections by the formal objection of the lacking protocol in Latin on a pergament paper; this, the judges believed, would open the system to the «absurd[ity]» of a court that was «not a court of record» being able to «control judgements which are of record»[169].

In 1613, Edward Coke was removed as Chief Justice of the Common Pleas and appointed to the formally more prestigious post of Chief Justice of the King's Bench. While nominally a promotion, this move was motivated by the king's (ultimately vain) hope that Coke would not be able to provoke as much trouble from here[170]. Thomas Egerton had been appointed as Lord Chancellor by James I in 1603, taking the title of "Baron Ellesmere" at the same time; from this point he would be customarily known as Lord Ellesmere. Ellesmere was a close advisor of the king and so an advocate of the royal prerogative. Furthermore, his judicial decisions in equity could possibly revoke the achievements gained by the common law courts in the conflict of competences[171]. Ellesmere claimed the right for him and the Court of Chancery to reopen cases that had already been closed before the common law courts[172]. However, this approach violated the statute *4 Henry IV, c. 23* (1403)[173], pursuant to which a proceeding that had been concluded before a common-law court could only be reopened by a writ of error[174]. The Court of Chancery itself had adhered to Ellesmere's view in *Throckmorton's Case* (1590)[175] – a circumstance that provided wind in the sails for the common law judges' actions[176].

The House of Commons discussed a bill against the reexamination of common law verdicts by the prerogative courts in the first reading on 3 June 1614[177]. Coke opposed judicial injunctions of the Chancery[178]. In the case of *Heath v Ridley*, decided in 1614, the judges of the King's Bench refused the adjournment of a proceeding which had been ordered by the Chancery: «It was delivered for a general maxim in law that if any court of equity doth intermeddle with any matters properly treated at the common law, […] they are to be prohibited»[179]. Coke claimed that the reopening of cases by the Chancery violated the *Praemunire* statute[180], which prohibited the reopening of proceedings apart for cases of a writ of error[181]. From this rather old law the name of a criminal offence was taken, which sanctioned knowingly calling upon

the wrong court and so questioning the authority of the monarch[182].

Already in 1616, the year that would mark the peak of the conflict between Coke and Ellesmere[183], the common law courts developed a further strategy to prevent the further incision of their competences by the Court of Chancery. The use of writs of prohibition to this end was apparently discussed by the common law judges but ultimately dismissed[184]; the Chancery was not a clerical court, at which the prohibitions were directed. The remaining option was the writ of habeas corpus, which had already been used a couple of times in the conflict with the High Commission to release the unlawfully incarcerated. It put the common law courts in the position of being able to guarantee the freedom of the subjects[185]. As early as 1585, there are indications in the *Year Books* that such a writ was used against Chancery. Coke's *Institutes* established that the Court of King's Bench could assume proceedings by means of a writ if the Court of Chancery had overstepped its competences[186]. So the habeas corpus writ became an instrument of power between the King's Bench and the Chancery. These writs were intended to free persons who the Chancery had imprisoned for being in contempt of court, as they had refused a new proceeding before the court[187]. When using a habeas corpus writ, the so-called return was central, that is the reply of the arrested party. It could not be too general regarding the circumstances of the incarceration, as *Addis' Case*[188] from 1609 shows. Even before Edward Coke was transferred to the King's Bench it dismissed a return maintaining that Addis had been held by order of the Lord Chancellor in a case concerning the king as too vague, «for it shews not for what causes he was committed, for it might be for a cause which would not hinder him under his privilege»[189]. Those few concrete returns threatened the success of a habeas corpus writ, which was specifically intended to determine the reasons for a person's imprisonment and to assess the legality of the incarceration.

The common law courts used the writ of habeas corpus in similar circumstances to the writ of prohibition. While in the latter case the accusation was more that of violation of competences by the prerogative court, habeas corpus seems to have been the method of choice when the common-law judges wanted to achieve the quick release of an accused from prison. At the same time the use of a habeas corpus writ included the accusation of excess of authority by Chancery. Over its direct aim to preserve the rights of the accused from the *Magna Carta*, this writ had also become an instrument of power at the beginning of the seventeenth century.

With the writs of habeas corpus, the King's Bench questioned the legality of the arrest by the Lord Chancellor («*per considerationem curie Cancellarie Domini Regis pro contemptu eiusdem Curie*»). *Glanvill's Case* (1614)[190], *Aspley's Case* (1615)[191], and *Ruswell's Case* (1615)[192] document the struggle between arrests made by the Chancery and the writs of habeas corpus issued by the King's Bench, a struggle that culminated in the *Allen's Case* (1615)[193] and the *Earl of Oxford Case* (1615)[194].

Coke and his colleagues held in *Apsley's Case* to review the incarceration of Michael Apsley, which had begun in 1608[195]. The reply of the custodian in Fleet Prison, according to which Apsley had been held due to contempt of court by the Court of Chan-

cery, was criticised as insufficient by the judges of the King's Bench and after some consultation the release of the prisoner was ordered. The same approach was taken in the same year in *Glanville's Case*[196]. A landmark decision was also *Ruswell's Case*. The tailor William Ruswell fought his 1614 arrest with a habeas corpus writ issued in 1615. The custodian's reply, claiming that Ruswell had been held for being in contempt of the court by the Court of Chancery, was dismissed by the King's Bench as being too vague. The reason for the incarceration had to be clearly given, to make it possible for the controlling court to determine the legality of the imprisonment. Ruswell's defence counsel emphasized the precedence of the King's Bench when he declared that «this Court [the King's Bench] is the judge of all causes of imprisonment»[197].

The fact, that the common law judges suddenly strictly controlled the reasons for imprisonment clearly shows that they were aiming to limit the power of the Court of Chancery as a further prerogative court, which questioned the supremacy of common law, and that they were less concerned with the individual concerns[198]. The habeas corpus writs were an ideal instrument of power against the Court of Chancery, whose only option of enforcing its decision was to imprison the persons concerned. Coke's claim that his control, based on the use of prerogative writs, was an aspect of the royal prerogative, provoked Lord Ellesmere's objection. These writs had at least been created with the aim of limiting the exercise of the royal prerogative by the royal councils and the courts[199]. What followed was a serious conflict between the two highest jurists, Coke and Ellesmere.

The conflict escalated in 1616, when Ellesmere arrested Glanville, who had been freed the previous year. This led the King's Bench to order his second release[200]. In his treatises the Lord Chancellor criticized the use of prohibitions and habeas corpus writs against the clerical courts, which were endangered of losing their legitimate jurisdiction on the basis of mere contentions[201]. He also refuted Coke's assumption that the reopening of a closed case by the Court of Chancery was illegal, by showing that the *Praemunire* statute invoked by Coke only prohibited the reopening by a clerical court[202]. William Holdsworth agrees with Ellesmere that the accusations against the Chancery were partly without a basis. The actions of the common law courts had been too harsh and the reliance on the *Praemunire* statute had been a misuse of justice[203].

After Coke and his colleagues had refused the reply to a habeas corpus writ in the *Earl of Oxford's Case*[204], which had been reopened in the Chancery, Coke ordered the prosecution of the Chancellor for violating the *Praemunire* law[205]. This attempt failed and Coke steered himself and the cause of the common law judges into political margins[206]. After Coke again openly criticized the king by refusing to follow his order to adjourn proceedings in the *Case of Commendams* in June 1616[207], he was suspended and then sacked a couple of months later[208]. Combined with the petitions to the Privy Council[209], this provided Ellesmere[210] and his contemporary, Francis Bacon[211], the opportunity to discredit Coke in the eyes of James I[212], as he had committed a public affront against the Chancery and thus against the royal prerogative itself. James I decided the issue in favour of the Chancery by relieving Coke of his duties in

November 1616 by virtue of the Royal Decree of 18 July 1616[213].

Coke's successor, Henry Montagu, was a passionate royalist who wanted to avoid the impression that the writ had been used as an instrument of power against the prerogative[214]. In his ruling in Richard Bourn's Case (1620) he described the writ of habeas corpus as «a prerogative writ, which concerns the King's Justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned»[215]. Even though this case only touched upon the question if a writ could also be applicable in an ordinary proceeding in the special legal area of the Cinque Ports[216], it can be assumed that Montagu wanted to express his political orientation by presenting the writ as the means of a merciful king concerned about the wellbeing of his subjects[217].

The Lord Chancellors following Ellesmere – Francis Bacon[218], John Williams[219], and Thomas Coventry[220] – restored the rule-exception relation between rule-based common law and discretion-based equity. It is thanks to the maxim formulated in *Hervey v Aston* (1738) – «*aequitas sequitur legem*» (equity follows the law)[221] – that Lord Chancellor Hardwicke marked the complementary correction function of equity in case of an insufficiency of the common law due to the strictness of the *actiones*[222]. Thus, the Court of Chancery was neither able to intrude into the cases dealt with by the common law courts, nor to revise the verdicts rendered by the common law courts[223]. Because of this, the judicial discretion in equity, which lies at the heart of its association with the royal prerogative, could be reconciled with the precisely-defined legal rules that were intended to guarantee liberty under English law[224].

5. *The supremacy of law-concept as basis for the rule of law-enforcement in the Glorious Revolution*

On 8 May 1628, the House of Commons formulated the *Petition of Rights* under the guidance of Sir Edward Coke. This was accepted by the King Charles I on 7 June and thus became the first statutory restriction on royal powers since the beginning of the Tudor dynasty[225]. Apart from the guarantee of the ordinary judicial procedure, the call for the abolition of extraordinary commissions was formulated for the first time in the *Petition*[226]. This success was short-lived, as Parliament was soon disempowered by the king in 1629. The restoration and securitization of the power of Parliament only occurred with the advent of the Long Parliament in 1640. This Parliament lasted until 1660; in this time, not only was Parliamentary competence for all tax laws confirmed, but all extraordinary courts were abolished, via the *Act for the Abolition of the Court of Star Chamber* (5 July 1641)[227] and the *Act for the Abolition of the Court of High Commission* of the same date[228]. In doing so, the Third Part of the *Act for the Abolition of the Court of Star Chamber* affirmed the supremacy of the common law over the prerogative and the independence of the common law courts based thereupon:

> Be it likewise declared and enacted by authority of this present Parliament, that neither His Majesty nor his Privy Council have or ought to have any jurisdiction, power or authority by English bill, petition, articles, libel, or any other arbi-

> trary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary course of the law[229].

The Nineteen Propositions sent by the Two Houses of Parliament to the King at York of 1 June 1642 built upon this foundation, demanding that judges be bound to the law[230].

> That all Privy Councillors and Judges may take an oath, the form whereof to be agreed on and settled by Act of Parliament, for the maintaining of the Petition of Right and of certain statutes made by the Parliament, which shall be mentioned by both Houses of Parliament: and that an enquiry of all the breaches and violations of those laws may be given in charge by the Justices of the King's Bench every Term, and by the Judges of Assize in their circuits, and Justices of the Peace at the sessions, to be presented and punished according to law[231].

The call for the independence of the judge was repeated in the *The Propositions presented to the King at the Treaty of Oxford* of 1 February 1643, which stipulated that «all Judges of the same Courts, for the time to come, may hold their places by Letters Patent under the Great Seal, *Quam diu se bene gesserint*, and that the several persons not before named, that do hold any of these places before mentioned, may be removed»[232]. This prepared the ground for the provision of judicial independence granted in the later *Act of Settlement* of 1701.

The end of the Long Parliament in 1660 coincided with the collapse of the Commonwealth and Protectorate (1649-60), and restored the Stuart monarchy to power. This put an end to an unprecedented period of upheaval that had begun with the Puritan Revolution (1642-9). However, the relationship between the crown and Parliament had irrevocably altered. When James II (r. 1685-8) attempted to re-establish Catholicism through absolutism, he sparked the Glorious Revolution that eventually deposed him. With the agenda being set by the *Declaration of Rights* of 13 February 1689, the Conventional Parliament that was elected on the initiative of William III of Orange (1689-1702) and Mary II (1689-94) enforced the adherence of the crown to the law, through the instrument of the *Bill of Rights* (1689). Apart from the abolition of the ecclesiastic courts and the call for regular jury trials with regularly appointed jury members, the ban of all extraordinary court commissions in chapt. I section 2, No. 3 is of the most relevance, holding «[t]hat the Commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other Commissions and Courts of like Nature, are illegal and pernicious»[233].

The *Act of Settlement* of 1701 (or, to give its full name, *An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject*) secured the results of the Glorious Revolution. Of particular interest are the guarantees of the personal independence of the judges and that judges were appointed for life and could not be dismissed from office; these had already been demanded by the Long Parliament in 1641. In the context of the *Act of Settlement*, they were explicitly mandated in Part III: «That after the said Limitation shall take Effect as aforesaid, Judges Commissions be made *Quandiu se bene gesserint* (As long as they behave properly, it should be generally known), and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them»[234].

IV. *Parliamentary sovereignty as highest interpretative authority over the general consensus incorporated in the common law*

1. *Mediating function of the political power (adjustment)*

a. *Common law as stand for the mediating function of royal power*

The foundation of the idea of the common law, which is immanent to the English understanding of the state as well as of the basic adherence of the royal power to the law, is the mediating function of political power (adjustment). Coke formulated monarchical mediation as a paternal function: «Since no Law can fit every Country, the king who is *pater patriae* will like a father be most impartial to all his subjects. The realm trusts the king when they will not trust a private man»[235]. The mediating function of political power corresponds to the ideal of balance. James Morice's[236] praise of the Elizabethan ideal of balance continued to have an effect on the political consciousness of the seventeenth century. For instance, in 1604, the House of Commons formulated the interaction of all state powers towards the common good: «An harmonical [*sic.*] and stable state is framed, each member under the head enjoying that right, and performing that duty, which for the honour of the head and the happiness of the whole is requisite»[237]. In the sixth chapter of the eleventh book of *De l'Esprit des lois* (1748), Montesquieu's description of this ideal of balance provided a literary monument to the idea itself[238].

b. *Parliament as incorporation of the ideal of balance*

The balance engendered in the institution of Parliament was most impressively illustrated by the contemporary description of the legislative elaboration in Parliament as an act of mediating interests between the rights of the subjects and the royal prerogative:

> But now […] the parties in Parliament (in those things that concern the publique) meddle not as meere Judges, but as Parties interessed, with things that concerne every of their own Rights, in which case it is neither Law nor Reason, that some of the Parties should determine of that that concernes all their mutuall interests, *invita altera parte*, against the will of anyone of the parties. But that all parties concurre or else their mutuall interest to remain in the same condition it was before[239].

During the final deliberations before Parliament's dissolution by Charles I in 1629, Sir John Coke reminded the chamber of the incorporation of the crown in the balance as it is institutionalised in Parliament: «The King is a Parliament man as well as we are»[240]. Sir John Davies, the Queen's Counsel in Ireland and a fervent advocate of the royal prerogative, described the interaction of the representative in Parliament by means of pictures of musical harmony:

> These parliaments though they consist of three different Estates, the King, the Nobility, and the Commons, Yet as in Musick, distinct and severall Notes do make a perfect Harmony, so these Councils compounded of divers States and Degrees, beeing well ordered and Tuned, do make a perfect Concord in a Commonwealth […] And this Concord and Harmony doth ever produce the Safety and Security of the People[241].

This interpretation is supported by the tradition of Parliament acting in the role of a royal counsel[242]. The Queen's Counsel, Sir Robert Heath, argued that «[t]he Par-

liament is a great Court, a great Counsell, the great Counsell of the Kinge; but they are but his Counsell, not his governours»[243]. In *The jurisdiction of the Lords House, or parliament, considered according to ancient records* (1675-6), the barrister Sir Matthew Hale also described Parliament as a counsel[244]. The primacy of the judge amongst the royal counsels corresponds to this observation[245]. Parliament was not an institution aimed at eliminating the royal prerogative but a forum of political balance between the royal prerogative and the rights of the subjects as secured by common law. What resulted from this was the understanding of Parliamentary laws as the legal embodiment of this balance: the law served the wellbeing of the King, the subject, and the Commonwealth as a whole[246]. As John Selden argued, «[e]very law is a Contract between the king and the people; and therefore to be kept»[247]. Thomas Hobbes' (1588-1679) and John Locke's (1632-1704) theories of the social contract are to be found in the line with this tradition. The fact that the medieval idea of the contract was interwoven with the English Parliamentary system is the reason why this particular contractual conception has played this role in Western parliamentarianism[248].

2. *Parliament's claim to be the highest court for the rights and liberties of the kingdom*

a. *'Enabled by the laws to adjudge and determine the rights and liberties of the kingdom'*

Even during the constitutional struggle with the Stuarts, the Westminster Parliament never exercised its right to override the royal veto; as a result, it refrained from introducing a popular sovereignty (and separation of powers) that corresponded to Rousseau's *volonté générale*. This was due to the fact that the royal obligation in the coronation oath to agree to any law proposed by the people (*leges quas vulgus elegerit*)[249] originated from the royal veto in the legislative procedure.

Rather, Parliament claimed to be the highest common law court: «The High Court of Parliament is […] a court of judicature, enabled by the laws to adjudge and determine the rights and liberties of the kingdom, against such patents and grants of His Majesty as are prejudicial thereunto, although strengthened both by his personal command and by his Proclamation under the Great Seal»[250]. While the scholarship surrounding the conflict between Parliament and the Stuarts is extensive, this court aspect has hardly been addressed in research[251]. The emphasis of this function as a legislative branch due to the representative consensus in Elizabethan England[252] may have obscured the view in this regard[253]. On the other hand, jurisdictional discourse was already evident in contemporary works addressing the Elizabethan period, such as William Lambarde's *Archeion, or the High Courts of Justice in England* (1635), Richard Crompton's *L'authoritie et jurisdiction des courts de la Majeste de la Roigne* (1637), and Thomas Smith's *De republica Anglorum* (1636)[254]. The court conception of Parliamentary resistance against Stuart absolutism was obvious due to the increase in impeachment procedures, and in the number of civil law cases that were heard before the upper chamber after 1620[255].

b. *Coke's parliamentary conception as embodiment of the highest form of reason*

The formulation of the court concept within Parliament's resistance to the Stuarts had its origins in Coke's argument that Parliament embodied common law and, therefore, artificial reason, which was the highest form of reason. «[A]s in the natural body when all the sinews being joined in the head do join their forces together for the strengthening of the body there is *ultimum potentiae*», Coke wrote, «so in the politique body when the king and the Lords spiritual and temporal, knights, citizens and burgesses are all by the king's command assembled and joined together under the head in consultation for the common good of the realm, there is *ultimum sapientiae*»[256]. To Coke, the wisdom of Parliament was guaranteed in its representative function:

> And as it is said in Powden [257] the parliament is a court of the greatest honour and justice, of which none ought to imagine a dishonourable thing, and the Doctor and student [258] it cannot not be thought that a statute that is made by authority of the whole realm, as well of the King and of the Lords temporal and spiritual, as of all the Commons, will do a thing against the truth[259].

Conceiving of Parliament as the highest court was fundamental to the formulation of Parliament's sovereignty. This came from the fact that, while the monarch could veto Parliamentary bills, he could not veto judicial verdicts, «for that, by the constitution and policy of this kingdom, the King by his Proclamation cannot declare the law contrary to the judgement and resolution of any of the inferior courts of justice, much less against the High Court of Parliament»[260]. To this end, the classical commentary of Parliamentary sovereignty in Blackstone's *Commentaries on the Laws of England*[261] starts with Coke's definition of the highest jurisdiction of the High Court of Parliament: «Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds. Of this court it is truly said: *Si antiquitatem spectes, est vetustissima, si dignitatem, est honoratissima, si jurisdictionem, est capacissima*»[262].

c. *Supreme power of interpretation of the fundamental laws*

In the *Declaration of the Houses in Defence of the Militia Ordinance* of 6 June 1642, Parliament claimed the supreme power of interpretation of the fundamental laws[263] as the highest common law-court. Never being precisely phrased as to their content, the fundamental laws[264] were nevertheless brandished by the leaders of the Parliamentary opposition of Hakewill, Coke, and Pym[265] *against* the Stuart's claim for sovereignty, just as they were by Bacon[266], Samuel Daniel[267], and even James I[268] and Charles I[269] in order to *justify* monarchical sovereignty[270]. Their importance is revealed by a close look at the struggle between the common law and the monarchical prerogative, and in particular with reference to the issue of whether unforeseen and unregulated questions of the public good could be resolved arbitrarily by royal discretion, or whether the monarchical prerogative was bound by higher law. This raised the question of sovereignty as the competence of "the last word"[271], as the competence of deciding the legally unregulated case[272]. The fundamental laws contained the natural and equitable solution for any situation

of the common good. Therefore, they corresponded to the omnipotent reason-based conception of the common law, determining that public good was to be decided not by the will of the ruler but by common law[273]. A royal decision-making right contravened the common law[274]. This highest power of decision-making of Parliament concerning the public good was higher than the will of the monarch; the sovereignty of Parliament is the result[275]. Parliamentary sovereignty is enshrined in 1689 by Article XI of the *Bill of Rights*:

> All which Their Majesties are contented and pleased shall be declared, enacted, and established by Authority of this present Parliament, and shall stand, remain and be the Law of this Realm for ever; and the same are by Their said Majesties, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the Authority of the same, declared, enacted, and established accordingly[276].

The importance of this concept is also reflected in the fact that the above wording can be found to the present day in the introductory formula of English laws, in which it is declared: «BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows…».

V. *Conclusion: Misuse of procedural justness for substantial incorrectness*

Originally, the writs of prohibition were initially intended as methods of intervention for the king against the clerical courts to prevent a curtailing of royal rights. On this point, the judge Sir Anthony Fitzherbert asserted in 1534 that «[t]he King himself may sue forth this writ, although the plea in the spiritual court be betwixt two common persons, because this suit is in derogation of his Crown»[277]. The protection of private interest was only a reflex of the writs of prohibition; mainly, it was intended to protect the royal prerogative from interference from administration and the justice[278]. By using the writs of prohibition against the Court of High Commission, which was working with the direct approval of the king, the common law judges removed them from their original purpose as a core writ of the king and claimed the right for themselves to protect the law in the realm as representatives from the king, including against his will if need be. Effectively, common law courts turned the king and his prerogative courts' own weapons against them, especially in regard to the writs of prohibition.

In doing so, though, the key protagonist – Sir Edward Coke – was compelled to engage in his own legal fictions, thereby inventing "tales" of legality and legitimacy. First, Coke himself was not consistent in regard to the prerogative courts. Whereas he postulated that all prerogative courts exercising the royal prerogative were subject to the common law, he was prepared to recognise courts with which he had no conflict as a judiciary independent from the common law courts[279]. For example, as Holdsworth notes, the common law courts also had to admit a certain legitimacy of the Star Chamber, even though they viewed its jurisdiction outside of theirs with some scepticism, and its methods were similar and, sometimes, indistinguishable to those the courts condemned in the context of the

High Commission[280]. Secondly, Coke's argumentation about the limitation of the monarchical judicial sovereignty by the supreme reason of common law did not correspond to the historical understanding of the English monarchy as being the fountain of justice. According to Dicey's later assessment, Coke's arguments were «pedantic, artificial and unhistorical»[281].

Coke was wrong, and he knew he was wrong, but he was so nicely wrong. His argumentation was the basis for the *Petition of Rights* (1628), which called for the abolition of extraordinary courts and the guarantee of a fair trial[282]. The stubborn insistence of Coke on prerogative writs finally paid off in 1641, when the Long Parliament abolished the Court of the High Commission[283] and the Star Chamber[284]; in light of the common law attacks, public opinion had by this point turned against the Star Chamber, as its exercise of prerogative power was often viewed as tyrannical in political cases[285]. King James II attempted to re-establish the prerogative courts, but this led to the outbreak of the Glorious Revolution in 1688[286]. Finally, Coke's supremacy of law can be traced within John Locke's antecedent natural law, binding every political authority to guarantee life, liberty, and individual ownership[287].

Last but not least, the jurisdictional conflict between common law courts and prerogative courts by means of procedure was meant to be a constitutional struggle in substance, insofar that it meant the subjection of the royal prerogative under the rule of law. This goal of 1689 was reached by resetting royal prerogative in a rhetoric contradiction to law, addressing the law as the rule and the discretion of the prerogative as the exception. The rule-exception relationship between legally-bound ordinary power and extraordinary prerogative is mirrored in the ordinary and extraordinary jurisdiction[288]. According to the *Bate's Case* (1606), which reads as a preparatory pamphlet of Locke's treatises, ordinary power was focused on the wellbeing of individual subjects, on the civil justice, and the definition of property: «That of the ordinary power is for the profit of particular subjects, for the execution of civil justice, and the determining of *meum*»[289]. It was exercised by the ordinary courts and corresponded to the *ius privatum* in Roman law and the common law in English law. The latter was «exercised by [...] justice in ordinary courts, and by the civilians is nominated *ius privatum* and with us common law; and these laws cannot be changed without parliament»[290]. Extraordinary royal power was not to be exercised for the private good or «to the benefit of any particular person, but is only that which is applied to the general benefit of the people, and is *salus populi*; And as the constitution of this body varieth with the time, so varieth this absolute law, according to the wisdom of the king, for the common good; and these being general rules and true as they are, all things done within these rules are lawful»[291]. This basis was used in the *Bate's Case* to establish the argument that the taxation of Corinths was not a tax on local goods but a tariff on foreign imported goods. The demand of tariffs was a part of the prerogative sphere since the king had absolute power in the harbours with direct access to the sea and thus was independent from the consent of Parliament[292]. In the *Ship Money's Case* as well as the *Hampden's Case* (1637), it was established that the money needed for ship-building was not a tax but

a contribution to the royal task of defending the territory[293].

The relationship between legally-bound ordinary power and discretionless extraordinary absolute power was used to negate the jurisdiction of prerogative courts as extraordinary jurisdiction. According to the *Bate's Case* and the *Ship Money's Case*, the adherence to the law of the ordinary power also comprises the adherence to the rules of competence, procedure and the forms of action of the ordinary jurisdiction[294]. It can be figured from the *Bate's Case* that cases of civil law and those concerning property were only dealt with by the ordinary common law courts, since «[t]hat of the ordinary power is for [...] the execution of civil justice, and the determining of *meum*»[295].

Sources prove the rejecting attitude of the King's closest counsels against the arbitrary extension of the jurisdiction of the Star Chamber and the Privy Council. In 1616, for instance, Francis Bacon suggested that private law trials marked by reciprocal claims were «not fit» for the Privy Council and that «[these cases] should be left to the ordinary course and courts of justice»[296]. In 1641, Attorney-General Sir Robert Heath, who defended the royal prerogative in 1627 in the *Darnel's Case* (also referred to as *the Case of the Five Knights*)[297], supported the limitation of the jurisdiction of the Privy Council[298]. The supremacy of law assures the continuing existence of the ordinary jurisdiction by the adherence to the law; the royal prerogative beyond the ordinary rules of procedure and forms of action is thus exceptional[299]. Thus, the strictness and rule adherence of the common law guaranteed the material independence of the common law courts, while the personal independence of the judges is state fundamentally assured by the Act of Settlement of 1701. The protective dimension of the common law that contains the legal binding of monarchical power was fundamentally affirmed in the *Bill of Rights* of 1689, which affirmed English law's abolition of extraordinary courts via monarchical prerogative. The Court of Chancery is recognized as prerogative court due to the necessity of the corrective function, but the Star Chamber and the Court of High Commission were already abolished by the parliamentary laws of 1641. It was in these actions that Coke's "tales" of sovereignty found their suitable epilogue.

[1] P.B. Waite, *The Struggle of Prerogative and Common Law in the Reign of James I*, in «The Canadian Journal of Economics and Political Science», n. 25, 1959, p. 144.

[2] U. Müßig, *Constitutional Conflicts in the Seventeenth-Century England*, in «Tijdschrift», n. 76, 2008, pp. 27-47. For the influences of the English Parliamentarian Sovereignty on the Italian Constitutional discourse of the nineteenth century, see G. Mecca, *The Omnipotence of Parliament in the Legitimisation Process of 'Representative Government' under the Albertine Statute (1848-1861)*, in U. Müßig (ed.), *Reconsidering Constitutional Formation I: National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Cham, Springer, 2016, pp. 159-214.

[3] *Act of Supremacy* 26 Henry VIII, c. 1, cited in G.R. Elton (ed.), *The Tudor Constitution*, Cambridge, Cambridge University Press, 1982², pp. 364 f. See also U. Müßig, *Recht und Justizhoheit: Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich*, Berlin, Duncker & Humblot, 2009², p. 162.

[4] By the *Ecclesiastical Appeals Act* (1533) (24 Henry VIII. c. 12); see also J. H. Baker, *An Introduction to English Legal History*, Oxford, *Oxford* University Press 2007⁴, p. 130.

[5] Baker, *An Introduction to English Legal History*, cit., pp. 17 ff. U. Müßig, *Höchstgerichte im frühneuzeitlichen Frankreich und England - Höchstgerichtsbarkeit als Motor des frühneuzeitlichen Staatsbildungsprozesses*, in R. Lieberwirth, H. Lück (eds.), *Akten des 36. Deutschen Rechtshistorikertages in Halle an der Saale 2006*, Baden-Baden, Nomos, 2008, pp. 544-77.

[6] Baker, *Introduction to English Legal History*, cit., p. 117; Müßig, *Recht und Justizhoheit*, cit., p. 153.

[7] *Ibidem.*

[8] *Ibidem.*

[9] Baker, *Introduction to English Legal History*, cit., p. 118.

[10] *Ibidem.*

[11] *Ibidem*; J.A. Guy, *The Court of Star Chamber and its Records in the Reign of Elizabeth I*, London, HMSO, 1985, p. 5.

[12] Müßig, *Recht und Justizhoheit*, cit., pp. 154 ff.

[13] Ivi, p. 155; Baker, *Introduction to English Legal History*, cit., pp. 118 ff.

[14] *Magna Carta*, c. 27. However, capital cases could not be conducted without a jury court of peers, and so neither Star Chamber nor the Court of High Commission had the authority to issue death sentences. Baker, *Introduction to English Legal History*, cit., p. 119; Müßig, *Recht und Justizhoheit*, cit., p. 157.

[15] Baker, *Introduction to English Legal History*, cit., p. 119.

[16] *Act of Supremacy* Eliz. c. 1, in G.W. Prothero (ed.), *Select Statutes and other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, Oxford, Clarendon Press, 1913⁴, p. 1. See also Müßig, *Recht und Justizhoheit*, cit., pp. 157, 163; Baker, *Introduction to English Legal History*, cit., p. 157.

[17] *The Letters Patent of 1611*, in Prothero (ed.), *Select Statutes*, cit., pp. 424 f.

[18] J.P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, in «Illinois Law Review», n. 36, 1941, p. 129.

[19] Cit. according to Leonard W. Levy, *Origins of the Fifth Amendment. The Right against Self-incrimination*, New York 1986, p. 46.

[20] See W. Cobbett, T. Bayley Howell, T.J. Howell (eds.), *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours from the Earliest Period to the Present Time with Notes and Other Illustrations*, London, 1809, vol. III, pp. 1321, 1332; more recently also *Miranda v. Arizona*, 384 U.S. 436.

[21] The *ex officio* oath was introduced as a "present" from Pope Gregory IX. (rul. 1227-41) to Henry III. (rul. 1216-72) by his papal legate, Cardinal Otho (r. 1227-51). After his arrival in England, the papal legate Otho convened a congregation of all English bishops and decreed a number of so-called constitutions regarding the parochial procedures. One of these constitutions concerned the oath *de veritate dicenda*, which was later known as the *ex officio* oath, as judges could order it of their own motion. L.W. Levy, *Origins of the Fifth Amendment. The Right against Self-incrimination*, New York, Macmillan, 1986, p. 45 (and following pages for the confirmation of these reforms by the Fourth Lateran Council). For the constitutive reorganization of ecclesiastical jurisdiction by the decretal *Ad nostram audientiam* (*Liber extra* 1.4.3.) cf. Müßig, *Recht und Justizhoheit*, cit., pp. 70-1.

[22] After Boniface of Savoy (1217-70), then the Archbishop of Canterbury (r. 1241-70), further strengthened the oath by threatening those who declined to take it with excommunication, Parliament fully banned its use during the reign of Edward II (1307-27). The *Prohibitio Formata de Statuto Articuli Cleri* limited not only the taking of the oath but also the jurisdiction of ecclesiastical courts. Many cases were assorted exclusively to the common-law courts and the ecclesiastical courts were also forbidden from ruling in these. Laymen were prohibited from testifying under the *ex officio* oath outside of inheritance and marriage cases. Coke would cite this decree in his dispute with Archbishop Bancroft.

[23] Waite, *The Struggle of Prerogative and Common Law*, cit., p. 148. See also J. Hostettler, *Sir Edward Coke: A Force for Freedom*, Chichester, Barry Rose, 1997, p. 68.

[24] Waite, *The Struggle of Prerogative and Common Law*, cit., 148.

[25] J. Whitgift, *Reasons for the Necessity of the Commission for Causes*

Ecclesiastical, 1583.

[26] T. Fuller, *The Church History of Britain*, Oxford, University Press, 1845, vol. V, pp. 298 ff.

[27] Waite, *The Struggle of Prerogative and Common Law*, cit., p. 145.

[28] W. Shakespeare, *The Tragicall Historie of Hamlet, Prince of Denmarke*, Act 3, Scene 1.

[29] Waite, *The Struggle of Prerogative and Common Law*, cit., p. 145.

[30] *Coke Reports*, Part V, 1 a; also known as *Caudrey (Cawdry) v Atton.*

[31] W. Epstein, *Issues of Principle and Expediency in the Controversy over Prohibitions to Ecclesiastical Courts in England*, in «Journal of Legal History», n. 1, 1980, p. 218.

[32] Waite, *The Struggle of Prerogative and Common Law*, cit., p. 146.

[33] The plaintiff, Caudrey, doubted the jurisdiction of the High Commission as well as the legitimacy of its procedure which led to the loss of the sinecure, as there had been neither a jury verdict nor a confession of the accused. The letters patent had furthermore not provided for the loss of the sinecure for the first offence of not using the *Book of Common Prayer*. *Coke Reports*, Part V, 1 a (3 b ff).

[34] *Coke Reports*, Part V, 1 a (7 a, 8 a ff).

[35] See Müßig, *Recht und Justizhoheit*, cit., pp. 166 ff.

[36] Müßig, *Recht und Justizhoheit*, cit., pp. 166 ff.; Waite, *The Struggle of Prerogative and Common Law*, cit., 146.

[37] S.A. de Smith, *The Prerogative Writs*, in «Cambridge Law Journal», n. 11, 1951, p. 43.

[38] Glanvill, XIV, c. 3. For a broader methodological context, see U. Seif (=Müßig), *Methodenunterschiede in der europäischen Rechtsgemeinschaft oder Mittlerfunktion der Präjudizien*, in G. Duttge (ed.), *Freiheit und Verantwortung in schwieriger Zeit*, Baden-Baden, Nomos, 1998, pp. 144-5.

[39] Cro. Jac. 543; also known as *R. v Lord Warden of the Cinque Ports, ex parte Bourn*.

[40] De Smith, *The Prerogative Writs*, cit., p. 53.

[41] 97 E.R. 587.

[42] 97 E.R. 587 (599); see also de Smith, *The Prerogative Writs*, cit., p. 53.

[43] See Baker, *Introduction to English Legal History*, cit., p. 145.

[44] De Smith, *The Prerogative Writs*, cit., p. 55.

[45] Baker, *Introduction to English Legal History*, cit., p. 143.

[46] *Ibidem.*

[47] De Smith, *The Prerogative Writs*, cit., p. 55.

[48] Ivi, p. 52.

[49] In Müßig, *Recht und Justizhoheit*, cit., p. 165 (fn. 81), prerogative writs are described as «extraordinary legal means». This may be mistakable for continental European readers familiar with suspense and devolutive effects in the continental legal systems. The prerogative writs, however, do not lead to such effects.

[50] See Baker, *Introduction to English Legal History*, cit., pp. 143 f.

[51] See T. Plucknett, *A Concise History of the Common Law*, Boston, Little, Brown and Co., 1956[5], p. 355.

[52] Baker, *Introduction to English Legal History*, cit., p. 144.

[53] *Ibidem.*, and pp. 128 ff.

[54] Waite, *The Struggle of Prerogative and Common Law*, cit., pp. 146 ff.

[55] Ivi, p. 147.

[56] 78 E.R. 484.

[57] 78 E.R. 985.

[58] 78 E.R. 1018.

[59] Moore 906 = 72 E.R. 1265.

[60] At the same time, the statement showed that there should be different standards in inheritance and marriage cases, and that the High Commission would still hold some authority; its whole existence was not cast into doubt. Furthermore, a connection was established with the law *Articuli Cleri,* which had already banned the use of the *ex officio* oath outside of inheritance and marriage cases in the fourteenth century.

[61] J.H. Wigmore, J.T. McNaughton, *Evidence in Trials at Common Law*, Boston and Toronto, Little, Brown and Co., 1961, vol. VIII, p. 280.

[62] U. Müßig, *Coke, Edward*, in A. Cordes (ed.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Berlin, Erich Schmidt Verlag, 2012[2], vol. I, p. 871.

[63] E. Coke, *The Fourth Part of the Institutes of the Laws of England. Concerning the Jurisdiction of Courts*, London, 1671[5], pp. 70 ff.

[64] For example, see *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.* which directly addresses Bracton's introduction to his second volume: «[T]hen the king said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by artificial reason and judgment of law, […] [and answering the king Coke continues]; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*». For more details cfr. Müßig, *Recht und Justizhoheit*, cit., pp. 171, 177.

[65] Cf. A.V. Dicey, *An Introduction to the Study of the Law of Constitution*, London, Macmillan, 1959[10], p. 18.

[66] 12 *Coke Reports* 109.

[67] At the same time, they emphasized that precedents before one court justified further proceedings of the same nature before the court, concluding that, «for a long time, and in many successions of reverend judges, prohibitions upon information, without any other plea pending, have been granted». 12 *Coke Reports* 109.

[68] Epstein, *Issues of Principle and Expediency*, cit., p. 232.

[69] E. Coke, *The Second Part of the Institutes of the Laws of England*, London, 1642, pp. 601, 606 f., 609 f.

[70] Psalm 124, Verse 7.
[71] «[T]he humour of the time is growne to be too eager against all Eccesiasticall jurisdiction». Coke, *The Second Part*, cit., p. 603.
[72] Ivi, pp. 608, 609 f., 613.
[73] Ivi, p. 604.
[74] Ivi, p. 615.
[75] Ivi, p. 609.
[76] See, for instance, Ivi, pp. 601 f., 608 f.
[77] Ivi, pp. 602, 607.
[78] Ivi, p. 609.
[79] Coke even went so far as to accuse Bancroft of perpetrating the biggest scandal in the history of English law: «[A]nd what scandall it will be to the justice of the Realme to have so great levity, and so foule an impuation laid upon the Judges, as done in this, is too manifest. And we are assured it cannot be shewed, that the like hath been done in any former age». Coke, *The Second Part*, cit., p. 617. See also Epstein, *Issues of Principle and Expediency*, cit., p. 232.
[80] See also Dawson, *Coke and Ellesmere Disinterred*, cit., p. 130.
[81] 12 *Coke Reports* 41.
[82] Hostettler, *Sir Edward Coke*, cit., p. 68.
[83] Cited in D. Willoweit, U. Seif (=Müßig) (eds.), *Europäische Verfassungsgeschichte*, Munich, C.H. Beck, 2003, p. 41.
[84] P.D. Halliday, *Habeas Corpus: From England to Empire*, Cambridge, MA and London, Harvard University Press, 2010, p. 15.
[85] Cf. e.g. *Kayser's Case* (1465), 1 Dyer's report 108 (= 72 E.R. 101); Baker, *Introduction to English Legal History*, cit., p. 146.
[86] Baker, *Introduction to English Legal History*, p. 146.
[87] Coke, *The Fourth Part*, cit., p. 71.
[88] R.G. Usher, *Nicholas Fuller: A Forgotten Exponent of English Liberty*, in «The American Historical Review», n. 12, 1907, pp. 747 f.
[89] Hostettler, *Sir Edward Coke*, cit., p. 68.
[90] 12 *Coke Reports* 41 (42 f).
[91] 12 *Coke Reports* 41 (43).
[92] 12 *Coke Reports* 41 (44).
[93] *Ibidem*.
[94] 24 Henry VIII. c12, also known as *Statute in Restraint of Appeals*.
[95] «[T]his realm of England is […] governed by one supreme head and king […] unto whom a body politic compact of all sorts and degrees of people divided in terms and by names of spiritualty and temporalty [*sic*], be bounden and owe to bear next to God a natural and humble obedience; he being also institute and furnished by the goodness and sufferance of Almighty God with plenary, whole and entire power, preeminence, authority, prerogative and jurisdiction to render and yield justice and final destination to all manner folk resiants or subjects within this realm». Cited in Elton (ed.), *The Tudor Constitution*, cit., p. 353.
[96] W.S. Holdsworth, *A History of English Law*, London, Methuen, 1924, vol. V, p. 431.
[97] Hostettler, *Sir Edward Coke*, cit., p. 69.
[98] 12 *Coke Reports* 19.
[99] 12 *Coke Reports* 26.
[100] 4 *Leonard Reports* 22 = 74 E.R. 701.
[101] 13 *Coke Reports* 9.
[102] See 12 *Coke Reports* 37.
[103] Hostettler, *Sir Edward Coke*, cit., p. 69.
[104] 12 *Coke Reports* 47.
[105] 12 *Coke Reports* 82.
[106] Holdsworth, *A History of English Law*, cit., vol. I, pp. 508 f.
[107] 2 *Dyer's Reports* 242 b (= 73 E.R. 537).
[108] Printed in Holdsworth, *A History of English Law*, cit., pp. 495 f.
[109] See Waite, *The Struggle of Prerogative and Common Law*, cit., p. 146.
[110] Coke, *The Fourth Part*, pp. 61, 63.
[111] Ivi, p. 63.
[112] Ivi, p. 65; Waite, *The Struggle of Prerogative and Common Law*, cit., p. 146.
[113] Coke, *The Fourth Part*, cit., p. 65.
[114] 2 *Brownlow & Goldenbourough* 49 (= 123 E.R. 808).
[115] 12 *Coke Reports* 93.
[116] Wigmore, McNaughton, *Evidence in Trials at Common Law*, cit., p. 282 (fn. 64).
[117] Ivi, p. 281.
[118] Ivi, p. 282. See also *Stroud's Trial*, in W. Cobbett, *Cobbett's Parliamentary History of England*, London, R. Bagshaw, 1807, vol. II, col. 504.
[119] 12 *Coke Reports* 63.
[120] A writ de non procedendo rege inconsulto brings about a suspension of the procedure in cases in which royal property is concerned, until the crown enters the trial as a party by means of a change of party. After the change of party to the king, the case is no longer heard before the King's Bench, but before the Chancery. A writ de non procedendo rege inconsulto does not allow the crown to give substantive orders to the common law judge. *Brownlow v Cox & Michil* 3 *Bulstrode* 32 = 81 E.R. 27 per *Edward Coke, C.J.*
[121] See *Brownlow v Cox and Michell*, 3 *Bulstrode* 32 (33) (= 81 E.R. 27).
[122] De Smith, *The Prerogative Writs*, cit., p. 41.
[123] *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1342 per *Edward Coke, C.J.* C.f. C. Stephenson, F.G. Marcham (eds.), *Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Present*, London, Macmillan, 1937, No. 91 B, pp. 437-8.
[124] *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*
[125] *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*
[126] *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.* C.f. also the confirmation of this thought in *Extracts from the speech of Oliver St. John in the ship-money case* (November 1637), cited in S.R. Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution 1625-1660*, Oxford, Clarendon Press, 1906[3], No. 21, pp. 111-12.
[127] «And it appears by the Act of Parliament of 2 Ed. 3. cap. 9 2 Ed. 3. cap. 1 that neither by the Great Seal, nor by the Little Seal,

justice shall be delayed; ergo the king cannot take any cause out of any of his Courts, and give judgement upon it himself, but in his own cause he may stay it, as it doth appear 11 H. 4.8». *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*

[128] «And the Judges informed the King, that no King after the Conquest assumed to himself to give any judgement in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice: and the king cannot arrest any man, as the book is in 1 H.7.4. for the party cannot have remedy against the King; so if the King give any judgement, what remedy can the party have». *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 ER 1343 per *Edward Coke, C.J.*

[129] «[T]hen the king said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature». *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*

[130] U. Müßig, *Superior Courts in Early Modern France, England and the Holy Roman Empire*, in P. Brand and J. Getzler (edited by), *Judges and Judging in the History of the Common Law and Civil Law*, Cambridge, Cambridge University Press, 2012, pp. 213-14.

[131] U. Müßig, *Precedents – Stare Decisis*, in S.N. Katz (ed.), *The Oxford International Encyclopedia of Legal History*, Oxford and New York, Oxford University Press, 2009, pp. 380-2.

[132] *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.* Coke's argumentation regarding the independence of judges is examined in depth by Dicey, *An Introduction to the Study of the Law of the Constitution*, cit., p. CXXXVII. Beginning with the *Prohibitions del Roy* (1607), the bench evolved into an independent authority under Coke, in order to mediate between crown and subjects. J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689*, Cambridge, Cambridge University Press, 1928, p. 37. Even in the nineteenth century, decisions relied heavily upon this. In the matter of the *Petition of Complaint of the Right Rev. John William Colenso, D.D., Lord Bishop of Natal* (1864), for instance, it was ruled that «[i]t is a settled constitutional principle or rule of law, that although the Crown may by its Prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court, to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament. There is, therefore, no power in the Crown to create any new or additional ecclesiastical Tribunal or jurisdiction, and the clauses which purport to do so, contained in the Letters Patent to the Appellant and Respondent, are simply void in law». III Moore N.S. 115, 154 = 16 E.R. 43, 58.

[133] Cited in Prothero (ed.), *Select Statutes*, cit., pp. 302-3.

[134] W.R. Anson, *The Law and Custom of the Constitution*, Oxford, Clarendon Press, 1922[5], vol. I, p. 343: «Here are set forth in a few words some salient features of our Constitution: and this at a time when a clear statement of the points at issue between Crown and Parliament was greatly needed, and when the first step to be taken towards a settlement of constitutional difficulties was that the nature of those difficulties should be understood». Cfr. also Tanner, *English Constitutional Conflicts*, cit., p. 38.

[135] J. Fortescue, *In Praise of the Laws of England*, Appendix A, in J. Fortescue, *On the Laws and Governance of England*, S. Lockwood (edited by), Cambridge, Cambridge University Press, 1997, pp. 127-8.

[136] *Ibidem.*

[137] C.f. *If High Commissioners have Power to Imprison* (Hil. 4 Jac.Regis) 12 *Coke Reports* 19 = 77 E.R. 1301.

[138] *The Case of Proclamations* (1611, Mich. 8 Jac. 1) 12 *Coke Reports* 74, 76 = 77 ER 1352, 1354.

[139] Fortescue, *In Praise of the Laws of England*, cit., chapter XVII (*The customs of England are very ancient, and have been used and accepted by five nations successively*), pp. 26-7. C.f. also R. Schmidt-Weigand, *Deutsche Rechtsregeln und Rechtssprichwörter: Ein Lexikon*, Munich, C.H. Beck, 1996, p. 264; S. Lockwood, *Introduction*, in Fortescue, *On the Laws and Governance of England*, cit., p. XXXI; D. Willoweit, *Vom guten alten Recht: Normensuche zwischen Erfahrungswissen und Ursprungslegenden*, in L. Gall (ed.), *Jahrbuch des Historischen Kollegs 1997*, Munich, R. Oldenbourg, 1998, pp. 24-5.

[140] The same applies to *national custom* as opposed to *local custom*. The national, general custom was defined as the entirety of all rules of the country since 3 September 1189 This date was determined in the Statute of Westminster I of 1275 as the date marking the beginning for land property. A right that was claimed to have originated before that date had to be proved. J. Selden, *Opera Omnia*, D. Wilkins (ed.), London, 1726, vol. III, p. 1671.

[141] Anonymus, *The Mirror of Justices*, W.J. Whittaker and F.W. Maitland (edited by), London, Selden Society, 1893, p. 5. C.f. also N. Doe, *Fundamental Authority in Late Medieval English Law*, Cambridge, Cambridge University Press, 1990, p. 26; D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*, Cambridge, Cambridge

University Press, 1989, p. 72.

142 C. St. German, *Dialogue between a Doctor of Divinity and a Student of the Common Law of England*, T. Frank, T. Plucknett, J.L. Barton (eds.), London, Selden Society, 1974, p. 45.

143 St. German, *Doctor and Student*, cit., p. 59. C.f. also J.A. Guy, *St. German on Equity and Statute*, London, Selden Society, 1985, pp. 20-1; P. Stein, *Regulae iuris: From Juristic Rules to Legal Maxims*, Edinburgh, University Press, 1966, p. 10.

144 The technicity of the legal rules could only be learnt by means of oral practice before court and the Inns of Courts. J.H. Baker, *The Inns of Court and Legal Doctrine*, in T.M. Charles-Edwards, M.E. Owen, D.B. Walters (eds.), *Lawyers and Laymen: Studies in the History of Law Presented to Professor Dafydd Jenkins on his 75th Birthday*, Cardiff, University of Wales Press, 1986, pp. 274-5; W.R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640*, Oxford, Clarendon Press, 1986, p. 14; W.R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts: 1590-1640*, London, Longman, 1972 pp. 10-11.

145 H. Finch, *A Description of the Common Laws of England*, 1759, pp. 52-3. C.f. also J. Dodderidge, *The English Lawyer*, 1631, p. 103; W.R. Prest, *The Dialectic Origins of Finch's Law*, in «Cambridge Law Journal», n. 36, 1977, pp. 326-7. Further assessments of British legal-comparative science: Doe, *Fundamental Authority*, cit., p. 26; E.W. Ives, *The Common Lawyers of Pre-Reformation England: Thomas Kebbell: A Case Study*, Cambridge, Cambridge University Press, 1983, p. 161.

146 The authority of the general custom for the common law, however, was not negated. C.f. explicitly Edward Coke, *Ninth Reports* 75b = 77 E.R. 843 (*Combes's Case*).

147 Coke, *Second Reports* 81a = 76 E.R. 597 (*Lord Cromwel's Case*); *Sixth Reports* 5b = 77 ER 261 (*Sir John Molyn's Case*).

148 Edward Coke, *The First Part of the Institutes of the Laws of England: A Commentary upon Littleton*, London, Charles Butler and Francis Hargrave, 1794[15], vol. I, p. 183b. C.f. also p. 394b: «*ratio est anima legis*, for then we are said to know the law when we apprehend the reason of the law, that is when we bring the reason of the law so to our own reason, that we perfectly understand it for our own».

149 Ivi, 232b.

150 *Ibidem*.

151 «[G]ood law, if it be well understood; for *non in legendo sed intelligendo leges consitsunt*». (Edward Coke, Eighth Reports, 167a = 77 E.R. 726 (*The Earl of Cumberland's Case*).

152 Coke, *The First Part*, cit., p. 97b.

153 Edward Coke, *Third Reports*, iv, in J.H. Thomas, J.L. Fraser (eds.), *The Reports of Sir Edward Coke*, London, Joseph Butterworth & Son, 1826, p. 110.

154 *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*

155 *The Case of Proclamations* (1611, Mich. 8 Jac. 1) 12 *Coke Reports* 74, 76 = 77 E.R. 1352, 1354. C.f. also R.G. Usher, *James I and Sir Edward Coke*, in «English Historical Review», n. 18, 1903, pp. 664-5; J.P. Sommerville, *History and Theory: The Norman Conquest in Stuart Political Thought*, in «Political Studies», n. 34, 1986, pp. 249-50.

156 *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 ER 1342 per *Edward Coke, C.J.*: «To which it was answered by me […] that the King in his own person cannot adjudge any case, either criminal […] or betwixt party and party […] but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgements are given, *ideo consideratum est per Curiam*, so that the Court gives the judgement».

157 Cf. St. German, *Doctor and Student*, cit., p. 45: «[T]he common law proper was divers general customs of old time used through all the realm, which have been accepted and approved by our sovereign lord the King and his progenitors and all their subjects».

158 Tanner, *English Constitutional Conflicts*, cit., p. 60.

159 Lieberman, *The Province of Legislation Determined*, cit., p. 75.

160 Ivi, p. 79.

161 J.H. Baker, *The Common Lawyer and the Chancery 1616*, in J.H. Baker (ed.), *The Legal Profession and the Common Law: Historical Essays*, London, Hambledon, 1986, pp. 205-6; W.H. Dunham, *Regal Power and the Rule of Law: A Tudor Paradox*, in «The Journal of British Studies», n. 3, 1963-4, pp. 24-5. On equity, see C.M. Gray, *Copyhold, Equity, and the Common Law*, Cambridge, MA, Harvard University Press, 1963, pp. 12-13; F.W. Maitland, *Equity. A Course of Lectures by Frederic William Maitland*, A.H. Chaytor and W.J. Whittaker (edited by), Cambridge, Cambridge University Press, 1936[2], pp. 10-11.

162 Coke, *The Fourth Part*, cit., p. 82; Coke, *Second Reports* 78b = 76 ER 592 (*Lord Cromwel's Case*); C.M. Gray, *The Boundaries of the Equitable Function*, in «American Journal of Legal History», n. 20, 1976, pp. 192-3; W.J. Jones, *Conflict or Collaboration? Chancery Attitudes in the Reign of Elizabeth*, in «American Journal of Legal History», n. 5, 1961, pp. 12-13; W.J. Jones, *The Elizabethan Court of Chancery*, Oxford, Clarendon Press, 1967, pp. 10-11.

163 Baker, *The Common Lawyer and the Chancery*, cit., pp. 205, 207.

164 *Garth v. Cotton* (1750) 1 LCE 559 = 28 E.R. 510; *Newcoman v. Bethlem Hospital* (1741) 1 Ambler 8, 2 Ambler 785 = 27 E.R. 501; *Scroggs v. Scroggs* (1755) 1 Ambler 272, 2 Ambler 812 = 27 E.R. 182, 513; *Stace v. Mabbott* (1754) 2 Vesey Sr. 552 = 28 E.R. 352).

165 Baker, *The Common Lawyer and the Chancery*, cit., pp. 205-6.

166 London BL, Additional MS. 35957, fo. 55*v*: «Et ceo est ore usuall que quant le defendant al comon ley ad try son fortunes la et stood out all the course of the law and in the end the matter adjudged against him then will he exhibite his bill in Chauncery and grownd yt upon poinctes of equitie for which he might have preferred his suite in Chauncery before the judgment et issint double et infinite vexacion».

167 Cf. in general Gray, *The Boundaries of the Equitable Function*, cit., pp. 192-3; L.A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere*, Cambridge, Cambridge University Press, 1977, pp. 123-4; G.W. Thomas, *James I, Equity and Lord Keeper Williams*, in «English Historical Review», n. 91, 1976, pp. 506-7.

168 Report by Coke himself: London BL, Harley MS. 6686, fo. 226*v*-229*r*.

169 London BL, Harley MS. 6686, fo. 228*v*.

170 Holdsworth, *A History of English Law*, cit., pp. 436 ff.

171 Dawson, *Coke and Ellesmere Disinterred*, cit., p. 131.

172 Baker, *An Introduction to English Law*, cit., p. 109.

173 Cited in W.D. Evans, A. Hammond, and T.C. Granger (edited by), *Collection of Statutes connected with the General Administration of the Law*, London, E. Lumley, 1836, vol. II, p. 350.

174 Dawson, *Coke and Ellesmere Disinterred*, cit., pp. 132 ff.

175 Moore, 291 = *Croke Reports Tempore Elizabeth I*, 221.

176 Dawson, *Coke and Ellesmere Disinterred*, cit., p. 135.

177 Draft Bill, 3 June 1614. London, House of Lords Library, *Historical Manuscripts Commission Third Report*, Appendix, p. 15.

178 *Heath v. Ridley* (1614) 2 *Bulstrode* 194= 80 E.R. 1062; Cro. Jac. 335 = 79 E.R. 286. Cf. Jones, *The Elizabethan Court of Chancery*, cit., pp. 463-4.

179 2 *Bulstrode* 194.

180 27 Edward III. St. 1 c. 1.

181 Holdsworth, *A History of English Law*, cit., vol. I, p. 462.

182 See 12 *Coke Reports* 37.

183 Dawson, *Coke and Ellesmere Disinterred*, cit., p. 127.

184 See Francis Bacon's letter to King James I, in J. Spedding, R.L. Ellis, and D.D. Heath (edited by), *The Works of Francis Bacon*, London, Longman, 1872, vol. XIII, p. 92.

185 Dawson, *Coke and Ellesmere Disinterred*, cit., p. 139 f.

186 Coke, *The Fourth Part*, cit., p. 71.

187 Dawson, *Coke and Ellesmere Disinterred*, cit., p. 140.

188 *Croke Reports* 219.

189 *Croke Reports* 219.

190 While the writ of error was pending before King's Bench, the accused lodged his petition at the Court of Chancery. Then, the Master of Rolls, as the representative of the Lord Chancellor, repealed the common law verdict. *Richard Glanvill's Case* 4° *Jacobi*, London BL, Harley MS. 1767, fol. 37*r*; Harley MS. 4265 fol. 75*v*; Lansdowne MS. 163, fol. 122*r*. Due to his opposition, the claimant Glanvill was arrested in 1613; the King's Bench issued a writ of habeas corpus in 1614. *Richard Glanvill v. Francis Courtney* 1 *Rolle Reports* 111 = 81 E.R. 365; 2 *Bulstrode* 302 = 80 ER 1139. Lord Chancellor Ellesmere had Glanvill arrested again on 7 May 1615 while the King's Bench issued a writ of habeas corpus once more. The answer of the Chancery, «*quod commissus fuit prisone per mandatum Thome Domini Ellesmere Cancellarii Anglie*», was revoked by all twelve common law judges. London BL, Additional MS. 35957, fol. 2*v*.

191 1 *Rolle Reports* 193 = 81 E.R. 365, 367.

192 1 *Rolle Reports* 219 = 81 E.R. 445. Cf. also London BL, Harley MS. 1691, fol. 55*v*.

193 *Allen's Case in Chancery*, London BL, Harley MS. 1767, fol. 39*r*; Harley MS. 4265, fol. 78*v*. Moore K.B. 840 = 16 E.R. 385.

194 The decision of the King's Bench, criticized by the Chancery, can be found by the name *The Case of Magdalene College (Warren v Smith)* (1615) (11 Rep. 66 = 77 E.R. 1235; 1 *Rolle Reports* 151 = 81 E.R. 394). The claimant failed to appear before the Court of Chancery and was subsequently arrested on the order of Lord Chancellor Ellesmere. Ellesmere justified this by claiming that, by failing to appear, the claimant had lost his right not only to appear before Chancery, but also the common law courts. This delineation of both jurisdictions was deemed a provocation by Coke. *The Earl of Oxford's Case (Oxford and Smith v Googe and Wood)* (1615) (1 Chancery Report, part i, 1; London BL, Harley MS. 1767, fol. 30*v*; Harley MS. 4265, fol. 68*v*; University of Cambridge, MS. Mm. i. 43, fol. 466*r*).

195 1 *Rolle Reports* 192, 218.

196 1 *Rolle Reports* 219.

197 1 *Rolle Reports* 219 = 81 ER 445. Cf. London BL, Harley MS. 1691, fol. 55*v*.

198 See Holdsworth, *A History of English Law*, cit., vol. I, p. 461.

199 Baker, *Introduction to English Legal History*, cit., p. 144.

200 Cf. 1 *Rolle Reports* 219; Dawson, *Coke and Ellesmere Disinterred*, cit., p. 145.

201 Cited in Knafla, *Law and Politics in Jacobean England*, cit., pp. 283, 291.

202 Cited in Knafla, *Law and Politics in Jacobean England*, cit., p. 332.

203 Holdsworth, *A History of English Law*, cit., vol. V, pp. 438 f.

204 21 E.R. 485.

205 Cf. Bacon's letter to the king on 15 February 1616, in Spedding, Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. XII, pp. 247 f.

206 Holdsworth, *A History of English Law*, cit., vol. V, pp. 438 f.; Dawson, *Coke and Ellesmere Disinterred*, cit., p. 145.

207 = *Colt v Glover*, 1 Rolle Reports 451.

208 Baker, *Introduction to English Legal History*, cit., p. 167; Dawson, *Coke and Ellesmere Disinterred*, cit., p. 130.

209 Copies of the petitions of Glanvill

and Allen in: London BL, Additional MS. 11574, fol. 44*r*. 46*v*.

[210] London BL, Additional MS. 35957, fol. 54*v*.

[211] Francis Bacon, *Letter to the King's most excellent Majesty, concerning the praemunire in the King's Bench, against the Chancery*, 21 February 1616, in Spedding, Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. V, p. 252.

[212] For James I, the limits of the different jurisdictions were determined by the king and not by common law judges. James I, *His Majesties Speach in the Starre Chamber the xx [20] of June Anno 1616, sig. D4**, cited in C.H. McIlwain (ed.), *The Political Works of James I*, Cambridge, MA, Harvard University Press, 1918, p. 329; cf. also London BL, Additional MS. 35957, fol. 55*v*. Hence, the king rejected the indictments of *praemunire* against the Lord Chancellor and the Chancery: «I thought it an odious and inept speach, and it grieved me very much, that it should bee said in Westminster Hall, that a premunire lay against the Court of Chancery and the officers there: how can the King grant a premunire against himself? It was a foolish, inept and presumptuous attempt, and fitter for the time of some unworthie King: understand me aright; I meane not, the Chancerie should exceede his limite; but on the other part, the King onely is to correct it, and none else. And therefore sitting here in seate of judgement, I declare and command, that no man hereafter presume to sue a premunire against the Chancery». McIlwain (ed.), *The Political Works of James I*, cit., p. 329.

[213] The royal decree of 18 July 1616 is widely dispersed in the form of manuscripts (London BL, Harley MS. 1767, fo. 49*v*; Harley MS. 4265, fo. 83*r*; Lansdowne MS. 174, fol. 119*r*; Lansdowne MS. 613, fol. 47*v*; Lansdowne MS. 826, fol. 2*r*; Stowe MS. 298, fol. 217*v*; Stowe MS. 415, fol. 63*v*; Hargrave MS. 227, fol. 583*r*; Hargrave MS. 249, fol. 159*v*). It only safeguarded the Court of Chancery, but not the other prerogative courts. See, for instance, *Calmady's Case* (1640) Cro. Car. 595 = 79 E.R. 1112. As a result, equity remained a questionable issue even during the Commonwealth period (1649-59). See, for example, H. Rolle, *Un abridgement des plusieurs cases et resolutions del common ley alphabeticalment digest desouth severall titles*, 1668, vol. I, p. 381. Cf. also the resolution of the House of Commons in 1676-7 and the Bill of House of Lords in 1690, referenced in Holdsworth, *A History of English Law*, cit., vol. I, p. 464. The principal direction of the common law opposition remained the *in personam* effect of equity verdicts. Anonymus (1627) Litt. Rep. 37 = 124 E.R. 124: «[I]f judgement is rendered in an action of common law, the Chancellor cannot alter it or meddle over the judgement, but he can proceed against the person for corrupt conscience because he has the advantage that law encounters conscience». Cf. also *Tompson v Hollingsworth* (1641) March N.R. 83 = 82 E.R. 422; Anonymus (1647) Style 27 = 82 E.R. 503.

[214] De Smith, *The Prerogative Writs*, cit., p. 52.

[215] *Croke's Reports* Jac. 543; also known as *R. v Lord Warden of the Cinque Ports, ex parte Bourn*.

[216] For this confederation of coastal towns in Kent and Sussex cf. R. Jessup and F. Jessup, *The Cinque Ports*, London and New York, Batsford, 1952, pp. 16-17.

[217] De Smith, *The Prerogative Writs*, cit., p. 53.

[218] In the appeal of the *Ruswell's Case* (1615) (1 Rolle Reports 219 = 81 E.R. 445), Bacon reconfirms: «Equity could not operate against the a maxim of law, which would be to make a new law, but could only relieve in cases of particular mischief».

[219] «[A]nd it were most absurd to let the King's conscience be at enmity and opposition with his laws and statutes. This Court (as I conceive it) may be often occasion'd to open and confirm, but never to thwart, and oppose, the grounds of the laws». John Hackett, *Scrinia Reserata*, 1693, p. 73. Cf. also Thomas, *James I, Equity, and Lord Keeper Williams*, cit., pp. 506-7.

[220] *The Character of Lord Keeper Coventra*, London BL, MS. Stowe 619*v*: «Where it falls into observation that this high place [Lord Keeper] is rarely well served but by men of law and persons of deepest judgment in the statute and common lawes of the land; whereby they may distinguish of cases whether they lye proper in that court to be relieved in equitie without intrenching on the jurisdiction of the kingdome, which is the inheritance of the subject».

[221] *Hervey v Aston* (1738) West T.Hard. 350, 425 = 25 E.R. 975, 977. Cf. also *Anonymus* (1746) 3 Atkyns 350 = 26 E.R. 1002; *Jesus College v. Bloom* (1745) 1 Ambler 54 = 27 E.R. 30; *Lord Montague v. Dudman* (1751) 2 Vesey Sen. 396 = 28 E.R. 253.

[222] *R. v. Hare and Mann* (1719) 1 Strange 146, 151 = 93 E.R. 439: «Where the common law afforded no remedy most commonly churchmen, men of conscience would seek to provide a remedy by summoning the litigants and laying it upon the conscience of the wrongdoer to do right».

[223] U. Seif (= Müßig), *Der Bestandsschutz besitzloser Mobiliarsicherheiten im deutschen und englischen Recht*, Tübingen, Mohr Siebeck, 1997, pp. 157-8.

[224] W. Blackstone, *Commentaries on the Laws of England*, 1768, vol. 3, chapter XXII, p. 327 Cf. also A. Smith, *Lectures of Jurisprudence*, R.L. Meek, D.D. Raphael, P.G. Stein (eds.), Oxford, Clarendon Press, 1978, pp. 275, 282.

[225] «[N]evertheless of late divers commissions under your Majesty's Great Seal have issued forth, by which certain persons have been assigned and appointed

Commissioners with power and authority to proceed within the land, according to the justice of martial law against such soldiers and mariners, or other dissolute persons joining with them [...] that the foresaid commissions for proceeding by martial law may be revoked and annulled, and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid». Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., p. xx. Although the *Petition of Rights* was only to describe the extant state, later it was regarded as a stronghold of citizens' constitutional rights. Their interpretation led to the beginning of the Puritan Revolution in 1642. The *Petition of Rights* was fully brought to fruition by the *Habeas-Corpus-Act* of 1679 and the *Declaration of Rights* of 1689. D.L. Keir, *The Constitutional History of Modern Britain since 1485*, London, Black, 1966[8], p. 191.

226 *The Petition of Right* (7 June 1628), in Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 10, pp. 66, 69. See also Eduard Kern, *Der gesetzliche Richter*, Berlin, Otto Liebmann, 1927, pp. 19, 24.

227 17 Car. I c.10. Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 34, pp. 179-80.

228 Ivi, p. x; 17 Car. I. c. 11. Ivi, No. 35, pp. 186-7.

229 17 Car. I c.10. Ivi, No. 34, p. 183.

230 «That all Judges, and all the officers placed by approbation of both Houses of Parliament, may hold their places *quam diu bene se gesserint*». Ivi, No. 53, pp. 249-50.

231 Ivi, No. 53, p. 253.

232 Ivi, No. 57, p. 265.

233 1 Gul. & Mar. Sess. 2 c.2, cited in J. Raithby (ed.), *The Statutes at Large of England and of Great-Britain: from Magna Carta to the Union of the Kingdoms of Great Britain and Ireland*, London, G. Eyre and A. Stratham, 1811, vol. III, pp. 275-6.

234 12 & 13 Gul. III. c.2, cited in ivi, pp. 574, 576.

235 Edward Coke, in W. Notestein, F.H. Relf, H. Simpson (eds.), *Commons Debates 1621*, New Haven, Yale University Press, 1935, vol. II, p. 228.

236 J. Morice, *A Remembrance of Certeine Matters concerning the Clergie and theire Jurisdiction*, 1593, p. 51: «Wee agayne the Subjects of this Kingdome are borne and brought upp in due obedience, butt farre from Servitude and bondage, subject to lawfull aucthoritye and commaundement, but freed from licentious will and tyrannie; enjoyinge by lymitts of lawe and Justice oure liefs, lands, goods, and liberties in greate peace and security».

237 Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., p. 421.

238 U. Seif (=Müßig), *Der mißverstandene Montesquieu: Gewaltenbalance, nicht Gewaltentrennung*, in «Zeitschrift für Neuere Rechtsgeschichte», n. 22, 2000, 149-50.

239 D. Digges, *A Review of the Observations upon some of his Majesties Late Answers and Expresses*, 1643, p. 12.

240 W. Nordstein, F.H. Relf, *Commons Debates for 1629*, New Haven, Yale University Press, 1921, p. 230.

241 Two Speeches by Sir John Davies before the Lords Deputy of Ireland (1613), Sir Thomas Clarke and Lord Alvanley's MSS. Lincoln's Inn London, fol. 6*r*. Cf. also J. Davies, *A Perfect Abridgement in English of the Eleven Books of Reports*, 1651, p. 6.

242 Coke also described Parliament in similar terms: «The King of England is armed with divers Councels, one whereof is called *Commune Councilum*, and that is the Court of Parliament». Coke, *First Part*, cit., p. 110. In 1635, William Lambarde added: «The genereall Assembly in Parliament, is termed in our old Writs, *Commune Consilium Regnis Angliae*, the Common Councell of the Realme of England, called to getheer by the King, for advice in matters concerning the whole Realme». This coincides with the definition given by Thomas Smith, published fifty years earlier. See, respectively, W. Lambarde, *Archeion, or the High Courts of Justice in England*, 1635, p. 102; T. Smith, *De Republica Anglorum*, M. Dewar (ed.), Cambridge, Cambridge University Press, 1982, chapter 1, book 2, p. 48. C.f. on Sir Thomas Smith: J. Strype, *The life of the learned Sir Thomas Smith, Principal secretary to King Edward the sixth and Queen Elizabeth. Wherein are discovered many singular matters relating to the state of learning, the reformation of religion and the transactions of the Kingdom, during his time. In all which he had a great and happy influence*, Oxford, 1820, pp. 27-8.

243 R. Heath, *Speach in the Case of Alexander Leighton in the Star Chamber, 4 June 1630*, S.R. Gardiner (ed.), London, Camden Society, 1875, p. 9.

244 The English monarch governs by virtue of the *consilium privatum* (Privy Council), by virtue of the *magnum consilium* (House of Lords) and by virtue of the *commune consilium* (House of Commons), also *consilium ordinarium*. M. Hale, *The Jurisdiction of the Lords House, or Parliament, Considered According to Ancient Records*, F. Hargrave (ed.), 1796, pp. 5-6. Cfr. E. Husbands (ed.), *An Exact Collection of all Remonstrances, Declarations, Votes, Orders, Ordinances, Proclamations, Petitions, Messages, Answers and other Remarkable Passages between the King's Most Excellent Majesty and his High Court of Parliament*, 1643, p. 304: «[...] but it is likewise a council, to provide for the necessities, prevent the imminent dangers, and preserve the public peace and safety of the kingdom, and to declare the King's pleasure in those things as are requisite thereunto». Cf. also M.J. Mendle, *The Great Council of Parliament and the First Ordinanc-*

es: The Constitutional Theory of the Civil War, in «Journal of British Studies», n. 31, 1992, p. 13.

245 Hale, *The Jurisdiction of the Lords House*, cit., p. 6: «But when the business were of a more contracted nature, and fell more specially under the cognizance of some of his council, then those were called to it that were fittest to advise about it; as the Chancellor and the judges when the advice concerned matters in law».

246 M.A. Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645*, New Brunswick, Rutgers University Press, 1949, p. 77.

247 J. Selden, *Table Talk*, F. Pollock (ed.), London, Selden Society, 1927, p. 102.

248 Judson, *The Crisis of the Constitution*, cit., p. 74.

249 Husbands (ed.), *An Exact Collection*, cit., p. 269.

250 *Declaration of the Houses in Defence of the Militia Ordinance* (6 June 1642), in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 54, pp. 254-6. C.f. also *The Votes of the Houses for Raising an Army* (12 July 1642), in the same, Nr. 56, p. 261.

251 C.H. McIlwain, *The High Court of Parliament and Its Supremacy, An Historical Essay on the Boundaries Between Legislation and Adjudication in England*, New Haven, Yale University Press, 1934, pp. 118-20; A. Cromartie, *Sir Matthew Hale 1609-1676: Law, Religion and Natural Philosophy*, Cambridge, Cambridge University Press, 1995, p. 24.

252 G.R. Elton, *The Parliament of England 1559-81*, Cambridge, Cambridge University Press, 1986, p. 39; D.M. Dean and N.L. Jones, *The Parliaments of Elizabethan England*, Oxford, Blackwell, 1990, pp. 2-3.

253 As Thomas Smith argued, legislative Parliament «representeth and hath the power of the whole realm both the head and the body. For every Englishman is intended to be there present». Smith, *De Republica Anglorum*, cit., p. 49. Lambarde agreed: «[F]orasmuch as every man, from the highest to the lowest, is there either in person or by procuration, every man is said to be bound by that which doth pass from such an assembly». Lambarde, *Archeion*, cit., p. 245.

254 Cromartie, *Sir Matthew Hale*, cit., p. 53.

255 C.f. for example *The Impeachment of one Member of the House of Lords, and of Five Members of the House of Commons* (3 January 1642), in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 46, pp. 236-7. C.f. also Art. 2 IV *Constitution of the United States of America*.

256 Coke, *The Fourth Part*, cit., p. 3.

257 8 *Coke Reports* 107a = 77 E.R. 638 (*Dr Bonham's Case*). C.f. also T.F.T. Plucknett, *Bonham's Case and Judicial Review*, in «Harvard Law Review», n. XL, 1926, pp. 30-1; S.E. Thorne, *Dr. Bonham's Case*, in «Law Quarterly Review», n. LIV, 1938, pp. 543-4.

258 St. German, *Doctor and Student*, cit., p. 300.

259 Coke, *Eleventh Reports*, 14a = 77 ER 1163 (*Priddle and Napper's Case*): «[I]t was also urged that if the said act [should have a particular effect, then] it would do a wrong». While authors like Thomas Smith and William Lambarde emphasized consensus, Coke stressed knowledge: «[T]he law intends that every person hath knowledge thereof, for the parliament represents the body of the whole realm». Coke, *The Fourth Part*, p. 26. Coke was not the first to consider the knowledge of the represented subjects on the parliamentary statute, but his dismissal of consensus in favour of knowledge as a legitimizing factor was new. Cf. R. Crompton, *L'authoritie et jurisdiction des courts de la Majeste de la Roigne*, 1637, fol. 16r.

260 *Declaration of the Houses in Defence of the Militia Ordinance* (6 June 1642), in Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 54, pp. 254-6. C.f. also *The Votes of the Houses for Raising an Army* (12 July 1642), in the same, Nr. 56, p. 261. This position of the Parliament in 1642 was also justified by the Member of Parliament Charles Herle (1598-1659) with reference to the status of the Parliament as supreme (appellate) court: «[H] is Majesty often professeth himself no lawyer, therfore in law he judgeth not, but by his courts, in the meanest of which the sentence passed stands good in law, though the king by proclamation or in person should oppose it: whereas there is nothing more frequent or proper to parliaments, than to reverse any of [the courts'] judgements». C. Herle, *A Fuller Answer to a Treatise Written by Doktor Ferne*, 1642. C.f. also Husbands (ed.), *An Exact Collection*, cit., pp. 206-7.

261 Blackstone, *Commentaries*, cit., vol. 1, chapter II (*Of the Parliament*), p. 156.

262 Coke, *The Fourth Part*, p. 36.

263 C.f. the interpretation of the law as self-defence in the *Declaration of the Houses in Defence of the Militia Ordinance* (6 June 1642): «[…] but ought to be obeyed by the fundamental laws of this kingdom […] so the question is […] whether there is not a power in the two Houses to provide for the safety of the Parliament and peace of the kingdom, which is the end for which the Ordinance concerning the militia was made». Cited in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 54, p. 254.

264 On the theory on the *leges fundamentales*, which was generally widely spread since the seventeenth century, c.f. H. Quaritsch, *Staat und Souveränität*, Frankfurt am Main, Athenäum, 1986, vol. I, p. 364.

265 Cf. the opposition against a legislative draft on the grounds that «it alters the fundamentall lawe», see S.R. Gardiner (ed.), *Debates in the House of Commons*

in 1625, London, Camden Society, 1873, p. 90.

266 Francis Bacon, *A Collection of some principal Rules and Maximes of the Common Lawes of England, Epitsle Dedicatory*, in Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. XIV, p. 10.

267 S. Daniel, *A Panegyrike Congratulatory*, 1603, p. 30: «We shall continue one, and be the same In Law, in Iustice, Magitsrate, and forme, Thou wilt not touch the fundamentall frame Of their Estate thy Ancestors did forme, but with a reuerence of their glorious fame Seeke onely the corruptions to reforme, Knowing that course is best to be obseru'de Whereby a State hath longest beene preseru'd».

268 McIlwain (ed.), *The Political Works of James I*, cit., p. 54.

269 J. Rushworth (ed.), *Historical Collections of Private Passages of State, Weighty Matters in Law, Remarkable Proceedings in Five Parliaments: 1618-1629*, London, D. Browne, 1721, vol. I, p. 268.

270 J.W. Gough, *Fundamental Law in English Constitutional History*, Oxford, Clarendon Press, 1961², pp. 13, 30-1. Cf. also Quaritsch, *Staat und Souveränität*, cit., vol. I, pp. 363-4.

271 H. Krüger, *Souveränität und Staatengemeinschaft*, in H. Krüger, G. Erler (eds.), *Zum Problem der Souveränität, Verhandlungen der Tagung der Gesellschaft in Frankfurt am 31.3.-1.4.1955*, Karlsruhe, C.F. Müller, 1957, p. 20.

272 Quaritsch, *Staat und Souveränität*, cit., p. 363.

273 The monarchical right to the sole decision on the public good was argued in the *Ship money's case* or *Hampden's Case* (1637): «And we are also of opinion that in such case your majesty is the sole judge both of the danger and when and how the same is to be prevented and avoided». Stephenson and Marcham (edited by), *Sources of English Constitutional History*, cit., No. 94 C, p. 459. The opposite agument was provided by the common law judges in their response of 7 February 1637: «[A]nd whether in such case is not the King the sole judge both of the danger, and when and how the same is to be prevented and avoided». Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 20, p. 108. Matthew Hale also argued: «That he alone is the Judge of all publique dangers and may appoint Such remedyes as he please and impose what Charges he thinkes fitt in Order thereunto. Those wild Propositions are 1. Utterly falce. 2. ag[ainst] all Naturall Justice. 3. Pernicious to the Governm. 4. Destructive to the Common good and safety of the Governmt. 5^{thly} Without any Shaddow of Law or reason to Support them». M. Hale, *Reflections by the Lord Chief Justice Hale on Mr. Hobbes His Dialogue of the Lawe, Second Essay: Of Soveraigne Power*, cited in Holdsworth, *A History of English Law*, cit., vol. V, p. 509.

274 Hale, *Reflections by the Lord Chief Justice Hale on Mr. Hobbes His Dialogue of the Lawe, Second Essay: Of Soveraigne Power*, cited in Holdsworth, *A History of English Law*, cit., vol. V, p. 509: «They are utterly false, in thinges of this Nature the best measures of Truth or Falsehood are not imaginary Notions or Reasons att large, but the Laws and Customes of this Kingdome w^{ch} have determined Reasons att large and bound itt up within the boundes of Such Lawes and Usages. Itt is certain that the King without the Consent of ther Lordes and Commons in Parlem^{t} neith^{r} by Proclamation nor by Ordinance, Act of Council or Ordinance cannot make a bindeing Law […] And as he cannot make a Law without Consent of Parliam^{t}, Soe neither can he Repeale a Law without the like Consent».

275 Speech by J. Whitelocke (1610), in Cobbett (edited by), *State Trials*, cit., vol. II, pp. 482-3: «The soveraigne power is agreed to be in the king: but in the king is a two-fold power, the one in parliament, as he is assitsed with the consent of the whole state; the other out of parliament, as he is sole, and singular, guided merely by his own will. And if of these two powers in the king one is greater than the other, and can direct and controule the other; that is suprema potestas, the soveraigne power, and the other is subordinata. It will then be easily proved, that the power of the king in parliament is greater than his power out of parliament: and doth and controule it; for if the king make a grant by his letters patent out of parliament, it bindeth him and his successors: he cannot revoke it, nor any of his successors; but by his power in parliament he may defeate and avoyd it; and therefore that is the greater power».

276 1 Gul. & Mar. Sess. 2 c.2, cited in Raithby (edited by), *Statutes at Large*, cit., vol. III, pp. 275, 278.

277 A. Fitzherbert, *The New Natura Brevium*, Dublin, 1793, p. 40 E; see also Baker, *Introduction to English Legal History*, cit., p. 144.

278 De Smith, *The Prerogative Writs*, cit., pp. 49 f.

279 Waite, *The Struggle of Prerogative and Common Law*, cit., p. 149. See also *Empringham's Case* (ca. 1611), 12 *Coke Reports* 84.

280 Holdsworth, *A History of English Law*, vol. I, pp. 512 ff.

281 Cf. Dicey *An Introduction to the Study of the Law of Constitution*, cit., p. 18 (esp. fn. 140).

282 *The Petition of Rights*, in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., pp. 66, 68 f.

283 *The Act for the Abolition of the Court of High Commission*, 17 Charles I c. 11, in Ivi, p. 186; see also Hostettler, *Sir Edward Coke*, cit., p. 76.

284 *The Act for the Abolition of the star Chamber*, 17 Charles I. c. 10, in Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., p. 179.

285 Holdsworth, *A History of English Law*, cit., vol. I, p. 514.

286 Hostettler, *Sir Edward Coke*, cit.,

p. 76.

287 For details cf. Müßig, *Recht und Justizhoheit*, cit., pp. 181-2, 195-6.

288 C.f. also J. Dodderidge, *Treatise on the King's Prerogative Dedicated to Lord of Buckhurste*, 1610, London BL, Harley MS. 5220, fo. 9*v*. The differences between absolute and ordinate power, by contrast, are not elaborated in the introductory announcements: «[W] herein it doth consist and in what causes in discourse whereof ar detearmined at large manic notable questions of most high importance touching the dignitie Roiall and the estate of the Realme, by the Lawes, Statutes, and publick Recordes of this Realme».

289 Cited in Stephenson, Marcham (ed.), *Sources of English Constitutional History*, cit., No. 91, pp. 435-6 per *Chief Baron Thomas Fleming*.

290 *Ibidem*.

291 *Ibidem*. C.f. also Fortescue, *In Praise of the Laws of England*, cit., chapter XIII (*How kingdoms ruled politically first began*), p. 22 (*political and royal dominion*); Fortescue, *The Governance of England*, cit., chapter II (*Why one king reigns royally and another politically and royally*), p. 87 (*Dominium politicum et regale*).

292 Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., No. 91, pp. 435-6 per *Chief Baron Thomas Fleming*.

293 The King's Counsel, Sir John Banks, attributed the disputed question to both spheres of power, as it «concerneth the king both in his ordinary and absolute power». Ivi, No. 94 C, p. 459; Cobbett (ed.), *State Trials*, cit., vol. III, p. 1016.

294 M.A. Judson, *The Crisis of the Constitution*, cit., p. 114.

295 Cited in Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., No. 91, pp. 435-6 per *Chief Baron Thomas Fleming*.

296 Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. VI, p. 41.

297 Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 8, pp. 59-60; Cobbett (edited by), *State Trials*, cit., vol. III, p. 10; Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., No. 94 A, p. 457.

298 According to Heath, «*I did willingly subscribe to that part of the act … havinge Long been of opinion: that the privie Counsell, and that honorable board the Counsell table, should not have meddled with questions of meum and tuum*». Cited in Judson, *The Crisis of the Constitution*, cit., p. 50.

299 Ivi, p. 114.

The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective*

JOHN W.F. ALLISON

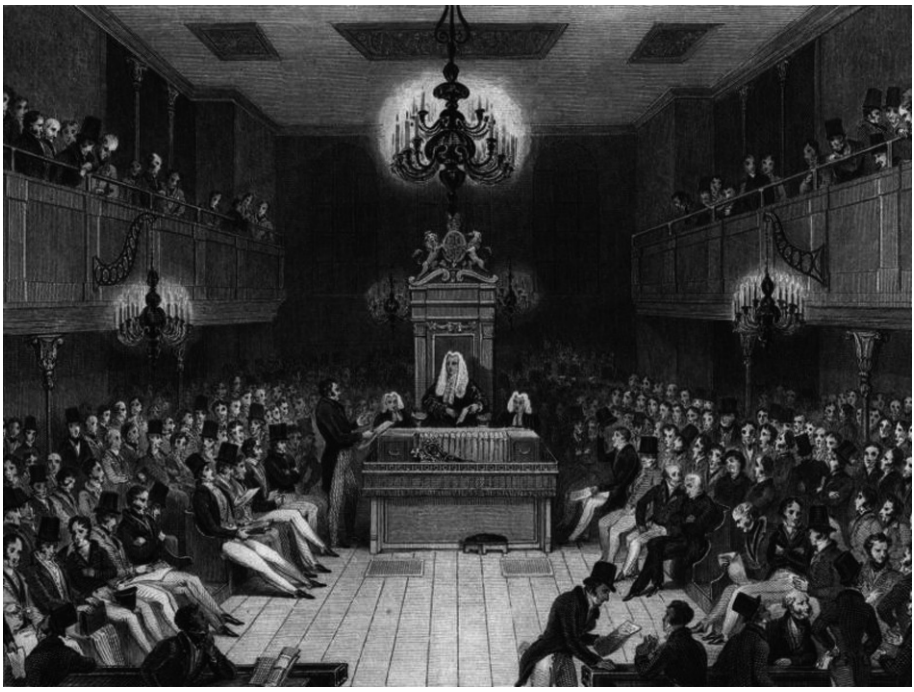
Introduction

Thank you, Professor Müßig and ReCon-Fort, for inviting me to give this lecture and for your excellent hospitality, which has made my visit to the Carl Friedrich von Siemens Foundation here in Munich a great pleasure.

This lecture might just as well have been entitled *The Westminster Parliament's Formal and Substantive Sovereignty*, but the extension would have been long and inelegant, and, as it stands and as will become apparent, the title reflects the exercise of sovereignty[1] that resulted in the United Kingdom's Brexit referendum on 23 June of this year. On the Brexit referendum, I should add that I am pleased at least to come from Cambridge and to be close to London - two cities that strongly supported the Remain campaign!

Advocacy of Brexit was expressed with the popular slogan "Take back control", which has two main dimensions - "control of borders" on the one hand, and "control of laws" on the other. The second of these raises the issue of Parliament's sovereignty, which has held the status of the ultimate legal and political principle, the *Grundnorm*, or the basic rule of recognition, in much positivist legal thinking about the British legal system[2]. "Control of borders" was of far greater political significance, but "Control of laws" was also significant both in its general appeal to most Brexit leaders (not Nigel Farage, but Boris Johnson, Liam Fox and Michael Gove for example) and to those from the intelligentsia who supported Brexit, and as a veneer of respectability for the less seemly side of "Control of borders" relating to immigration.

Now, my college in Cambridge is Queens' College, and, in the lead-up to the Brexit referendum, two of our former students who are now Members of Parliament (MPs) – on opposite sides – came to debate the issues. The one alumnus is Labour Party MP Stephen Kinnock, the son of former Leader of the Opposition and



The Speaker presides over debates in the House of Commons, 1834 print

former European Commissioner Neil Kinnock (and Stephen is married to the former Prime Minister of Denmark Helle Thorning-Schmidt). The other alumna is Conservative Party MP Suella Fernandes, who was elected in the General Election last year (2015), and who was therefore worrying that almost her first main move as an MP was to oppose her Prime Minister and Government by campaigning for Brexit. What were striking in their debate on the issues were two contrasting and competing conceptions of the Westminster Parliament's sovereignty (as it was in other debates on the Brexit referendum). Suella Fernandes, who had studied law at university, presented a legal conception, one that had been encroached upon formally through the effective assertion of the supremacy of Community law by the ECJ (as they were then called) and thereafter through acceptance of that supremacy by the British courts, definitively by the House of Lords (as it was then called) in the *Factortame* litigation[3], resulting in disapplication of provisions of the Merchant Shipping Act 1988 enacted by Parliament. Stephen Kinnock, in contrast, presented a substantive political conception of the reality of what Parliament can and cannot do. He argued that EU membership actually enhances Parliament's sovereignty by enabling it to do much more through the EU than it would otherwise be able to do. He argued further, as I remember, that Brexit would make little difference to the practical constraints on Parliament's sovereign-

ty, because international trade deals by the UK with the EU (as with other state entities or states elsewhere) would thereafter be conditioned on compliance with such constraints (Prime Minister Cameron went so far as to say that Parliament's sovereignty in the minds of the Brexit campaigners was an illusion).

Explaining the background and relative significance of the contrasting conceptions of the Westminster Parliament's sovereignty, exemplified in that Brexit debate in Queens' College, is the subject of this lecture. It has four main parts. First, I will seek to explain this dichotomy of formal legal and substantive political conceptions of Parliament's sovereignty as a doctrinal product of Albert Venn Dicey's foundational multi-edition textbook *The Law of the Constitution*, first published in 1885[4]. Secondly, I will suggest the historical significance of Dicey's exposition, relative to prominent earlier constitutional writings and in relation to the theme of juridification in the ReConFort project. Thirdly, I will present various prominent manifestations of the formal legal conception of the Westminster Parliament's sovereignty, and of the concurrence or simultaneous role of various substantive conceptions alongside the formal. Fourthly and finally, I will focus on the real and/or apparent transfer of sovereign powers to the EU institutions as the backdrop to Brexit and its implications.

Let me return, first, to the Brexit debate in Queens' College. My own, personal, problem is that, in context, on the implications of Brexit for Parliament's sovereignty, I agreed with Stephen Kinnock but I had supervised/tutored Suella Fernandes in Constitutional Law at Queens' College. What had I taught her and where had I gone wrong…? Suella had been taught, as the usual starting point, Dicey's account of parliamentary sovereignty, but, in retrospect, we in English academia may well have paid too much attention to his one pillar of the British Constitution – the rule of law – the various formal and substantive conceptions of the rule of law[5], at the expense of his other pillar – the sovereignty of Parliament.

I. *Dicey's Dichotomy of Formal and Substantive Conceptions of Parliament's Sovereignty*

In his treatment of Parliament's sovereignty, Dicey was concerned with two observational difficulties for someone studying the English constitution[6] (as he called it). The one was that Parliament was said to be sovereign, but sovereignty was at least shared with the electorate through Parliament's representative character. The other was that sovereignty was said to be unlimited, but was clearly subject to limited practicability in day-to-day politics. His answer to these observational difficulties for students studying the constitution was to distinguish between the legal sense of Parliament's sovereignty – the lack of any legal limit to law making – and the political sense in which the electorate (through the House of Commons), the House of Lords and the King were sovereign. This distinction overlapped with a second distinction. Parliament's sovereignty in its legal sense was theoretically limitless, whereas its sovereignty in its political sense was subject to various, innumerable, limits in actuality. In expounding the law of the constitution, Dicey's focus was purely on the legal con-

ception, and it provided a basic rule - "an undoubted legal fact" (thus largely unjustified in Dicey's account) - for the courts to obey/apply any parliamentary legislative enactment whatever its content[7]. Part of the rule reflected[8] the maxim «Parliament cannot bind its successors». It required that, if a later Act of Parliament is inconsistent with an earlier Act, the later Act be taken to have repealed by implication the earlier Act to the extent of the inconsistency. Dicey's legal conception of Parliament's sovereignty was formal, even fictitious, because it required the courts to treat Parliament's sovereignty as limitless although it was clearly limited in political actuality or practicability.

Dicey's comparative constitutional lectures were first delivered and written from 1895 to 1900, but they were lost both to the public and academia until about 1985, and they remained largely unpublished until publication of *The Oxford Edition of Dicey* in 2013[9]. They now shed light on Dicey's account of Parliament's sovereignty in an important way. Contrasting the different spirits of different constitutions (such as the civil administrative spirit of French constitutionalism or the military spirit of Prussian constitutionalism of his day) he described the legal spirit of the institutions of the English constitution[10]. For him, that legal spirit was a love for legal forms and an acquiescence in fictions, such as the fiction in the seventeenth century that King Charles II immediately succeeded King Charles I. That was the fiction by which «Englishmen … contrived to forget the fall of the monarchy», with the effect that «the very memory of the Interregnum» from 1649 to 1660 (when the reigns of Charles I and Charles II were separated by the Commonwealth of England and the Protectorate) was «blotted out from popular tradition»[11]. For Dicey, the English constitution was viewed from the perspective of a people with «a legal turn of mind and a love for forms and precedents» who «imbued with legalism … import into their political arrangements that love of precedent and acquiescence in fictions which is proper to the law courts»[12]. Dicey's formal legal conception of Parliament's sovereignty[13], its longevity and influence were in accordance with that legal spirit, as was that spirit's importation into the English political arena.

II. *The Historical Significance of Dicey's Exposition of the Law of the Constitution and of Parliament's Sovereignty*

What is also clear from Dicey's comparative constitutional lectures is that he saw the English constitution as the prime example of a historical constitution, as did most of his contemporaries, exhibiting characteristics of "antiquity", "continuity", etc.[14] His conception of it as a historical constitution is consistent with his abundant historical references, in his famous work *The Law of the Constitution*, to the antiquity of Parliament's sovereignty and the critical importance of the formative struggles between Crown and Parliament in the seventeenth century[15].

The historical significance of Dicey's exposition, however, was principally the thoroughness, authority and lasting influence of his attempt to juridify or juridicalise, even judicialise, the English historical constitution through legal doctrine in The Law of the Constitution. He put the rule of law in pride

of place as the second pillar of the constitution. The third meaning he attributed to the rule of law (after his first two meanings centred on legal certainty and equality before the law) was of the English constitution itself as the «result of [the] ordinary law of the land», principally «the consequence of the rights of individuals, as defined and enforced by the Courts»[16]. Further, parliamentary sovereignty was his first-stated pillar of the English constitution, but the conception with which he was concerned was a legal and theoretical conception. It was the conception of the «Unlimited legislative authority of Parliament», the lack of any limit to law making, providing the rule for the courts that they apply whatever Parliament enacts in an Act of Parliament[17]. It was distinct from the political conception of Parliament's sovereignty subject to external and internal limits, constraining actual political practicability[18].

Earlier prominent writings on the English constitution, such as those of Coke, Blackstone, De Lolme, Cox and Hearn[19], emphasised or listed all that Parliament could do in the exercise of its sovereign legislative authority. According to Edward Coke in 1644[20],

> Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds. Of this court it is truly said: *Si antiquitatem spectes, est vetustissima, si dignitatem, est honoratissima, si jurisdictionem, est capacissima*.

In 1765 William Blackstone, after quoting Coke's passage, listed all that Parliament could do and all the matters in respect of which they could be done[21]:

> [Parliament] hath sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.

These writings lack the distinction between legal and political conceptions, with the legal conception providing a rule for the courts. In 1867, according to William Hearn[22] (to whom Dicey expressed his greatest indebtedness in his preface[23]),

> It is now universally conceded that the authority of Parliament in matters of legislation is unlimited … [W]hen the meaning [of an Act of Parliament] is clear, it is the duty of the Court not to question the wisdom of the statute but to obey its commands.

Thus Hearn also presented parliamentary sovereignty as providing a rule for the courts, but he did not elaborate a distinction between legal and political conceptions of sovereignty, as did Dicey.

III. *Manifestations of the Formal Legal Conception of Parliament's Sovereignty and of the Concurrence of Substantive Conceptions*

In various ways since Dicey's *The Law of the Constitution* was first published, the highly formal quality of the Westminster Parliament's legal sovereignty has been manifest in its exercise to the great detriment of its substantive sovereignty, and has accordingly provoked unease.

3.1. One manifestation was in the process of decolonisation through parliamentary enactments of the Westminster Parliament conferring self-government or independence on colonies and dominions. They contributed to a much earlier, imperial, form of transnational constitutionalism in Britain and the rest of the British Commonwealth, which became the Commonwealth of Nations. In strict legal theory, Parliament retained the right to legislate for the independent dominions initially subject only to the convention that it not does so without the consent of a dominion. The Statute of Westminster 1931 removed limitations on the competence of dominion parliaments and effectively replaced the convention with the provision in section 4:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof.

The courts still recognised, nonetheless, that Parliament's power to legislate remained unimpaired as a matter of strict law. In relation to Canada, Viscount Sankey L.C. acknowledged that it did so in the *British Coal Corporation* case (1935)[24]:

> It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. *But that is theory and has no relation to realities. In truth Canada is in enjoyment of the full scope of self-government* …

Lord Denning M.R. in the *Blackburn* case (1971) similarly acknowledged Parliament's unimpaired power to legislate and also emphasised the consequent artificiality[25]:

> We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside practical reality. Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can one imagine that Parliament could or would reverse that Statute? Take the Acts which have granted independence to the Dominions and territories overseas. Can anyone imagine that Parliament could or would reverse those laws and take away their independence? Most clearly not. Freedom once given cannot be taken away. Legal theory must give way to practical politics.

The UK Parliament's legal and political conceptions of sovereignty - limitless in legal theory, but limited in practical politics - were thus a source of unease and, earlier, of some instability («a double-edged sword» according to excellent recent work)[26]. Fortunately, sovereignty was usually exercised with political restraint - a pragmatic concession to the geographical distance of Britain from its colonies and dominions - and with the light touch of a «constitutional ethic … of laissez-faire» at least towards those that were self-governing[27].

3.2. A second manifestation of the formal legal conception of Parliament's sovereignty at work has been the increased use of "Henry VIII clauses" through the course of the last century. They have been named after clauses in Acts of Parliament by which sweeping law-making powers were conferred upon King Henry VIII, especially in the infamous Statute of Proclamations of 1539 (31 Henry VIII, c. 8) by which the King's proclamations

were to have the same force as Acts of Parliament subject to restrictions (the absence of prejudice to inheritances, liberties, goods etc.). The statute was repealed on Henry VIII's death in 1547.

In this and the last century Henry VIII clauses have involved the grant of powers to the executive to legislate by executive order and thereby amend what Parliament has enacted[28]. The Human Rights Act 1998, section 10, is a well-known example in providing for fast-track ministerial amendment of parliamentary legislation to be incompatible with European Convention rights, subject to a process of parliamentary approval provided for in schedule 2 to the Act. Henry VIII clauses have been a particular concern of Lord Igor Judge, former Lord Chief Justice of England and Wales, as a circumvention of Parliament's substantive role and function[29]. Although «when these Henry VIII clauses are introduced they will always be said to be necessary» and are the outcome of the exercise of Parliament's formal legal sovereignty, Lord Judge has portrayed them as detrimental to Parliament's actual substantive sovereignty:

> Half a moment's thought will demonstrate that proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament, and increasing yet further the authority of the executive over the legislature[30].

On the premise of detriment to the sovereignty of Parliament, Lord Judge has concluded that «Henry VIII clauses should be confined to the dustbin of history»[31]. They are highly unlikely to be so confined. Rather, their greatly increased and prominent use may well again be said to be necessary so as to effect the legal changes pursuant to Brexit[32].

3.3. A third manifestation of the formal legal conception at work has been the Westminster Parliament's asymmetric devolution of governing powers to Scotland, Wales and Northern Ireland, in which express provision has been made, as in the Scotland Act 1998, for the conferral of legislative competence on the Scottish Parliament not to «affect the power of the Parliament of the United Kingdom to make laws for Scotland»[33]. Shortly before Tony Bair became Prime Minister, he said as much in the 1997 General Election campaign. When interviewed on the implications of the Labour Party's Scottish legislative devolution proposals in their manifesto, he stressed that sovereignty would still belong solely to the Westminster Parliament, that it «rests with me as an English MP and that's the way it will stay»[34]. Then, maintaining that his five-year pledge on tax «applies to Scotland as it does to England», he made the political blunder of comparing the tax-varying powers of the proposed Scottish Parliament to those of an English parish council (a civil local authority in the first tier of English local government), thus only holding powers at the behest of the Westminster Parliament. Tony Blair's comparison attracted attention because of its expected remoteness from what the likely political reality would be, and it was a blunder in the Scottish context because it flatly contradicted the substantive appeal of devolution (that is, of real substantive legislative power) to many Scots, in asserting the Westminster Parliament's retention of formal sovereignty.

3.4. A fourth manifestation, for brief consideration before I return to the European Communities Act 1972 and sovereignty in relation to the EU, is the European Union Referendum Act 2015, providing for the holding of a referendum on whether the UK should remain a member of the EU. This was also an exercise of formal legislative sovereignty with far-reaching substantive effects of which we are now all too aware - a highly questionable open-ended abrogation of substantive parliamentary responsibility and the invocation of direct democracy on a technical and multi-faceted issue or, rather, a multiplicity of such issues.

Behind the unease accompanying these four profound exercises of Parliament's formal legal sovereignty are substantive conceptions of the necessarily, or unduly, limited actuality of the scope of its sovereignty in consequence. Various commentators have therefore identified divergence in the reality of Parliament's sovereignty from its accepted or traditional legal form[35], have concluded that it still remains «formally intact as a matter of law» but questionable in «practical realism»[36], or have sort to take full account of the reality of the increasingly complex substantive political and legal constraints upon it[37].

3.5. Two further doctrinal conceptions of Parliament's sovereignty are distinguishable and are worth mentioning because of the tension between form and substance that has been manifest in their invocation or elaboration.

The one conception has been of a modified sovereignty of Parliament, exercising plenary power inclusive of the power to make laws binding itself in respect of its own procedure and legislative forms (for example, precluding an Act of Parliament's implied repeal by a later enactment). It is of a Parliament empowered to make binding laws «that do not in any way diminish parliament's substantive power» but precisely so as «to protect itself from its own inadvertence» and thus keep the substantive law-making power unaffected[38]. Formal restrictions on Parliament's sovereignty have been advocated to secure its substance.

The other doctrinal conception has been of a formal, capacious and legally fictitious conception centred on the presumed intention of the presumed-to-be-all-powerful Parliament, an intention inferred also from Parliament's inaction. It has been invoked in the context of English administrative law to provide constitutional justification for what developed beyond Parliament, in particular to provide justification for the grounds for the judicial review of administrative action, which developed through the exercise of what has traditionally been viewed as the English courts' original jurisdiction to supervise administrative and other governing authorities. Heavy reliance has been placed on the argument that «what an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly»[39]. Thus, when Parliament has not legislated to alter the general effect of a court decision or decisions in the judicial review of administrative action, it has been taken to authorise, specifically or in general, the accompanying development of the grounds of review. The English courts, then, in finding administrative action *ultra vires*, i.e. beyond the administrative body's powers, on the basis of a ground of review, are taken to have been acting in accordance

with the presumed intention of the sovereign Parliament that the courts develop that ground in particular and/or the rule of law more generally[40]. Constitutional justification though recourse to the presumed intention of the presumed-to-be-all-powerful Parliament in the doctrine of *ultra vires* has been expressly promoted by its leading early advocate as a necessary fig leaf, which does not deceive anyone, to avoid or conceal conflict between the role of the courts and that of Parliament[41]. The fig leaf is reason to reflect on the steadfastness of that love for legal forms and acquiescence in legal fictions of the English legal spirit of which Dicey spoke in his comparative constitutional lectures[42]. This time it has been exemplified in a presumed, capacious and legally fictitious intention of a presumed-to-be-all-powerful sovereign Parliament. Not surprisingly, this invocation and elaboration of Parliament's sovereignty, in developing the doctrine of *ultra vires* so as to justify judge-made English administrative law, has attracted severe criticism for its excessive legal formalism[43].

IV. *The European Communities Act 1972*

A further, fundamental, manifestation of the exercise of the Westminster Parliament's formal legal sovereignty and of profound implications for its substance was the effective transfer of certain central and substantive legislative and adjudicative powers to what became the institutions of the European Union, in domestic law through the European Communities Act 1972.

Before Britain joined the European Communities, the doctrine of the supremacy of Community law was well established in the case law of the ECJ. Re-reading, with Brexit in mind, the judicial dicta from the leading ECJ cases on the supremacy of Community law, I am struck more than I previously was by their assertiveness and uncompromising lack of qualification.

From the ECJ's judgment in 1964 in *Costa* v. *ENEL*[44] we have the following:

> The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. […] It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

From the ECJ's judgment in 1970 in the *Internationale Handelsgesellschaft mbH* case[45] we have further:

> Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independence source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law

> and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or principles of a national constitutional structure.

Unmistakeable in these passages are the strong assertions about what was possible, or rather «impossible for the States, as a corollary» of acceptance and reciprocity, assumptions, indeed question-begging[46], about the «original nature» of Community law, its «very nature», thus with a given or pre-determined character, «the concept of the Community», its «legal basis», and the priority accorded to the «uniformity and efficacy of Community law» as essential for the working of the common market. In short, the lack of judicial restraint, explanation and any conceivable condition, qualification or alternative is striking, as is the patency of assertion of Community law's supremacy. It was an assertion of legal supremacy not tempered by the geographical remoteness of the areas over which supremacy was being claimed and exercised, as had been the case in the much earlier, British imperial, form of transnational, indeed transcontinental, constitutionalism[47].

Britain joined, nonetheless, the European Communities, and the Westminster Parliament has provided for the implementation of the relevant Treaties (now the EU Treaties) in the European Communities Act 1972. Sub-section 2 (4) of the Act has required that «any enactment passed or to be passed … shall be construed and have effect subject to the foregoing provisions». As those familiar with the development of EU law in the UK will know, the domestic crunch came in the *Factortame* litigation. On a preliminary reference to the ECJ from the House of Lords in the first *Factortame* case[48], the ECJ re-asserted that requirements to secure the full force and effectiveness of Community law were its «very essence» and ruled that, if the sole obstacle to granting effective interim relief for the protection of rights under Community law was a rule of national law, that rule of national law must be set aside[49]. On the facts, the disapplication of provisions of the Merchant Shipping Act 1988 was thus required under Community law. In the second *Factortame* case, the House of Lords (as it then was) acted accordingly, and in very few words. Of the Law Lords, only Lord Bridge spoke of implications for Parliament's sovereignty. In answer to comments in the press that this was a «novel and dangerous invasion by a Community institution of the sovereignty» of the UK Parliament, Lord Bridge asserted that those comments were «based on a misconception»[50]. On the basis that Parliament, in passing the European Communities Act 1972, had accepted whatever limitation of its sovereignty was involved, he concluded that «there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply»[51]. What was undoubtedly novel, however, was abandonment, in context, of the doctrine of implied repeal: the later Merchant Shipping Act 1988 was not taken to have repealed by implication the earlier European Communities Act 1972. Lord Bridge said nothing at all about implied repeal.

Shortly thereafter, in contributing to the *Liber Amicorum* for Lord Slynn (former Attorney General of the ECJ), I depicted the second *Factortame* case as an illustration of

English judicial minimalism - «the economy of the common law»[52]. Looking back after the Brexit Referendum and with the benefit of hindsight, I am less sanguine than I was, necessitating reconsideration and, I would suggest, a change of emphasis.

The second *Factortame* case has been relevant to Brexit, I would argue, alongside much else besides, both by accident and by design. Relevant by accident was also, for example, the expectation that the referendum called would never actually be held, because pollsters were consistently predicting a hung Parliament and the resistance of a coalition government. Relevant by design was also, for example, the Remain campaign's deciding to avoid sustained emphasis on the various advantages of EU membership, on the basis that their own early referendum polling suggested that the economic impact or risk arguments would attract more support. The many causes of Brexit are undeniable, but the decision in the second *Factortame* case, to which Suella Fernandes MP expressly referred in the Brexit debate in Queens' College, was presented as minimalist or economical and may have seemed so, at least at the time, but was also insufficiently explained and justified. In response to the ECJ's renewed assertion of the supremacy of Community law, provisions of the Merchant Shipping Act 1988 were disapplied, directly negating the formal sovereignty of the Westminster Parliament as exercised in the most recent applicable parliamentary enactment - a direct negation, both by the ECJ and by the highest British court, of one of the residual legal forms and fictions of the English legal spirit described by Dicey (although alongside various substantive conceptions of Parliament's sovereignty, as argued above). The doctrine of the implied repeal of an inconsistent earlier Act of Parliament by a later one to the extent of the inconsistency was abandoned in relation to the European Communities Act 1972, but without any recognition or explanation.

The abandonment of the doctrine of implied repeal in the second *Factortame* case not only negated the formal conception of Parliament's sovereignty as traditionally understood. It also confirmed in effect a significant political obstacle to the exercise of Parliament's substantive sovereign power to respond pragmatically to new situations as they arise in areas subject to Community law. The possibility of express repeal of the European Communities Act 1972 surely remained[53], but short of such a drastic measure – short of that express and substantive political exercise of Parliament's sovereignty – the thorough implementation of EU law through the 1972 Act and the working of the ECJ's doctrines of direct effect and supremacy of Community law secured and maintained the day-to-day application of large swathes of EU law in the UK. In the second *Factortame* case, the effect of the House of Lord's decision on both the formal legal and substantive political conceptions of Parliament's sovereignty required considerably more judicial attention than it received. The decision amounted to little more than «general obfuscation», one of the forms of the common law's economy listed in *The English Historical Constitution*[54]. It was, however, an extreme manifestation that has now proved to be unstable - a false economy - through the starkness of the failure to explain or even acknowledge pressing issues at stake and thus not clearly or specifically to address them.

In short, the ECJ's unrestrained and unqualified assertion of the supremacy of Community law, and the British courts very apparent but poorly explained and justified, indeed barely mentioned, acceptance of it, constituted a soft target for euro-sceptics. It afforded little with which to address even intellectual or academic legal euro-scepticism, which, through various twists and turns, contributed to the outcome of the Brexit referendum. Pressing issues of Parliament's sovereignty were inadequately recognised and explained, and left unresolved, serving as sources of instability.

Concluding Remarks

Let me conclude by briefly considering doctrinal and constitutional options and implications for the UK and by raising questions for the EU.

In responding to the UK's formal legal and substantive political conceptions of Parliament's sovereignty, there would seem to be three general options, the relative merits and demerits of which warrant a few words now but also further thought, investigation and elaboration well beyond the scope of this lecture.

The first option is doctrinal traditionalism. It is the option of remaining true to Diceyan orthodoxy by keeping the formal legal conception of Parliament's sovereignty for the courtroom and out of the political arena, where the substantive conception is appropriate. Whether or how the European Union was an enhancement or diminution of Parliament's substantive political sovereignty should thus have been central in considering Brexit. For various reasons, taking this option is not as easy as it might seem. Formal legal conceptions slip easily into the English political arena, historically as Dicey observed[55], and as debating Brexit has shown. Further, are we in Britain not yet exhausted of all these constitutional legal forms and fictions, their unreality, and in this instance, the varying tension of a formal legal conception of Parliament's sovereignty with a substantive political conception? And Dicey's *The Law of the Constitution* may have served as the English substitute for a written constitution in the past[56], but no longer does so, even or especially on the issue of sovereignty[57].

A second option is renewed doctrinal and judicial clarification, adaptation and justification of form, substance and their interaction in the exercise of sovereignty, so as to reduce the tension or remove the dichotomy between formal legal and substantive political conceptions[58]. But how exactly to unravel and retie the legal political sovereignty knot remains unclear, as does how to do so without judicial endorsement of constraints upon Parliament's sovereignty that might well still be seen, in traditional terms, to jeopardise the independence of the courts and to encroach unacceptably upon that sovereignty. The legitimacy of the doctrinal and judicial reformation might well remain elusive or questionable.

A third option, for the sake of legitimacy, is juridicalisation or juridification (to use the key word in the ReConFort project) in a fully codified constitution, setting out a separation of powers, the powers and responsibilities of the courts and of Parliament, provisions for constitutional amendment, and so forth. Despite Jeremy Bentham's early, strong and prominent advocacy of codification of the whole of

the English common law, Britain has shied away from it, especially from codification of its historical or unwritten constitution[59]. Further, taking on the huge and daunting political and legal task of introducing a codified constitution remains remote amidst all the governmental political and legal work that will accompany Brexit.

On constitutional implications for the EU, I can only express doubts and ask questions, because my area of expertise is not EU law. Was there sufficient pragmatic self-restraint in the unqualified assertion and development of the doctrine of the supremacy of Community law? Was enough done by the ECJ to refine, explain and justify the doctrine? Finally, was the seemingly implicit positivist methodology of a hierarchy of legal sources with a change of the *Grundnorm* on offer in the legal orders of member states up to the task of justification and securing legitimacy?

On the Way to Juridification by Constitution is the title of your conference. I would agree what we are only on the way, because much more is needed by way of clarification and principled justification, especially on issues of sovereignty, for the constitutional legitimacy of political orders to be securely established, both in Britain and seemingly in the European Union. Much more is needed, at least on the one hand, if one assumes, as I have now done, that "juridification" involves substantive justification for the sake of legitimacy. If, on the other hand, "juridification" is meant as a narrow technical pursuit of legal clarity in a political order's sources of law, such juridification seems insufficient *per se* to establish legitimacy. What is still needed, in the English context at least, is both clarification and further principled justification on issues of sovereignty, especially if populist or nationalist challenges, advanced under the banner of sovereignty, are to be met effectively. This basic need makes your project, of which this conference is a product, all the more pertinent and important.

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[1] The exercise of sovereignty was the enactment of the European Union Referendum Act 2015 under which the Brexit referendum (i.e. the United Kingdom European Union membership referendum, 2016) was held.

[2] See J.W.F Allison, *The English Historical Constitution: Continuity, Change and European Effects*, Cambridge, CUP, 2007, pp. 110-119.

[3] Case C-213/89, *R* v. *Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)* [1991] 1 AC 603, [1990] ECR I-2433.

[4] A.V. Dicey, *The Law of the* Constitution, in *The Oxford Edition of Dicey*, ed. by J.W.F. Allison, Oxford, OUP, 2013, vol. I.

[5] See P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in «Public Law», Autumn, 1997, pp. 467 ff.

[6] Dicey, *The Law of the Constitution* cit., pp. 41 ff.

[7] Ivi, p. 41.

[8] Ivi, pp. 39 ff.

[9] A.V. Dicey, *Comparative Constitutionalism*, in *The Oxford Edition of Dicey*, ed. by J.W.F. Allison, Oxford, OUP, 2013, vol. II.

[10] Ivi, pp. 70, 92.

[11] Ivi, pp. 179, 178.

[12] Ivi, pp. 182, 181 f.

[13] Dicey's comparative constitutional lecture on representative government also highlights a problem for his account of par-

liamentary sovereignty's two senses. By way of an analogy between representation in Parliament and agency in private law and on the basis that there can be no universal agent in private law, he concluded that the «authority vested in Parliament is rather indefinite than absolute», i.e. subject to a limit inherent in its popular representative character (ivi, pp. 218 f.). The apparent problem for Dicey of tension between parliamentary sovereignty and popular sovereignty was aggravated institutionally by Dicey's being the referendum's first English advocate (ivi, pp. 270 ff.; see also ivi, *Editor's Introduction*, pp. xxx f.). The tension is now manifest in the outcome of the Brexit referendum, in which a substantial majority of MPs favoured to remain in the EU, and a clear majority of the electorate voted to leave. In his comparative constitutional lectures, Dicey's recognition of that inherent limit to Parliament's sovereignty was counterbalanced by his emphasis on the great authority that Parliament derived from the parliamentary character of its executive (ivi, *Editor's Introduction*, pp. xxxii ff.).

[14] Ivi, pp. 175 ff.

[15] See, e.g., Dicey, *The Law of the Constitution* cit., pp. 95, 113 ff., 395 ff.

[16] Ivi, pp. 115, 119.

[17] Ivi, pp. 27 ff., 28.

[18] Ivi, pp. 44 ff.

[19] J.L. De Lolme, *The Constitution of England*, Dublin, W. Wilson, 1775, p. 38; H. Cox, *The Institutions of the English Government*, London, H. Sweet, 1863, pp. 8-10.

[20] E. Coke, *The Fourth Part of the Institutes of the Laws of England*, London, W. Clarke, 1817[17], 36.

[21] W. Blackstone, *Commentaries on the Laws of England*, Oxford, Clarendon Press, vol. I, 1765, p. 156.

[22] W.E. Hearn, *The Government of England: Its Structure and Its Development*, London, Longmans, 1867, p. 50.

[23] Dicey, *The Law of the Constitution* cit., p. 5.

[24] *British Coal Corporation* v. *R* [1935] AC 500, 520 (author's emphasis).

[25] *Blackburn* v. *Attorney General* [1971] 1 WLR 1037, 1040.

[26] D. Lino, *Albert Venn Dicey and the Constitutional Theory of Empire*, in «Oxford Journal of Legal Studies», vol. XXXVI, n. 4, 2016, pp. 751 ff., p. 780.

[27] Ivi, p. 777.

[28] On many uses of Henry VIII clauses and the various arguments used to justify them, see N.W. Barber and A.L. Young, *The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty*, in «Public Law», Spring, 2003, pp. 112 ff.

[29] Lord Judge, *Henry VIII Clauses*, in Lord Judge, *The Safest Shield: Lectures, Speeches and Essays*, Oxford, Hart, 2015, pp. 99-106.

[30] Ivi, p. 105.

[31] Ivi, p. 106.

[32] See now the European Union (Withdrawal) Bill 2017-2019 (HC Bill 5).

[33] Sub-section 28 (7).

[34] J. Penman, *Real Power will Stay with MPs in England, Blair tells Scotland*, in «The Scotsman», 4 April 1997, p. 1. See I. Mclean, *The National Question*, in A. Seldon (ed. by), *Blair's Britain, 1997-2007*, pp. 487-508, 492.

[35] See, e.g., A.W. Bradley, K.D. Ewing and C.J.S. Knight, *Constitutional and Administrative Law*, 16 edn., Harlow, Pearson, 2015, pp. 72 ff. See also A.W. Bradley, *The Sovereignty of Parliament - Form or Substance?*, in J. Jowell and D. Oliver (ed. by), *The Changing Constitution*, Oxford, OUP, 2011[7], pp. 35-69.

[36] C. Turpin and A. Tomkins, *British Government and the Constitution: Text and Materials*, Cambridge, CUP, 2011[7], p. 95.

[37] See, e.g. M. Elliott, *Legislative Supremacy in a Multidimensional Constitution*, in M. Elliott and D. Feldman (ed. by), *The Cambridge Companion to Public Law*, Cambridge, CUP, pp. 73-95; M. Elliott, *The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective*, in J. Jowell, D. Oliver and C. O'Cinneide (ed. by), *The Changing Constitution*, Oxford, OUP, 2015[8], pp. 38-66.

[38] J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, Cambridge, CUP, 2010, pp. 200, 182. See also J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, Oxford, OUP, 1999, pp. 14-16.

[39] C. Forsyth, *Of Fig Leaves and Fairy Tales: The* Ultra Vires *Doctrine, the Sovereignty of Parliament and Judicial Review*, in «Cambridge Law Journal», vol. LV, 1996, n. 1, pp. 122 ff., 133.

[40] See M. Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, in «Cambridge Law Journal», vol. LVIII, 1999, n. 1, pp. 129 ff.

[41] Forsyth, *Fig Leaves and Fairy Tales* cit., pp. 136-137.

[42] Dicey, *Comparative Constitutionalism* cit., pp. 70, 178-182.

[43] See, e.g., P. Craig, *Ultra Vires and the Foundations of Judicial Review*, in «Cambridge Law Journal», vol. LVII, 1998, n. 1, 63 ff.; T.R.S. Allan, *The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?*, in «Cambridge Law Journal», vol. LXI, 2002, n. 1, 87 ff.

[44] Case 6/64, *Costa* v. *ENEL* [1964] ECR 585, 593-594.

[45] Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, 1134.

[46] See the telling criticism of Pavlos Eleftheriadis from the 1990s, which now seems portentous, has been relied on here and deserves renewed attention, *Begging the Constitutional Question*, in «Journal of Common Market Studies», vol. XXXVI, 1998, n. 2, pp. 255 ff. See also P. Eleftheriadis, *Aspects of European Constitutionalism*, in «European Law Review», vol.

XXI, 1996, n. 1, pp. 32 ff.

47 See Dylan, *Dicey and the Constitutional Theory of Empire* cit., pp. 775 ff.

48 *R* v. *Secretary of State for Transport, ex parte Factortame Ltd.* [1990] 2 AC 85.

49 Case C-213/89, *R* v. *Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)* [1991] 1 AC 603, 644-645, [20], [24]; [1990] ECR I-2433, [20], [24]. On «the very essence of Community law» and its implications, the ECJ was following Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal S.p.A.* [1978] ECR 629, 644, [22].

50 *R* v. *Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)* [1991] 1 AC 603, p. 658GH.

51 Ivi, p. 659AB.

52 J.W.F. Allison, *Parliamentary Sovereignty, Europe and the Economy of the Common Law*, in M. Andenas and D. Fairgrieve (ed. by), *Judicial Review in International Perspective*, The Hague, Kluver, 2000, vol. II, pp. 177-194; Allison, *English Historical Constitution* cit., ch. 5.

53 See Lord Denning's *obiter dictum* in *Macarthys* v. *Smith* [1979] 3 All ER 325, 329CD.

54 On this form of judicial economy and other forms available in the English common law, see Allison, *English Historical Constitution* cit., pp. 125 f., 126.

55 Dicey, *Comparative Constitutionalism* cit., pp. 181 f.

56 See Allison, *Editor's Introduction*, in Dicey, *The Law of the Constitution* cit., pp. XIV f.

57 According to Lord Steyn in *Jackson* v. *Attorney General* [2006] 1 AC 262, [102], «The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution».

58 See, e.g., the attempts of Bradley, *Sovereignty of Parliament* cit.; Elliott, *Principle of Parliamentary Sovereignty* cit.

59 Allison, *Editor's Introduction*, in Dicey, *Comparative Constitutionalism* cit., pp. XLII f.

Re-thinking the UK Constitution

LORD ROBERT REED

I am grateful to have been invited to take part in this conference on the Precedence of Constitutions. Constitutional law is a topical subject in the United Kingdom, and has been at the forefront of some of my work on the Supreme Court.

That might surprise you. For you will be aware that the UK differs from more modern states, in Europe and elsewhere, in not possessing a legal text called "the constitution". It has a body of rules and principles governing the legal relationships between the legislative, executive and judicial institutions of the state, and protecting fundamental rights, and you will find them discussed in textbooks on constitutional law and taught at our universities in courses on constitutional law. But they are not set out in any authoritative legal text. And our *Grundnorm*, if I can borrow the German expression, is the sovereignty of Parliament. According to the traditional conception of the UK constitution, associated particularly with the 19th and early 20th century jurist A.V. Dicey[1], Parliament's legislative freedom is circumscribed only by political realities. So there are not hierarchically superior norms against which the courts can judge the legality of the statutes enacted by Parliament. Indeed, it follows from the sovereignty of Parliament, according to this theory, that no statute is of greater legal significance than any other: they are all equally subject to amendment or repeal whenever and however Parliament chooses. Far from there being a Kelsenian idea of a legal hierarchy (*Stufenbau der Rechtsordnung*), Dicey famously wrote that «neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law»[2].

But that is not to say that Parliament operates in a constitutional vacuum, free of all legal constraints upon the exercise of its sovereignty. In particular, the UK's constitutional values are reflected in a body of law governing the interpretation of legislation, with the result that the courts do not simply give unquestioning effect to a literal interpretation of whatever Parlia-

ment has enacted. Putting the matter generally, statutes are construed on the footing that «Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law»[3]. Parliament is therefore presumed, for example, not to intend to violate basic civil rights and liberties[4], or the constitutional role of an independent judiciary[5]. And statutes will, if possible, be construed so as to avoid those consequences. If Parliament wishes to override fundamental principles, it must make its intention plain[6]. So there are a number of constitutional principles which are protected against implied repeal. Those principles do not have the same level of protection as the principles found, for example, in the German *Grundgesetz*: they can be overridden by clear and specific language, without the need for any special legislative procedure. Nevertheless, there is an approach to interpretation which can be compared to the German concept of *Verfassungskonforme Auslegung*. As in Germany, this approach is sometimes criticised as imposing a meaning on legislation which the legislator never intended.

The absence of a written constitution, and the sovereignty of Parliament, reflect the UK's history, and more particularly the history of England. Parliament, the government and the courts have all evolved continuously since medieval times, and Parliament has long been accepted as the foremost of those institutions. The last major constitutional crisis, comparable to the French or American revolutions, occurred during the 17th century, provoked in large measure by a breakdown in the relationship between the Crown and Parliament. It resulted in a number of important constitutional principles being written down in legislation, but it occurred almost a century before the idea of a written constitution had become widely accepted.

In more recent times, however, the nature of the contemporary constitution has become a matter of much discussion, reflected and to some extent provoked by decisions of the Supreme Court. You will not be surprised to learn that this discussion has arisen primarily in relation to the place in our law of EU law and the European Convention on Human Rights.

To anticipate where I am going, the discussion in our recent judgments has led to an emphasis upon constitutional principles in our common law and in our statutes, to the discussion of a possible distinction between constitutional statutes and ordinary statutes, to thinking about a hierarchy in which some constitutional principles are regarded as being more fundamental than others, and to an understanding that Parliamentary sovereignty has to be understood as existing within a richer and more complex constitutional framework than was previously assumed. This represents a significant change from the traditional Diceyan approach.

This re-thinking of the contemporary constitution began following the enactment of the Human Rights Act 1998. When it was enacted, giving effect to the rights protected by the European Convention on Human Rights within a framework of Parliamentary sovereignty, it introduced into our law a modern catalogue of protected civil and political rights. Unlike in most other countries, that catalogue was not a national catalogue but one set out in an international treaty, of which an international court was the authoritative interpreter. Of course, those rights were already protected by our

law in a multitude of different ways. For example, the common law protected individuals against arbitrary detention through the writ of habeas corpus; torture had been unlawful under the common law since medieval times; and the right to a fair hearing before an independent and impartial tribunal was protected by a variety of common law principles and statutory rules. But one effect of the Human Rights Act, and the enthusiasm for discovering the Strasbourg jurisprudence which it engendered amongst our lawyers, was a tendency to disregard the ways in which our domestic law protected civil rights, and instead a focus exclusively upon the articles of the Convention and the case law of the European Court of Human Rights. Rather curiously, issues which would previously have been discussed in terms of our national law were now discussed solely in terms of the Strasbourg jurisprudence.

This trend was checked by the Supreme Court in its 2013 judgment in the case of *Osborn*[7]. The case concerned the right of prisoners to a fair hearing when being considered by a tribunal for release on parole, and had been argued exclusively by reference to Strasbourg jurisprudence, despite our having a rich domestic jurisprudence on administrative law going back centuries. The court stated that «the protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system»[8], and gave examples of how the guarantees set out in the Convention were fulfilled through rules and principles to be found in our common law and legislation. It stated that the Human Rights Act «does not however supersede the protection of human rights under the common law or statute», and that «human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate»[9].

The idea of common law constitutional rights was not new: the court was building on precedents from the 1990s[10], which themselves were based on cases decided as far back as the 17th century. It has proved to be a rich idea, and the court has continued to develop it in later cases, such as *Kennedy v Information Commissioner*[11], concerned with freedom of information, *A v British Broadcasting Corporation*[12], concerned with the reporting of proceedings in court, and *R (Evans) v Attorney General*[13]. The latter was a controversial case concerning a statutory provision which, on a literal interpretation, entitled a Government minister to overrule the court's judgment as to the Government's obligations under freedom of information legislation whenever he disagreed with the judgment. The court held that the legislation should not be construed as having such a broad effect, since it would cut across two fundamental constitutional principles, namely that a decision of a court is binding and cannot be set aside by the executive, and that decisions by the executive are normally reviewable by the courts.

The idea that constitutional principles are immanent in our common law and some of our statutes has also proved to be important in relation to EU law. Our thinking about this has been enriched by discussions with colleagues in other jurisdictions, and in particular by discussions with the judges of the *Bundesverfassungsgericht*, which began at an exchange between our courts in 2012, and have continued since then. The development of our thinking can be seen in

two important cases in which we gave judgment in 2014 and 2015.

The first, in January 2014, was the *HS2* case[14]. It concerned a challenge under EU environmental law to the Government's decision to introduce a Bill into Parliament which, if passed, would authorise the development of a high speed rail connection between London and Birmingham: «High Speed 2», or HS2, in the jargon[15]. The court dealt with the case before the Bill had been passed into law, observing that the constitutional difficulties would otherwise have been even greater[16]. The EU directive which the claimants relied on[17] was designed to secure public participation in environmental decision-making. It expressly provided that it did not apply to:

> … projects the details of which are adopted by a specific act of national legislation, since the objectives of this directive, including that of supplying information, are achieved through the legislative process[18].

The rationale for that exclusion is that when the decision is taken by the legislature, that in itself ensures public participation.

At first sight, one might have thought that, since HS2 was a project the details of which were to be adopted by a specific act of national legislation, it followed that the directive did not apply. The Court of Justice had however interpreted the exclusion from the directive as being subject to the proviso that the legislative procedure must achieve the objectives of the directive. In order to satisfy that proviso, the court had imposed two requirements: first, that the legislative process must be real, and not merely the ratification of a pre-existing administrative act; and secondly, that appropriate information must be available to the members of the legislature at the time when the project is adopted. In some cases the Advocate General had gone somewhat further, stating that, in assessing whether a legislative process was adequate, the national court should consider whether the appropriate procedure was respected and whether the preparation time and discussion time were sufficient for it to be plausible to conclude that the members of the legislature were able properly to examine and debate the proposed project. It was principally on those statements that the claimants relied in the *HS2* case in seeking, at the very least, a preliminary reference to the Court of Justice.

From a constitutional perspective, the first remarkable feature of the case was the remedy sought, which was the quashing of the Government's decision to promote HS2 by means of a Bill in Parliament. Since the case of *Factortame*[19] in 1990, we have become used to the idea that EU law may require the granting of remedies which might not previously have been available under our domestic law, but what the court was being asked to do in this case was to order the Secretary of State not to introduce a Bill in Parliament in his capacity as a Member of Parliament. There is no equivalent under the UK constitution of the power possessed, for example, by the French *Conseil Constitutionnel* to consider *une question prioritaire de constitutionnalité*. From a UK perspective, it would be difficult to imagine a more flagrant interference by the court with proceedings in Parliament.

The constitutional problems did not end there. The ground on which the court was invited to grant the remedy was that the legislative process in Parliament failed to meet the standards set by the directive. It was ar-

gued that the fact that the votes of Members of Parliament would be influenced by party discipline was contrary to the directive, on the basis that it implicitly required the members of the legislature to apply an independent mind to the proposal. Secondly, it was argued that Parliament would not subject the proposals to the level of scrutiny required by the directive, since MPs were unlikely to read and understand the complex and voluminous documentation, and the debates would be too short to enable the issues to be adequately addressed. Each of these grounds of challenge conflicted with the constitutional principles governing the relationship between Parliament and the courts, reflected in article 9 of the Bill of Rights 1689, which prohibits the questioning in court of Parliamentary proceedings.

The Supreme Court doubted whether the statements of the Advocates General were intended to go as far as the claimants argued, and noted that they had not in any event been endorsed by the Court of Justice. The requirements which the court had itself laid down were satisfied by the proposed proceedings: they were not merely formal, and adequate information would be available to members of Parliament. The EU law issues could therefore be treated as *acte clair*.

In reaching that conclusion, the court said, in a judgment drafted by myself, that it was inconceivable that the Council of Ministers could, when legislating for the directive, have envisaged close judicial scrutiny of the operations of Parliamentary democracy. The Court of Justice would have been well aware of the principles of the separation of powers and mutual respect which govern the relations between the different branches of government in

The Houses of Parliament from old Westminster Bridge in the early 1890s

modern democracies. The court could not have overlooked or intended to destabilise these.

Secondly, the Supreme Court said that judicial oversight of the quality of the legislature's consideration of a Bill would pose a particular constitutional problem in the United Kingdom. In that regard, the court referred to the judgment of the *Bundesverfassungsgericht* of 24 April 2013 on the Counter-Terrorism Database Act[20], where it was said that decisions of the Court of Justice must be understood in the context of the cooperative relationship which exists between that court and a national constitutional court, and therefore should not be read in a way that places in question the identity of the national constitutional order. The Supreme Court said that there was much to be said for that approach to the interpretation of judgments of the Court of Justice.

It is how the Supreme Court dealt with the constitutional questions which is of particular interest. It was argued in the

first place that, if the Court of Justice required national courts to scrutinise Parliamentary proceedings, then UK courts must do so, because of the primacy of EU law over national law, as established by the jurisprudence of the Court of Justice[21]. The Supreme Court, however, considered that the status of EU law in our legal system was derived from the national legislation which gave it effect in national law – the European Communities Act 1972, by which Parliament gave effect to the UK's membership of the EU. It therefore depended upon the effect of that Act. Questions about the relationship between EU law and UK law could not be resolved simply by applying the EU doctrine of the primacy of EU law, since the application of that doctrine in UK law itself depended on the 1972 Act.

It was next argued that, following the earlier decision of the House of Lords in the case of *Factortame*[22], the 1972 Act required any other rule of national law to be disapplied if it could not be interpreted or applied consistently with EU law, and that the Bill of Rights should therefore be disapplied. That argument also was rejected: the *Factortame* case had not been concerned with a conflict between EU law and a constitutional principle, but with a conflict between EU law and a statutory provision enacted after 1972. Treating the 1972 Act as a constitutional measure, it was not impliedly repealed by the later provision, and EU law therefore prevailed over that provision. The same analysis would not apply where one constitutional measure – the 1972 Act – was in conflict with another, namely the Bill of Rights 1689.

The Supreme Court's conclusion was expressed by Lord Neuberger and Lord Mance in this way:

> The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Right 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list[23]. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation[24].

That reasoning is, I think, readily understandable. The 1972 Act is of the most general nature: it simply provides a basis for the reception into our law of legislation and case law emanating from another legal regime, and therefore not subject to Parliament's control. It is difficult to imagine that, in providing that gateway, as it were, Parliament intended that, in the event of a conflict between the EU law entering through that gateway and any of the constitutional statutes which it had ever enacted, those statutes should automatically be overridden, whatever their subject-matter and however important they might be. And the same would apply, *mutatis mutandis*, to common law principles of comparable importance.

This approach does not deny that EU law must normally be given effect in order to achieve the objectives of EU membership. Nor does it mean that any conflict between EU law and a principle of UK constitutional law must automatically result in the non-application of the EU law. Some constitutional principles are more important than others, and some may be capable of

development in a way which avoids conflict. That might indeed have been argued in relation to judicial scrutiny of Parliamentary proceedings, which is an area of UK law which has undergone some development in recent years[25]. On the other hand, the Supreme Court is far from being the only national court to envisage some limits to the extent to which EU law can be accorded primacy over domestic constitutional law.

The approach adopted in *HS2* was developed further in the case of *Pham v Secretary of State for the Home Department*[26], decided in March 2015. This case concerned a challenge to the decision of the Home Secretary to deprive a suspected terrorist of his UK citizenship. The challenge was brought on a number of grounds, one being that since the loss of UK citizenship resulted in the loss of EU citizenship, it could not be imposed except in accordance with EU law. In that regard, the appellant relied on a judgment of the European Court of Justice which stated, despite contrary governmental declarations and Council decisions relating to the Maastricht and Lisbon Treaties, that a decision to withdraw national citizenship must have due regard to EU law and was conditional upon observance of the principle of proportionality[27].

Lord Mance, with whose reasoning on this point the other members of the Supreme Court agreed, stated that the question whether the Court of Justice had any jurisdiction in relation to the grant or withdrawal of UK citizenship was, for a UK court, one of construction of a domestic statute, the 1972 Act. That followed from the constitutional fact that the UK Parliament was the supreme legislative authority within the UK[28]. He continued:

> For a domestic court, the starting point is… to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act… Unless the Court of Justice has had conferred upon it under domestic law unlimited as well as unappealable power to determine and expand the scope of European law, irrespective of what the Member States clearly agreed, a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties and upon the competence conferred on European institutions including the Court of Justice[29].

The two cases which I have discussed were cited by the *Bundesverfassungsgericht* in its extradition decision of 15 December 2015[30], and are plainly significant in relation to the issue of the relationship between national constitutions and EU law. But they are also relevant to the wider theme of the present conference.

First, they illustrate how, even in a jurisdiction lacking a formal constitution and the techniques of legal reasoning associated with a constitution of that kind, the realities of the modern legal world, with interconnected layers of national, supranational and international law, require the development of thinking which can clarify the relationships between them, and in particular questions of hierarchical ordering. The judgments recognise the existence

of constitutional principles which are given some measure of protection from the ordinary doctrine that an enactment impliedly repeals earlier statutes or rules of common law which are inconsistent with it. They recognise, furthermore, that constitutional principles may be protected against implied repeal by enactments which are themselves of constitutional importance, such as the European Communities Act.

Secondly, the cases raise the question how, in the absence of a formal constitution, a number of issues typically dealt with by constitutional courts should be addressed. The first is how one identifies constitutional principles, whether contained in constitutional instruments or in the common law. That question cannot be resolved, as it would be in most other countries, by consulting the text of the constitution. Instead, criteria have to be developed by the courts. This issue was not discussed in the arguments in the cases I have mentioned, but some valuable ideas have been developed in the academic literature[31]. The category of common law constitutional principles has also been discussed to some extent in recent cases concerned with human rights[32] and in academic commentary on those cases, and would include such matters as open justice and judicial independence. My own impression is that the most promising way of categorising rights or principles as "constitutional", under our system, may be based not only on their functional role in regulating relationships between the institutions of government, or between government and the citizen, but also on an evaluation of their normative significance.

Other related questions also arise: notably, how, if at all, one distinguishes between constitutional principles that are fundamental and those that are not; and how one resolves conflicts between constitutional principles, such as that embodied in the 1972 Act, which requires effect normally to be given to EU law, and others which may conflict with it, such as the right to a fair trial.

As I explained earlier, the ordinary approach in the UK is to treat a statute which is inconsistent with an earlier statute as impliedly repealing it to the extent of the inconsistency. There was, prior to *HS2*, no established doctrine establishing that statutes embodying constitutional principles were in any different position: nothing equivalent to the provision in article 79(1) of the *Grundgesetz* that the *Grundgesetz* can only be changed by a law expressly amending or supplementing its text («*durch ein Gesetz … das den Wortlaut des Grundgesetzes ausdrücklich ändert oder ergänzt*»).

On that traditional British approach, the conflict which arose in the *HS2* case, between the 1972 European Communities Act and the constitutional principle expressed in the 1689 Bill of Rights would have been resolved by treating the Bill of Rights as being impliedly repealed. But the Supreme Court did not endorse that approach. It did not focus on statutes at all, but on principles which may or may not be expressed or reflected in statutory provisions.

Another possible approach would be to apply the principle I explained at the beginning of my remarks, according to which fundamental principles of our law are protected against implied repeal by a later statute. But it might be argued that that approach has been developed in order to protect fundamental principles against implied repeal by ordinary statutes, and that different considerations arise where the later statute is itself of a constitutional

nature. In other words, the Bill of Rights would not be protected against implied repeal by the European Communities Act.

A further possibility, which appears to me to merit consideration, is that conflicts between constitutional principles should not – indeed, cannot – be resolved by giving one or the other an automatic priority based on their chronological order (a characteristic which principles do not truly possess), but that instead the courts should make a more specific assessment of their normative ranking in the circumstances of the case. If, for example, one is considering whether a constitutional principle has been impliedly qualified by Parliament's acceptance of the priority of EU law, the answer might differ according to whether what was in question was a flagrant breach of a fundamental principle, such as a complete denial of the right to a fair trial, or was a less flagrant breach of a less fundamental principle.

The latter approach suggests that, instead of focusing on legislation, and adopting a bright-line distinction between constitutional and ordinary statutes, the nature of the British constitution may require courts to focus on constitutional principles, whether established by the legislature or developed by the courts. The status of those principles reflects their importance to the present-day arrangements under which the UK is governed. Conflicts between them can perhaps best be resolved by adopting a nuanced approach, based on an evaluation of their relative importance, either generally or in the particular situation which has come before the court.

One consequence of the re-thinking of the UK constitution which I have described is that the domestic operation of EU law may come to be understood as being subject to qualifications of a constitutional nature. That is not to say that the protection of constitutional values would be entrenched in the UK to the same extent as, for example, in Germany. If a UK court were to hold that an EU law which was inconsistent with a constitutional principle was not authorised by the European Communities Act, Parliament could nevertheless pass legislation in order to ensure that the EU law was given effect. But that limited degree of entrenchment would itself be in accordance with the UK's constitutional tradition: it would be Parliament which had the last word.

The fundamental importance of the *HS2* and *Pham* line of cases is not, however, related to EU law. Their greater importance lies in the way in which they develop our understanding of the modern UK constitution. Although Parliament's ultimate authority is re-asserted, it is not understood, as it once was, as operating free of any relationship to the legal system other than one of hierarchical superiority. Instead, we may be in the process of developing a richer view of our constitution as involving complex interactions between a body of constitutional principles, some of which can be found in Parliamentary enactments, and others of which have been developed by the courts, embodying the story of our nation's development over many centuries. Parliamentary sovereignty is one of those principles, and plays a special role in relation to the others. But it does not exist in isolation. So understood, the UK constitution can be re-thought in a way which narrows the gap between the UK and other liberal democracies, and may enable us to play a more significant part in wider legal discussions and developments.

[1] See, for example, *An Introduction to the Study of the Law of the Constitution*, London, Macmillan, 1885.
[2] Chapter 1.
[3] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 587 per Lord Steyn.
[4] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539.
[5] *R (Evans) v Attorney General* [2015] UKSC 21; [2015] AC 1787.
[6] *Ibidem*.
[7] *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115.
[8] Para 55.
[9] Para 57.
[10] In particular, *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539; *R v Lord Chancellor, ex parte Witham* [1998] QB 575; and *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115.
[11] [2014] UKSC 20; [2015] AC 455.
[12] [2014] UKSC 25; [2015] AC 588.
[13] [2015] UKSC 21; [2015] AC 1787.
[14] *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324.
[15] HS1 is the rail connection between London and the Channel Tunnel.
[16] Para 97.
[17] The Environmental Impact Assessment Directive, 2011/92: [2012] OJ L26/1.
[18] Article 1(4).
[19] *R v Secretary of State for Transport, Ex p Factortame (No 2)* [1991] 1 AC 603.
[20] 1 BvR 1215/07, para 91.
[21] See for example Case 6/64 *Costa v ENEL* [1964] ECR 585.
[22] *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] AC 603, 658.
[23] That was not an exhaustive list: I would, for example, add the devolution statutes, and the statutes governing the franchise.
[24] Para 207.
[25] See for example *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312; and, for discussion, Kavanagh, «Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory» (2014) OJLS 443.
[26] [2015] UKSC 19; [2015] 1 WLR 1591. This case might be read with others, such as *HMRC v Aimia Coalition* [2013] UKSC 15; [2013] 2 All ER 719.
[27] (Case C-135/08) *Rottmann v Freistaat Bayern* [2010] QB 761.
[28] Para 76.
[29] Paras 80 and 90.
[30] *R v Oberlandesgerichts Düsseldorf* 2 BvR 2735/14, para 47.
[31] See, for example, D. Feldman, «The nature and significance of 'constitutional' legislation» in «Law Quarterly Review», 2013, p. 343.
[32] See for example *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115; *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455.

The Sovereignty of the Constitution. A historical Debate in a European Perspective*

LUIGI LACCHÈ

1. *Introductory elements*

In recent decades sovereignty and other, related concepts (people, nation, State, legitimacy, representation) have provoked an intense and wide-ranging debate. Its "golden age" seems very far removed from us. Can sovereignty still be a basic idea for the contemporary legal order? Can a concept that is so "contested" be helpful for our legal and political practice? Is it really a useful concept for the constitutionalization of the European Union?[1]

In some ways those who today invoke popular sovereignty to overcome the so-called "democracy deficit" at the European Union level have to combat several counterarguments[2]. Faced with this debate it may therefore prove useful to focus on certain "sovereignty issues" that were at the centre of European liberal thought in the nineteenth century, during the Restoration (1814-1848). In particular, we would like to stress the political-constitutional thought of the "Doctrinaires", especially in France, but looking also at other European experiences. This topic does thus bring into play the concrete relationships between sovereignty and constitution/constitutionalism. It deals with an original and structural tension between two major "movements" characterizing Western political and legal thought: on one side the "absolutist" (and monistic) idea regarding the modern concentration of power in a unique "point" (unity, indivisibility, inalienability), on the other side the cooperation between different parts of the "constitution" according to the ideas of political moderation and constitutional equilibrium. This tension has been transformed over time but it has nonetheless been transmitted to us and finds today a controversial "laboratory" in the European Union experiment. For this reason the debate conducted throughout the nineteenth century may prove instructive in terms of "compromise strategies" and the "neutralization of sovereignty".

The "unlimited" sovereignty concept emerged between the sixteenth and seventeenth centuries in the context of the European religious-civil wars[3]. From Bodin to Hobbes, though passing through several other authors, the challenge was to affirm the idea of a new legitimated power that could never again be placed in question. Speaking about a "new" power we essentially refer to a specific ideological conceptualization[4]. In fact it is always important to remind ourselves that "sovereignty" and "people" have a long, "local", pre-history and history and it is impossible to understand authors such as Bodin or Grotius, Hobbes or Rousseau without taking into account the great importance of Roman Law and the civilian tradition in reconstructing the intellectual history of statehood[5].

The great constitutional movements of the eighteenth Century, and especially the French version, can be seen as a sort of "powerful dynamo". The Revolution is an extraordinary "energy store". So strong and so deep a movement was it that societies and peoples would need much more time to "assimilate" these energies. The two most relevant forces emerging at that time are the idea and the reality of the constituent power of the people and, then, the principle of "natural" equality as the pivot of a "constitutionalized" society[6]. *We the People*, *Nous la Nation* defined – albeit with a wide range of different outcomes and in markedly different forms – a conceptual order destined to leave an indelible mark upon modern constitutional doctrine[7]. It was the people who represented themselves as a totality, as a political unity conscious of its own existence and of having the capacity to act politically. All "extraneous" bodies – extraneous, that is to say, to the people becoming nation – could no longer exist save by merging with popular sovereignty. The revolutionary constituent power has matched in an innovative way two old and polymorphic concepts: sovereignty and people. In concrete terms the American and the French Revolutions established, in contexts so far removed one from the other, two different kind of transfer of sovereignty[8].

In America the constitutional order remains linked to the ancient right to resist the sovereign once it has become a tyrannical power. The French people – according to Rousseau's sovereignty theory based on the exercise of the general will[9] – became after the Revolution the new bearer of that sovereign power. The abbot Sieyes made a crucial contribution to the revolutionary concept of "souveraineté nationale". Sovereignty belonged to the people becoming nation; people/nation acted as a "constituent power" (*fiat*) implementing modern constitutionalism[10]. The transfer of powers to an abstract concept – the nation – was an attempt to build a different "space" (different from both popular sovereignty and monarchical sovereignty). It was one of the strategies employed in order to find a "compromise" serving to neutralize[11] the inevitable conflict. In the French Constitution of 1791[12] the attempt was made to find an "equilibrium point" giving birth to a "republican monarchy". But, as we know, the conflict was shortly to be "resolved", and in favour of popular sovereignty.

The French Revolution addressed these issues without being able to resolve them. Whereas in the United States – as Tocqueville would later emphasise – the federal system (with its specific bicameralism) and therefore the absence of administrative centralization, the culture and

attitude of traditional common lawyers, the jury as political institution and the creation of the Supreme Court helped in practice to limit the principle of sovereignty (or, as Tocqueville glossed it, the "tyranny of the majority"), in France the concentration of power tended to prevail. After the Revolution the *absolutist* vision was transferred to the people and political sovereignty was the *space* of political unity and of Statehood. We could say that while in America sovereignty was tamed by "constitutional" solutions, in France that was precisely the problem[13]. The protagonists of the Revolution – as Tocqueville stressed – were the heirs, in some respects, of the claim to absolute sovereignty of the modern age[14]. The French Revolution inaugurated an age in thrall to a sort of "constituent obsession"[15].

The constitutional revolutions of the eighteenth century did not change the nature of political sovereignty as a monistic concept. When sovereignty "meets" in concrete historical reality constitutionalism, we are faced with a "paradox" based on two conceptual "areas" that are fundamentally at odds[16]. On the one hand, constitutionalism is considered a political philosophy and a strategy of limited government. The idea is that public authority, in all its forms, must somehow be limited and circumscribed within the bounds of law. On the other hand, political sovereignty has to do with the idea of an unlimited and absolute quality. The constitutional revolutions announce the advent of this contemporary paradox. But in America the «sharing strategy»[17] of the English tradition underwent a fortunate metamorphosis. In France, however, sovereignty and constitutionalism were at odds, in a nation marked by a political culture of conflict[18]. After the Revolution and especially after the fall of the ancient monarchy, the throne was empty[19] and the people-nation was under an obligation to fill it.

2. *Absorbing the Revolution into the Monarchy?*

After the Restoration the "new" governments (most of them monarchical) followed two main strategies: a) the first, to avoid the constitutional common core elaborated after the Revolution and to revert to the previous forms of organization; b) the second, to devise a political "compromise" by adopting a new type of constitutional framework.

We would like to consider this second perspective. Here, the main constitutional reality is what we define paradoxically as "granted constitutionalism". This is a phenomenon characterizing in particular the period 1814-1848, starting from the French experience. In the Preamble to the *Charte constitutionnelle* of 4 June 1814 granted by the "restored king" Louis XVIII, we thus read: *We have, willingly and by virtue of the free exercise of our royal authority, consented to and consent to, have conceded and granted the Constitutional Charter to our subjects, both for us and for our successors, and forever*.

The French *Charte constitutionnelle*, the German *Frühkonstitutionalismus*, the Brazilian/Portuguese Charters of 1824 and 1826, and the Italian "Statuti" (and especially the "Statuto" granted in March 1848 by the King of Sardinia) represent only the most famous constitutional documents of this European historical period. Our purpose is not to scrutinize here the pivotal role played by the category of granted

constitution in European constitutional history. For us this kind of constitution is something more than simply a transitional phenomenon, or an 'interval' (albeit an important one) between the idea of the eighteenth-century constitution based upon the constituent power of the people and the complete future realization of democratic constitutionalism in the course of the twentieth century[20].

In this paper I wish simply to underline the fact that this "granted constitutionalism" has also served as an attempt to neutralise – according to different groups of Liberals as well as of course of the ultraroyalists – that most terrible of powers, the constituent power of the people, that is the power allowing those who invoked it to "constitutionalize" popular sovereignty. Some monarchs tried to "appropriate" the "artificial" voluntarism of revolutionary constitutionalism. Urging Louis XVIII to follow the "sovereign" path of promulgating the *Charte*, Chancellor Count Beugnot reminded him that «The plan proposed [...] has this rare, indeed, very rare, merit, of absorbing the Revolution into the Monarchy; whatever is contrary to this plan, and tends to bring either the Senate or the Legislative Body or else the electoral colleges into deliberation, tends, on the contrary, to absorb the Monarchy into the Revolution». Absorbing the Revolution into the Monarchy: here is a very clear and significant message.

This attempt is interesting also because it shows that the Restoration did not in fact allow anyone to lead a nation without by the same token proposing an "idea of Constitution". Monarchs and conservatives thought to "absorb" the constitution into the Monarchy (as *Charte constitutionnelle* or *landständische Verfassung* or *Statuto costituzionale*). They devised their strategy by giving value to the *letter of the text*, whereas the liberals (using here very general categories) sought to stress the *spirit of the text*. The *royalistes* entrenched themselves behind the bulwark of the *lettre* and of the form of the concession; the liberals insisted on the presumed liberal character of the *esprit*.

In this article, given limitations of space, we can only hope to consider one, albeit very important aspect of the "sovereignty dispute". The "struggle" over the "constitution" in the years after 1814 has led to the formulation of some noteworthy reflections on sovereignty.

3. *Two threats*

The "obsession" of liberals during the nineteenth century was how to reconcile "liberties" affirmed after the Revolution with the "sovereignty dispute". For different "families" of liberals, Constitution (as ideology, as movement, or as a mere document and subject as such to interpretation) became the strategic resource exploited to address two "convergent" threats, namely, the spectre of the constituent power embodied in the sovereignty of the people (the people as "mass") and the absolute sovereignty of the monarch (a notion by then weakened in France but nonetheless sustained by the *ultras* and theocrats).

In this context we would like to reflect above all on the thought of the so-called "Doctrinaires", viewed often as French centre-left political theorists during the period of the 1814 *Charte*[21] and, conversely, as "right-wing" liberals under the July

Monarchy, but in reality they attempted to establish middle-class rule as a *juste milieu* between the extremes of revolution and reaction. I would also stress the fact that the Doctrinaire tendency was a wider "European movement", and one that included a number of different "political-constitutional thinkers" from the 1820s to the 1860s.

Pierre-Paul Royer-Collard, Pierre François Hercule de Serre, Camille Jordan, Abel-François Villemain, François Guizot, Charles de Rémusat, Prosper de Barante, Victor de Broglie, Victor Cousin, Pellegrino Rossi are usually considered to have been the main exponents of this composite movement in France.

The Doctrinaires owed an intellectual debt to the liberalism of the Coppet circle[22], evident for instance in their realisation that popular sovereignty, being itself absolute also, could be "dangerous". In the *Principes de politique* (1806), Benjamin Constant thus criticized both Rousseau, on the one hand, and Ferrand and Molé on the other, since one and all were theorists, in different ways, of the idea of unlimited sovereignty leading to the same tyrannical outcome. Constant's lexicon is dominated by the words dam, barrier, bound and so on, his concern being to express the need for a constitutional solution[23]. «A constitution is itself an act of defiance since it prescribes limits to authority»[24]. So «Sovereignty has only a limited and relative existence. At the point where independence and individual existence begin, the jurisdiction of sovereignty ends. If society oversteps this line, it is as guilty as the despot who has, as his only title, his exterminating sword»[25].

Limiting sovereignty means drawing the impassable line of the "freedom of the moderns" which guarantees citizens *contre le pouvoir*[26]. This «liberalism of the rule»[27] is closely linked to the idea of the constitution as "mistrust". After the Terror of 1793-94 it seemed impossible to have confidence in popular sovereignty as a *per se* reliable safeguard of individual freedom. The French Revolution, instead of destroying absolute power once and for all, would seem to have transferred it, thereby making possible a despotism based on a new idol: the general will. Post-revolutionary liberals (especially Constant and Guizot, but with significant differences between them) were concerned to combat Rousseau's ideas on liberty and sovereignty, although at times they would seem to have chosen the wrong adversary. According to Constant: «Two systems have always dominated the world: the sovereignty of the people which I deny and the divine right which I detest… The divine right destroys both legitimacy and liberty… The will of all is not more legitimate than the will of one man simply because it is – or claims to be – the will of all. There is no unlimited sovereignty. There is only limited sovereignty and sovereignty becomes usurpation when it exceeds its competence»[28].

Doctrinaires underscored the fact that – as Pierre-Paul Royer-Collard remarked – the sovereignty of the people was always a potential "souveraineté de la force". In 1820, François Guizot likewise declared that there was an equivalence between the usurpation of force[29] and every form of sovereignty that sought to be absolute, whether of the people or of divine right. He then added that popular sovereignty was a form of tyranny, in that it was the absolute power of the numerical majority over the minority ("souveraineté du nombre")[30]. In 1816

Guizot had lost no time in translating into French the work of the Prussian political thinker Friedrich Ancillon[31]. Both thinkers criticized Montesquieu's classification of political regimes and thought that the doctrine of popular sovereignty was a threat to political order making possible a "despotism of liberty" never seen before. French Doctrinaires opposed popular sovereignty because in their view, the latter was an impracticable and flawed political principle that postulated the equal right of all individuals to exercise sovereignty.

Guizot and the Doctrinaires criticized democracy as a political regime based on universal suffrage. But they recognized the sense of democracy as a social condition. For them the will of the majority (number) was not automatically synonymous with justice and wisdom.

4. *Neutralizing the sovereignty in the constitution?*

The philosophical "antidote" to the popular sovereignty of will and force is seen in the "sovereignty of reason"[32]. «I believe – Guizot said – in the sovereignty of reason, justice and law: such is the legitimate sovereign the world is in search of, and always will be in search of; because reason, truth and justice are not to be found complete and infallible anywhere»[33]. The "reasonableness" here is a synonym for prudence and a "middling" or moderate stance[34].

Sovereignty of reason is an abstract and ambiguous concept, but it is not without institutional implications[35]. Doctrinaires dealt with the specific mechanisms of a limited monarchy based on "representative government", namely, division of powers, bicameralism, open parliamentary debates, popular elections, free press and so on[36]. The idea of the sovereignty of constitution can be seen as a concept linking reason and constitution.

While the *ultras* considered the *Charte* of 1814 to be a sort of appendix of the "ancient constitution of the Kingdom"[37], Liberals tried to valorize the written constitution as a compromise[38] between ancient and modern constitution. The Charter of 1814 was for Doctrinaires the expression of the interests, conditions and state of society. But the "July Revolution" of 1830 looked as if it might be the "French" opportunity to imitate the British "Glorious Revolution". As in 1688-89 a King had attempted to shift the constitutional equilibrium towards an absolutist outcome. The promoters of the "liberal interpretation" of the *Charte constitutionnelle* according to its "spirit" had reacted as representatives of the nation: the King Charles X was dethroned and Louis-Philippe d'Orléans became "King of the French". The new constitutional regime affirmed the need for collaboration between the King and the two Chambers. "The Charter – it was said – will henceforth be a truth" ("La Charte désormais sera une vérité»). Long live the Charter, *Vive la Charte*, was the rallying cry during the revolutionary *journées*. The *Glorious Revolution* had been popular in its principles but aristocratic in its execution, thus giving rise to a «happy mix of hierarchy and harmony in the social order»[39]. In November 1830 Guizot distinguished between the popular character of the Revolution and the different origins of the new government[40].

The Charter of 1830[41] was the result of an "agreement" between representatives

and Peers appointed by the Charter of 1814[42] and the new monarch Louis-Philippe, King of the French, who swore an oath on the amended Charter on 9 August. Both Chambers now had the right of legislative initiative (art. 15), the chamber of Peers was reorganized, the primacy of law over regulations and decrees was affirmed. The Charter laid the foundations for a representative government with a monarchical executive. The dualistic constitutional system (based on a 'double trust') could evolve towards a stronger parlamentarisation according to constitutional practice[43].

The Revolution of July 1830 introduced (or reintroduced) into France the "reality" of national sovereignty. We can, however, find nothing comparable to the article 25 of the Belgian Revolution of 1831, that affirmed literally the principle of national sovereignty. Indeed, art. 25 established that «All powers come from the nation. They are exercised as stipulated in the constitution». The Belgian debate – as Brecht Desaure has proved[44] – illustrates the various meanings of the formula "national sovereignty" and the interchangeability of the words "nation" and "people" in combination with sovereignty. Certainly, popular sovereignty is by no means necessarily a "synonym" of universal suffrage.

Conversely, in France a different combination of sovereignty with people or nation was hotly contested throughout the nineteenth century. In August 1830 a number of deputies proposed that the "model" of the French Constitution of 1791 (sovereignty belongs to the nation) be adopted, but finally the "Constituent meeting" followed the recommendation of the Deputy Dupin. According to him the new political regime was clearly based on national sovereignty. There was no need for further explanation.

In particular, Doctrinaires worked to link the national sovereignty concept to their political philosophy of the sovereignty of reason. Now, in 1830, the ambiguous notion of the "sovereignty of reason" could find a sort of fulfilment in the amended *Charte*. The constitution was itself the parameter of reason and the attribute of a sovereign entity was assigned to it, so that neither the prince, the people, the monarchy nor democracy could invoke a monistic conception intertwined with the exercise of the intimidating constituent power[45]. This led to an idea of a constitution, sovereign within and for itself, based on a "pluralistic concept".

During the July Monarchy the doctrine of the constitution had been forged as the source of sovereignty. National sovereignty and sovereignty of the constitution were finally two sides of the same coin.

Among the Doctrinaires – from Royer-Collard to Guizot, Cousin, de Rémusat – the "sovereignty of reason" is the point of convergence between the theory of representation and the major distinction between the origin and the exercise of the sovereignty[46]. Representation is for the Doctrinaires the process of "detecting" all the elements connected to reason and capacity present in society. It is based on the "majorité des capables"[47]. This is a process that only an electoral system based on censitary criteria and capacity can sustain. In a pluralistic society different ideas and interests coexist and only a regime of publicity and free discussion can "produce" reason and truth.

The "sovereignty of reason" is above the Constitution, and is thus a stratum of moral

values that should offer a lead to human institutions. In certain respects it deals with the exercise of national sovereignty. There is often a concern to locate sovereignty in «une région suffisament lointaine et éthérée pour que nulle autorité constituée ne puisse se dire elle-même souveraine»[48]. But this philosophical doctrine was liable to be transformed during the Orleanist Monarchy as a legal doctrine, too. Royer-Collard had said that «Once there is a sovereignty, there is despotism, whenever there is despotism, there is social death if not, at the least, profound economic disorder. To ask where sovereignty is, is to be of a despotic inclination and to declare that one is precisely that»[49]. Sovereignty does not belong to any of the authorities legitimized by the *Charte* as « national Constitution ». Liberals attempt to « neutralize » sovereignty as an « absolute » concept because they fear the recurring risk of its concentration in a single « place »[50].

Any power can be said to be sovereign. Reason inheres in the *Constitution* and is the « result » of a common discussion and cooperation. The claims of sovereignty made by the King or the people had to be absorbed by the constitution. It is not by chance that in 1834 Guizot, as minister of education, established in Paris the first chair of constitutional law, summoning therefore from Geneva the brilliant Pellegrino Rossi[51]. The first aim was to affirm the full legitimacy of the new regime. But political interpretation was not sufficient.

They needed to affirm strongly the normativity of the constituted sovereignty as a text of law[52], thereby fixing the political-legal order.

> The purpose and form of teaching constitutional law is determined by its title; it is the expounding of the Charter and individual guarantees as political institutions enshrined therein. It is no longer, so far as we are concerned, a simple philosophical system subject to the disputes of men, it is a written law, a recognized [law], that can and should be explained, commented upon, in the same guise as civil law or any other part of our legislation. Such teaching, both broad and specific, based on the national public law and the lessons of history, capable of being extended by comparisons and foreign analogies, must replace the errors of ignorance and the temerity of superficial notions with solid and positives knowledge[53].

5. *Shall the Charter really be a truth?*

The political debate under the July Monarchy on the "sovereignty of the constitution" served to deepen the reflection on the «superiority» of the *Charter*. We can pose a number of questions: should judges undo decrees and ordinances that were contrary to the Constitution? In which cases? What were the limits? Shall the Charter really be a *truth*?

The *Charte* of 1830 contains two articles strictly linked to the affair of the ordinances of Charles X (25 July 1830). Art. 13 states that «The King [...] makes the regulations and ordinances necessary to execute the laws but he cannot suspend them nor dispense from their application» and art. 70 that «All laws and ordinances, inasmuch as they are contrary to the provisions adopted for the reform of the Charter, are as of now and remain». These articles would seek to limit the power of the monarch to issue decrees and are an attempt to find a solution to issues arising from 1827[54]. On 28 July 1830 – while the revolution was in its

second day – the court of commerce of Paris declared not applicable, because contrary to the Charte, the order of Charles X forbidding the publication of newspapers without a preventative permission[55].

In 1832 an ordinance of the King (6 June) imposed a state of siege upon Paris. The *citoyen* Geoffroy[56], on the basis of this ordinance, is sentenced to death by a war council (18 June). His lawyer, Odilon Barrot, an important liberal politician, then leader of the "Dynastic Left", appealed to the Supreme Court, claiming that the ordinance was unconstitutional, on the grounds that it breached the principle of the natural judge (arts. 53 and 54 of the Charter). The court of cassation declared that it was indeed unconstitutional, restoring to Mr. Geoffroy his natural judge. On that occasion Barrot said:

> the constitution would be a mere chimera… A constitution that was simply « optional » would not be a true constitution: because a constitution only means something if it is a real and positive truth[57].

It is not by chance that Jean-Baptiste Sirey accords to the Court's decision an important place among the "monuments" of French public law. This sentence will be a solemn precedent «which serves to prove that our new constitution is not deprived of all sanction, that the rights and guarantees which it stipulates in favour of the citizens are not at the disposal of power, and have not been vainly placed under the safeguard of the Judiciary»[58].

Some rulings of the law courts under the July Monarchy might lead one to posit the formation of an embryonic« control of the constitutionality » of the laws. But the Court of Cassation repudiated this putative development. Tocqueville's argument as regards the French situation, by contrast with the American, is well known:

> If, in France, the courts could disobey the laws on the grounds that they found them unconstitutional, the constituent power would actually be in their hands, since they alone would have the right to interpret a constitution whose terms no one could change. They would therefore take the place of the nation and would dominate society, at least in so far as the inherent weakness of the judicial power would allow them to do so.
> I know that by denying judges the right to declare laws unconstitutional, we indirectly give the legislative body the power to change the constitution, since it no longer encounters a legal barrier that stops it. But better to grant the power to change the constitution of the people to men who imperfectly represent the will of the people, than to others who represent only themselves[59].

Tocqueville's arguments about the « dangers » deriving from an hypothetical claim for judicial review in France reflect also the opinion of the majority of French jurists at the same period, for example Charles Hello or Armand Dalloz[60]. Félix Berriat-Saint-Prix states that «any law contrary to the text of the Charter is unconstitutional» and judges, when they have to choose between the text of the law and that of the Constitution, will follow the Constitution as the basis of their judgement», but he fears two risks: the judges can usurp the legislative power or, conversely, refuse to declare unconstitutional an "irregular" law[61].

During the July Monarchy there was, for the first time, a reflection upon the distinction between constitutional and ordinary laws, in particular, during the significant parliamentary debate in 1842 on the institution of regency. The Duc de Broglie then observed that «Appealing to sovereignty founded and settled by the Charter against

any other sovereignty is appealing to number, to brute force; it is to pretend to organize disorder itself [...]»[62]. Some days before, François Guizot, at that time foreign minister, had sarcastically rejected the theory of two powers: «one ordinary and one extraordinary; one constitutional, the other constituent; one for working days (if you will allow the term), the other for holidays: this is a thing unheard of, full of danger and fatal»[63].

Doctrinaires and liberal constitutionalists identified the constituent power with the "brute force" of the people-mass, the sovereignty of majority. But the "constituted", national sovereignty overrode the constituent power. So, «Be calm, gentlemen: we, the three constitutional powers, we are the only legitimate and regular organs of national sovereignty. Aside from us, there is nothing, I repeat, but usurpation or revolution»[64]. The "absorption" of the sovereignty of the people into the constitution sanctions the fact that the Charter was the sole depositary and for it, according to the English phrasing – often recalled – the powers according to the theory of the King in Parliament[65].

Tocqueville observed, comparing French judicial power with the American, that «In France, the constitution is, or is considered to be, an immutable work. No power can change anything in it; such is the accepted theory»[66]. Tocqueville was probably referring here to the attempt to "neutralize" the constituent power. According to the majority of the constitutionalists active under the July monarchy the constituent power died at the very moment that the constitution was born: «Is it not clear that this latent, reserved sovereignty would be in opposition to the establishment of the constitution? We thereby see how the constituent power dies the very instant that the constitution is born, only to live again when this latter dies»[67]. For Firmin Laferrière the constituent power was a "temporary" exercise of sovereignty[68]. «In the political order there does not exist any sovereign but the constitutional law and the powers determined by the Constitution»[69]. Politicians and jurists used the doctrine of the *omnipotence of Parliament* to affirm the sovereignty of constitution. «National will – Serrigny noted – or political sovereignty, is expressed by the cooperation of the three branches of the same power»[70].

6. *Legacy of the European dimension of Doctrinaire thought*

The Orleanists had tried to forge an ideology and a juridical doctrine of the sovereignty of the constitution. Carl Schmitt has seen in the "sovereignty of the constitution" a "mask" theory or, in other words, an attempt to conceptualize a dilatory compromise[71]. In 1848, as we know, "reason" could do nothing against the "machine arithmétique"[72]. This phase was marked by political failure. Guizot's reply to the deputy Garnier-Pagès's plea for universal suffrage is well known: «There is no day for universal suffrage. There is no day when all human creatures, whatever they are, can be called upon to exercise political rights. The question does not deserve to distract me at this moment from what we are dealing with»[73]. Some months before the Revolution, Guizot wrote to Pellegrino Rossi telling him that «It is the first and natural mission of governments to be conservative. We are con-

servative because we follow on after a series of revolutions, and we feel ourselves to be entrusted with the task of restoring order, duration, respect for the powers, laws, principles, traditions, everything that ensures the regular and long life of society [...]»[74].

But *Doctrinaire liberalism*, so meaningful in France in the first half of the nineteenth century, was not a purely French phenomenon. Indeed, some of its ideas and arguments were spread further afield because – transcending what was contingent in them – they formed part of a "common core" of European liberal thought. We are thus concerned with a number of different contexts united by the problem of a transition from the "ancient" to the "new" political regimes living a sort of "doctrinaire moment". *Juste milieu* liberalism underwent a variety of different incarnations.

The Doctrinaires and the political system of the July Monarchy show certain similarities (but also several differences) with the Whig dispensation in the aftermath of the Reform Bill of 1832. Vincent Starzinger[75] has focused in particular on Royer-Collard and Guizot's thought and the reflections of the Reform Whigs Henry Peter Brougham and Thomas Babington Macaulay. One of their common preoccupations was a concern to reconcile the idea of sovereignty with a pluralized political system, the sovereignty of reason and the mixed State, with a range of different outcomes. The Spanish Donoso Cortés, «before veering towards extreme conservatism in the late 1840's»[76], passed in the mid-1830s through a "doctrinaire" phase (when he lived in Paris), being deeply influenced then by Guizot and *juste milieu* liberalism[77]. Cortés in his *Lecciones de Derecho Político* (1836)[78] reflected on sovereignty, rejecting all "dogmas of social omnipotence" and following Guizot's theory of the sovereignty of reason and representative government.

These Doctrinaire ideas[79] filtered through to the Netherlands, as in the case of Johan Rudolf Thorbecke (1798-1872), professor of law in Leiden, one of the reformers of the Dutch constitution of 1848 and several times prime minister[80], but also to the Hungarian Baron József Eötvös (1813-1871), politician and reformer in 1848, author of *The Dominant Ideas of the Nineteenth Century and Their Impact on the State* (1851-1854)[81]. In Italy, Cesare Balbo, as likewise other Italian thinkers and politicians from 1840 onwards, criticized the dangerous theory of the constituent power and appealed to the sovereignty of the constitution based on the national idea and its corollary, parliamentary omnipotence. We demonstrated – Balbo wrote – that «[...] National representation does not reside or cannot reside in any of these three powers, but in all three; that none of these alone, but all three must constitute Parliament; and that in this Parliament alone can and ought to reside the power of making and unmaking laws and changing the state constitution, the power that is appropriately and accurately called parliamentary omnipotence»[82]. This empirical "dogma" of English constitutionalism was re-read in a "doctrinaire" sense.

The theory of the sovereignty of the constitution has to be properly contextualized. The main goal of this theory was to dispense with a sort of "political theological dispute" on sovereignty. Finally, the Doctrinaires tried to "neutralize", to "encapsulate" sovereignty in a "neutral" and higher space combining and limiting the

risk of each possible absolutisation. These liberals were perfectly well aware of *democracy* as the new *social condition* but they were nonetheless not democrats. The political side of democracy scared them. For this reason, the "democratic vocation" of sovereignty, expressed through the constituent power identified with the people become nation, has been seen, during this age, as a brute force, a river that does not seem to recognize either embankments, or barriers, which breaks down the pluralism of powers, reduces the space of autonomy of individuals, disputes differences and social ranks. They were trying in various ways to "neutralize" sovereignty because they knew from experience that it tended to concentrate power in one "place". Indeed, the liberal topography was based on a plurality of "places", divided and yet cooperating, moderating each other, directed to the same goal and unity. The "centre"[83] and "moderation"[84] were the moral, ideological and political reference points of European Doctrinaire thought. The cooperation between the three powers renewed the ancient myth of a mixed government. Political moderation and constitutional equilibrium might at last be achieved. Eclecticism was the «necessary philosophy of the age»[85], according to Victor Cousin. His thought had a significant influence in various European countries, but it mirrored a deeper stratum of liberal culture[86].

In 1847 Cesare Balbo sketched the "autobiography" of a generation: his "party" was that of the liberals «less extreme, less pure, who nominate themselves as liberals of the "middle", or liberal moderates; and so they are universally named, because this denomination is necessary, inevitable, because it alone expresses the relative fact of being in the middle of the other two parts [...]»[87], namely the pure conservatives and the most progressive liberals.

The « moderate party » « seeks to follow progress – Count Cavour wrote to Victor Cousin – without resorting to revolutionary means »[88]. The notion of the Sovereignty of the constitution did not disappear with the Doctrinaires but continued to be one of the essential components and issues of "liberal State building" during the second half of nineteenth century. This concept, elaborated especially by the Doctrinaires, contained some elements (not all, of course) used by liberal politicians and jurists. Certain of these elements merit closer scrutiny: a) a critical approach to the theory of the general will and the constituent power; b) an idea of constitution (granted or deliberated) in which a historicist perspective prevails, thereby counterbalancing the "contractualist point of view"; c) a renewed idea of nation as *historical-natural reality*; d) institutions and constitutions as the result of experience and history according to the "British constitution" experiment; e) a notion of the authority of the state[89]; f) elitist liberalism based on the idea of representative government through socio-political capacity; f) the sovereignty of the constitution as "moral and political superiority".

The above-mentioned elements, along with other aspects, contributed in different ways, during the nineteenth century, to the forging and consolidation of a European doctrine of the Constitution based on the sovereignty of the State. In Germany the idea, implicit in Doctrinaire thought, that the parliamentary institutions could be considered as "organs" of the Constitution and not of the people was common to the organicist construction of the *Staatslehre* from

Carl Friedrich von Gerber onwards[90]. This setting aimed at neutralising the emergent conflict between monarchical and popular sovereignty and hypostatizing a constitutional compromise[91]. The sovereignty of the constitution can be seen as a concept able to subordinate the monarch and the people to the law[92]. But in the second half of the nineteenth century the doctrine of self-limitation is affirmed. Only the State is sovereign as *Staatsgewalt* and in the German doctrine the monarch is the supreme organ («a super-organ»)[93] and the "holder" of the *Herrschaft*. As the monarchs in the first half of nineteenth century granted constitutions, so now the State – which cannot have any power above itself – "granted" its "auto-limitation" (*Selbstbindung*). In Germany the State as legal person, and not the nation, holds the sovereignty[94].

In France, as Ernest Renan remarked in 1869, the State-administration was so deep-rooted and strong that it absorbed all liberties. According to him «popular sovereignty cannot establish constitutional government»[95]. But it was during the Third Republic that the Alsatian Raymond Carré de Malberg (1861-1935) based his general theory of the State (1920-1922) on the principles of public law of the 1789 Revolution. In particular, Carré de Malberg highlighted the national sovereignty concept as a crucial revolutionary heritage[96]. The nation, as an abstract, "eternal", indivisible and collective being, subordinated itself to the constitution organizing the State's powers[97], the constitution as "unifying organization"[98]. The national State was the modern sovereign. According to Carré the French Revolution had achieved a conceptual transformation of sovereignty. The nation had obtained the "puissance" but – unlike the absolute monarch – it could not exercise it save through representation, creating therefore a new model of State organization. In this sense, the specific notion of Carré de Malberg (national sovereignty as the constitutive element of the state) was based on various "materials" derived from the new German doctrine (*Staatsrechtslehre*) but ultimately with the aim of criticizing Bismarck's political system[99] and of demonstrating, where the German experience was concerned, its incompatibility with the subordination of the nation to the monarch as supreme organ [100]. Carré de Malberg joined together two "concrete" forms of sovereignty, monarchical sovereignty and popular sovereignty (as democracy), arguing that they both claimed to exercise the sovereign power without mediation. De Malberg's reinterpretation of the revolutionary foundations led him to reformulate the theory of representation as a theory of the organ of State[101]. This theory was however based on the principle of national sovereignty and thus formally the nation retained the "puissance de l'État". In this case the State was the legal personification of the nation[102] which manifested its will through Parliament and the law[103]. The Strasbourg professor had "reinvented" the distinction between popular and national sovereignty from the Revolution onwards. He emphasized the contribution of the Revolution to the language and the doctrines of national sovereignty, but it is evident that he had borrowed a more refined theory from the Doctrinaires[104]. Nevertheless, Doctrinaire philosophical references to reason and justice could not satisfy the new theory of the State and a positivist jurist such as Carré de Malberg. Only the

State and its organs could determine what was right and reasonable[105].

Between the nineteenth and the twentieth century jurists attributed political sovereignty to the various paradigms of the Liberal State[106]. This was a new step replete with consequences. They "juridified" the constitution by the State. They used the doctrinaires' concept of political capacity and representation. Before the advent of mass democracy and industrial society most of public law doctrine had sought shelter in the legal personality of the State with its "autonomous will". Their "barriers", as we know, failed to stem the new era of the masses. Nonetheless it seems rewarding and useful to investigate further the links, evident or not, between these two phases in the European history of constitutional and public law.

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1 For an in-depth overview N. Walker (ed.), *Sovereignty in transition. Essays in european law*, Oxford-Portland, Hart Publishing, 2006; and N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford-New York, Oxford University Press, 1999.

2 For a synthesis v. R. Cavallo, *Il laboratorio europeo e le sfide del costituzionalismo globale*, in «Journal of Constitutional History», 32, II, 2016, pp. 119-130.

3 O. Beaud, *La puissance de l'État*, Paris, PUF, 1994, pp. 42 ff.

4 See M. Fioravanti, *Costituzione e popolo sovrano*, Bologna, il Mulino, 1998, pp. 47 ff. and Id., *Costituzione*, Bologna, il Mulino, 1999, pp. 71 ff.; L. Lacchè, *Constitución, Monarquía, Parlamento: Francia y Belgica ante los problemas y "modelos" del constitucionalismo europeo (1814-1848)*, now in Id., *History & Constitution. Developments in European Constitutionalism: the comparative experience of Italy, France, Switzerland and Belgium (19th-20th centuries)*, Klostermann, Frankfurt am Main, 2016, pp. 150 ff.

5 D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, Oxford, Oxford University Press, 2016; D. Quaglioni, *La sovranità*, Roma-Bari, Laterza, 2004.

6 «That all men are by nature equally free and independent» (The Virginia Declaration of Rights, June 12, 1776); «Tous les Hommes naissent et demeurent libres et égaux en droits » (art. 1 Déclaration des droits de l'homme et du citoyen, August 28, 1789).

7 C. Schmitt, *Constitutional Theory*, Durham and London, Duke University Press, 2008 (1928), pp. 126 ff.

8 See A. Craiutu, *Liberalism under Siege. The Political Thought of the French Doctrinaires*, Lanham, Oxford Lexington Books, 2003, pp. 124 ff.; S.M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in M. Loughlin, N. Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford, Oxford University Press, 2007, pp. 49-66; J. Ziller, *Sovereignty in France: Getting Rid of the Mal de Bodin*, in Walker (ed.), *Sovereignty in transition*, cit., pp. 261-277; J. Goldsworthy, *The Debate About Sovereignty in the United States: a Historical and Comparative Perspective*, Ivi, pp. 423-446.

9 L. Scuccimarra, *Sovranità popolare e Costituzione*, in M. Calamo Specchia (ed.), *La Costituzione Francese – La Constitution Française*, Torino, Giappichelli, 2009, pp. 78-84; Id., *Généalogie de la nation. Sieyès comme fondateur de la communauté politique*, in «Revue française d'histoire des idées politiques», 33, I, 2011, pp. 27-45.

10 Cf., for the reconstruction of the debate, L. Jaume, *Constituent Power in France: The Revolution and its Consequences*, in Loughlin, Walker (eds.), *The Paradox of*

Constitutionalism, cit., pp. 67-85. U. Müßig, *Juridification by Constitution. National Sovereignty in Eighteenth and Nineteenth Century Europe*, in Id. (ed.), *Reconsidering Constitutional Formation. I. National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Heidelberg-New York, Springer, 2016, pp. 13 ff.

[11] On the neutralization mechanisms see A. Jakab, *Neutralizing the Sovereignty Question. Compromise Strategies in Constitutional Argumentations about the Concept of Sovereignty before the European Integration and since*, in «European Constitutional Law Review», 2, 2006, pp. 375-397.

[12] «Sovereignty is one, indivisible, inalienable, and imprescriptible. It appertains to the nation; no section of the people, nor any individual may assume the exercise thereof» (art. 1, tit. III *Of public powers*); «The nation, from which alone all powers emanate, may exercise such powers only by delegation. The French Constitution is representative; the representatives are the legislative body and the king» (art. 2, tit. III *Of public powers*). On the first revolutionary French constitution cf. J. Bart, J.-J. Clère, C. Courvoisier, M. Verpeaux (eds.), *1791, la première Constitution française*, Paris, Economica, 1993; F. Furet, R. Halévi, *La monarchie républicaine. La Constitution de 1791*, Paris, Fayard, 1996; P. Pasquino, *Sieyès et l'invention de la constitution en France*, Paris, Odile Jacob, 1998.

[13] Cf. M. Gauchet, *La Révolution des pouvoirs. La souveraineté des pouvoirs. La souveraineté, le peuple et la représentation 1789-1799*, Paris, Gallimard, 1995.

[14] Cfr. F. Furet, *Penser la Révolution française*, Paris, Gallimard, 1978; Id., *L'idée de tradition révolutionnaire dans la France du XIXe siècle*, in «Pouvoirs», 50, 1990, pp. 5-13.

[15] R. Martucci, *L'ossessione costituente. Forma di governo e costituzione nella Rivoluzione francese (1789-1799)*, Bologna, il Mulino, 2001.

[16] Some insights in A. Arato, *Post Sovereign Constitution Making. Learning and Legitimacy*, Oxford, Oxford University Press, 2016.

[17] Jakab, *Neutralizing the Sovereignty Question*, cit., p. 377.

[18] Cf. P. Rosanvallon, *La Monarchie impossible. Les Chartes de 1814 et de 1830*, Paris, Fayard, 1994, pp. 179-180; Furet, *L'idée de tradition révolutionnaire*, cit., p. 12.

[19] According to the negative judgement of Jean-Joseph Mounier in 1792: quoted in P. Viola, *Il trono vuoto. La transizione della sovranità nella rivoluzione francese*, Torino, Einaudi, 1989, pp. VII-VIII.

[20] On this theme we refer to L. Lacchè, *Granted Constitutions. The Theory of* octroi *and Constitutional Experiments in Europe in the Aftermath of the French Revolution*, in «European Constitutional Law Review», 9/II, 2013, pp. 285-314. See also O. Ferreira, *Les équivoques du "constitutionnalisme octroyé": un débat transtlantique*, in «Historia Constitucional», 16, 2015, pp. 67-131, <http://www.historiaconstitucional.com>, november 2017.

[21] G.A. Kelly, *The Human Comedy. Constant, Tocqueville and French liberalism*, Cambridge, Cambridge University Press, 1992, p. 18.

[22] Cf. L. Lacchè, *Coppet et la percée de l'Etat libéral constitutionnel*, in Id., *History & Constitution*, cit., pp. 201-226.

[23] E. Hofmann, *Les "Principes de politique" de Benjamin Constant. La genèse d'une oeuvre et l'évolution de la pensée de leur auteur (1789-1806)*, Geneva, Droz, t. I, 1980, p. 315 and ff. For Sismondi the aim of a "free constitution" is first and foremost to prevent the nation from «confusing sovereignty with omnipotence […]» («confondre la souveraineté avec la toute puissance […]») (J.C.L. Sismondi, *Recherches sur les constitutions des peuples libres*, edition and introduction by M. Minerbi, Geneva, Droz, 1965, p. 91).

[24] «Une constitution est par elle-même un acte de défiance puisqu'elle prescrit des limites à l'autorité […]» (B. Constant, *Opinion* 5 nivôse an VIII (5.I.1800). On this passage cf. L. Jaume, *L'individu effacé ou le paradoxe du libéralisme français*, Paris, Fayard, 1997, p. 106.

[25] B. Constant, *Principle of politics applicable to all representative governments*, § *On the sovereignty of the people*, in *Political Writings*, translated and edited by B. Fontana, Cambridge, Cambridge University Press, 1988, p. 188 (ed. Paris, May 1815, *Principes de politiques*). In the édition of 1806 the text is: «La souveraineté n'existe que d'une manière limitée et relative. Au point où commence l'indépendance de l'existence individuelle, s'arrête la juridiction de cette souveraineté. Si la société franchit cette ligne, elle se rend aussi coupable de tyrannie que le despote qui n'a pour titre que le glaive exterminateur» (B. Constant, *Principes de politique*, ed. Hofmann, Genève, Droz, 1980, p. 49). The concept in Constant (Ivi, pp. 45, 46) evokes a speech of Sieyès before the Convention, 2 Thermidor, year III. Cf. E. Sieyes, *Opinion sur plusieurs articles des titres IV et V du projet de constitution*, in P. Bastid, *Les discours de Sieyès dans les débats constitutionnels de l'an III*, Paris, Hachette, 1939, pp. 17-18.

[26] «This is what we must declare; this is the important truth, the eternal principle which we must establish. No authority upon earth is unlimited, neither that of the people, nor that of the men who declare themselves their representatives, nor that of the kings, by whatever title they reign, nor, finally, that of the law, which, being merely the expression of the will of the people or of the prince, according to the form of government, must be circumscribed within the same limits as the au-

thority from which it emanates» (Constant, *Principle of politics applicable to all representative governments*, cit., p. 180).

[27] B. Manin, *Les deux libéralismes: la règle et la balance*, in I. Théry e C. Biet (eds.), *La famille, la loi, l'Etat: de la Révolution au Code civil*, Paris, Imprimerie nationale-Centre Georges Pompidou, 1989, pp. 372-389.

[28] B. Constant, *De la souveraineté*, in H. Cockerham and E. Ehrman (eds.), *Ideology and Religion in French Literature*, Camberley, Porphyrogenitus, 1989, quoted by Craiutu, *Liberalism under Siege*, cit., pp. 137 and 303.

[29] F. Guizot, *Du gouvernement de la France depuis la Restauration et du ministère actuel*, Paris, Ladvocat, 1820, p. 201.

[30] F. Guizot, *Philosophie politique: de la souveraineté*, in Id., *Histoire de la civilisation en Europe depuis la chute de l'Empire romain jusqu'à la Révolution française*, edition by P. Rosanvallon, Paris, Gallimard, 1985, p. 309 (*Présentation* by Rosanvallon) as well as p. 374. See also A. Laquièze, *Les origines du régime parlementaire en France (1814-1848)*, Paris, PUF, 2002, p. 111.

[31] *De la souveraineté et des formes de gouvernement: essai destiné à la rectification de quelques principes politiques, accompagné de notes du traducteur François Guizot*, Paris, Le Normant, Imprimeur-Libraire, 1816. In 1837 was published in France his book *Du juste milieu, ou du rapprochement des extrêmes dans les opinions*, translated by the baroness de Stassart. See Craiutu, *Liberalism under Siege*, cit., p. 134; on the *juste milieu* theories in France, England and Germany see U. Backes, *Political Extremes. A conceptual history from antiquity to the present*, London-New York, Routledge, 2010, pp. 69 ff.

[32] For a deep and wide analysis of this concept Craiutu, *Liberalism under Siege*, cit., pp. 123-153. According to H.S. Jones, *The French State in Question. Public law and political argument in the Third Republic*, Cambridge, Cambridge University Press, 1993, the sovereignty of reason derived from Turgot and Condorcet (p. 23).

[33] Guizot, *Du gouvernement de la France depuis la Restauration*, cit., p. 201.

[34] Ch.H. Pouthas, *Guizot pendant la Restauration, préparation de l'homme d'Etat*, Paris, Plon, 1923, pp. 313 ff.

[35] Craiutu, *Liberalism under Siege*, cit., pp. 142 ff.

[36] On these themes cfr. Laquièze, *Les origines du régime parlementaire en France (1814-1848)*, cit.; Craiutu, *Liberalism under Siege*, cit., pp. 185 ff.; Lacchè, *History & Constitution*, cit., pp. 301-377.

[37] Ferreira, *Les équivoques du "constitutionnalisme octroyé"*, cit., pp. 87 ff.

[38] On the *Charte* as "pact" cfr. Laquièze, *Les origines du regime parlementaire en France (1814-1848)*, cit., pp. 113-120.

[39] F. Guizot, *Pourquoi la Révolution d'Angleterre a-t-elle réussi? Discours sur l'histoire de la Révolution d'Angleterre*, Paris, Masson, 1850, pp. 162-163.

[40] «Le principe qui a présidé à notre révolution ne doit pas présider à notre gouvernement» (Speech 9 November 1830).

[41] See Rosanvallon, *La Monarchie impossible*, cit. and L. Lacchè, *La Libertà che guida il Popolo. Le Tre Gloriose Giornate del luglio 1830 e le Chartes nel costituzionalismo francese*, Bologna, il Mulino, 2002.

[42] J. Barthélemy, *La distinction des lois constitutionnelles et des lois ordinaires sous la Monarchie de Juillet*, in «Revue de droit public», t. 26, 1909, pp. 25 ff., refers to a «réunion constituante».

[43] Laquièze, *Les origines du régime parlementaire en France (1814-1848)*, cit.

[44] B. Desaure, *National Sovereignty in the Belgian Constitution of 1831. On the Meaning(s) of Article 25*, in *Reconsidering Constitutional Formation*, cit., pp. 93-157.

[45] See Schmitt, *Constitutional Theory*, cit.

[46] On these aspects see especially P. Rosanvallon, *Le moment Guizot*, Paris, Gallimard, 1985, pp. 87 ff.; Id., *Les Doctrinaires et la question du gouvernement représentatif*, in *The French Revolution and the Creation of modern political Culture*, 4 voll., Oxford, Pergamon Press, 1989, vol. 3, F. Furet and M. Ozouf (eds.), *The Transformations of Political Culture 1789-1848*, Oxford, Pergamon Press, pp. 421 ff.; Id., *Guizot et la question du suffrage universel au XIX*ème *siècle*, in M. Valensise (ed.), *François Guizot et la culture politique*, Paris, Gallimard, 1991, pp. 129-145; Id., *Le sacre du citoyen. Histoire du suffrage universel en France*, Paris, Gallimard, 1992, pp. 230-249. But also A.-F. Perny, *Le pouvoir constituant sous la monarchie de Juillet*, Paris, L. Boyer, 1901; M. Barbè, *Étude historique des idées sur la souveraineté en France de 1815 à 1848*, Paris, Pichon et Durand-Auzias,, 1904; Barthélemy, *La distinction des lois constitutionnelles*, cit.; Pouthas, *Guizot pendant la Restauration*, cit., pp. 313 ff.; L. Diez Del Corral, *El liberalismo doctrinario*, Madrid, Instituto de Estudios Políticos, 1984[4], pp. 221 ff.; V. Starzinger, *The Politics of the Center. The Juste milieu in Theory and Practice, France and England, 1815-1848*, New Brunswick and London, Transaction Publishers, 1991 (1965), pp. 20 ff.; G. Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, Paris, CNRS, 1985, pp. 120 ff.; S. Rials, *Constitutionnalisme, souveraineté et représentation*, in Id., *La continuité constitutionnelle en France de 1789 à 1989*, Paris, Economica et Presses Universitaires d'AixMarseille, 1990, pp. 49-69; L. Jaume, *Guizot et la philosophie de la représentation*, in «Droits», 15, 1992, pp. 141-152; Id., *La raison politique chez Victor Cousin et Guizot*, in «La pensée politique», 2, 1994, pp. 242-253; Id., *L'individu effacé*, cit., pp. 130 ff.; D. Roldán, *Charles de Rémusat. Certitudes et*

impasses du libéralisme doctrinaire, Paris, L'Harmattan, 1999, pp. 133 ff. ; Craiutu, *Liberalism under Siege*, cit., pp. 244 ff.; Laquièze, *Les origines du regime parlementaire en France (1814-1848)*, cit., p. 116.

47 See also H. Hofmann, *Rappresentanza – rappresentazione. Parola e concetto dall'antichità all'Ottocento*, Milano, Giuffrè, 2007, p. 538.

48 Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, cit., p. 135.

49 Quoted by G. Remond, *Royer-Collard. Son essai d'un système politique*, Paris, Sirey, 1933, p. 39. See P. De Barante, *La vie politique de M. Royer-Collard. Ses discours et ses écrits*, Paris, Didier, 1863, 2 voll.

50 «Il n'y a de souveraineté absolue nulle part […]» (Speech of F. R. de Chateaubriand, Chamber of the Peers, 7 August 1830, in «Archives parlementaires», 2 serie, t. 63, pp. 85-87).

51 On Pellegrino Rossi and his chair of constitutional law, cf. G. Colmet-Daage, *M. Rossi à l'école de Droit*, notice lue par Ernest Glasson à l'Académie des Sciences morales et politiques, séance du 22 mai 1886; P. Lavigne, *Le comte Rossi, premier professeur de droit constitutionnel français (1834-1845)*, in *Histoire des idées et idées sur l'histoire. Études offertes à Jean-Jacques Chevallier*, Paris, 1977, pp. 173-178; Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, cit., p. 142 ff.; Rosanvallon, *Le moment Guizot*, cit., pp. 285 ff.; Id., *La monarchie impossible*, cit., pp. 162 ff.; L. Lacchè, *Tra politica e diritto, ovvero Rossi e la Monarchia di Luglio*, in Id. (ed.), *Un liberale europeo: Pellegrino Rossi (1787-1848)*, Milano, Giuffrè, 2001, pp. 69-108, e Id., *La Libertà che guida il Popolo*, cit., pp. 164-173; J. Boudon, *Introduction* to P. Rossi, *Cours de droit constitutionnel*, Paris, Dalloz, 2012.

52 On the debate about the "constitutional position" of the *Charte* see also Ferreira, *Les équivoques du "constitutionnalisme octroyé"*, cit., pp. 103-109.

53 *Rapport au Roi sur la création d'une chaire de droit constitutionnel*, 22 August 1834.

54 Cfr. Ch. Durand, *Les décrets-loi napoléoniens devant la jurisprudence de la Restauration*, in *Etudes offertes à Jean Macqueron*, Aix-en-Provence, University of Aix-en-Provence, 1970, pp. 269-277 and above all the works of J.-L. Mestre, *Les juridictions judiciaires et l'inconstitutionnalité des ordonnances royales de la Restauration au Second Empire*, in «Revue française de droit constitutionnel», 15, 1993, pp. 451-461; Id., *La Cour de Cassation et le contrôle de constitutionnalité. Données historiques*, in *La Cour de Cassation et la Constitution de la République*, Aix-en-Provence, Presses Universitaires de Aix-en-Provence, 1995, pp. 35-67; Id., *L'inconstitutionnalité des actes réglementaires de 1814 à 1851*, in F. Burdeau (ed.), *Administration et droit*, Paris, L.G.D.J., 1996, pp. 123-133; G. Bigot, *L'autorité judiciaire et le contentieux de l'administration. Vicissitudes d'une ambition, 1800-1872*, Paris, L.G.D.J., 1999; M. Fioravanti, *Le potestà normative del governo. Dalla Francia d'Ancien Régime all'Italia liberale*, Milano, Giuffrè, 2009.

55 Court of commerce, *La Pelouze et Chatelain c. Gaultier-Laguione*, 28 july 1830, in «Recueil Sirey», 1830, second part, p. 223. Cfr. A.M. Dupin aîné, *Révolution de Juillet 1830. Caractère légal et politique du nouvel établissement fondé par la Charte constitutionnelle acceptée et jurée par Louis-Philippe 1er, roi des Français, en présence des deux Chambres le 9 août 1830*, Paris, 1833, pp. 82 ff.

56 On this case cf. J. Luther, *Idee e storie di giustizia costituzionale nell'Ottocento*, Torino, Giappichelli, 1990, pp. 128-131; Mestre, *La Cour de Cassation*, cit., pp. 42-43; Bigot, *L'autorité judiciaire*, cit., pp. 214-216; P. Alvazzi Del Frate, *Il giudice naturale. Prassi e dottrina in Francia dall'ancien régime alla Restaurazione*, Roma, Viella, 1999, pp. 211 ff.

57 «[…] la cour rendra un service, et le plus grand de tous; elle ramenera le Gouvernement à la loi, elle fera échouer, par une résistence patriotique et généreuse, toute atteinte à la constitution du pays […] Voilà, Messieurs, ce qui est profondement triste. Si vous ne pouvez faire justice, s'il est vrai qu'il n'y a aucun moyen légal de protéger un citoyen condamné à mort par un tribunal que la constitution défendait d'établir, il faudra se voiler la tête et désespérer à jamais de la légalité dans notre pays» (*Cour de Cassation*, Geoffroy, 29 june 1832, in «Recueil général des lois et des arrêts» par J.-B. Sirey, Paris, 1832, t. XXXII, part I, pp. 401 ff.).

58 Ivi, p. 401. Already in 1818 Sirey evoqued the need of a control by the Court of Cassation to verify if the ordinances were "constitutional", that is comply with the provisions of the *Charte*. Cfr. Bigot, *L'autorité judiciaire*, cit., pp. 179-181. For a broad analysis of the French debate in legal theory and court decisions on the art. 14 of the Charter of 1814 cfr. Fioravanti, *Le potestà normative del governo*, cit., pp. 73 ff.

59 A. De Tocqueville, *Democracy in America, HIstorical-Critical Edition of De la démocratie en Amérique*, ed. Eduardo Nolla, translated by J.T. Schleifer, Indianapolis, Liberty Fund, 2010, <http://oll.libertyfund.org/titles/2285>, november 2017. See Laquièze, *Le contrôle de constitutionnalité de la loi aux Etats-Unis vu par les penseurs libéraux français du XIX^ème siècle*, in «Giornale di storia costituzionale», 4, 2002, pp. 155-171.

60 See Bigot, *L'autorité judiciaire*, cit., pp. 217 ff. and above all Mestre, *La Cour de Cassation*, cit., pp. 47 ff. Cf. also P. Laroque, *Les juges français et le contrôle de la loi*, in «Revue du droit public», 33, 1926, p. 72.

[61] F. Berriat-Saint-Prix, *Commentaire sur la Charte constitutionnelle*, Paris, Videcoq, 1836, pp. 119 ff. «Ce sont – Barthélemy would write at the beginning ot the twentieth century – les objections que l'on adresse encore à l'introduction en France du système de l'inconstitutionnalité des lois» (*La distinction des lois constitutionnelles et des lois ordinaires sous la Monarchie de Juillet*, cit., p. 21).

[62] Chamber of Peers, 27 August 1842, in «Le Moniteur Universel», 28 August 1842, p. 1866. Shortly before de Broglie had declared: «The compromise of 1830 has brought about the sharing of the public powers ; the contract of 1830 has founded national sovereignty. If this great act is not absolute, definitive; if beyond the Charter there exists something other than the individuals that it protects, than the wills that are subject to it; if our power has got other limits than reason, justice and wisdom, in that case the Charte is simply a lie, the king does not reign, the Chambers, the elected bodies, the electoral body, all that is precarious and provisional».

[63] Chamber of Pairs, 19 August 1842, in «Le Moniteur Universel», 20 August 1842, p. 1811.

[64] Chamber of Pairs, 19 August 1842, in «Le Moniteur Universel», 20 august 1842, p. 1811. See. Laquièze, *Les origines du regime parlementaire en France (1814-1848)*, cit., p. 115.

[65] «[…] Maintenant, quelle est la présomption ordinaire dans un gouvernement, dans une constitution où le pouvoir constituant et le pouvoir constitué n'ont pas été distingués? La présomption, la voici d'après ce qui s'est passé en Angleterre et chez nous. Quand la constitution n'a pas distingué un pouvoir constituant et un pouvoir consitué, et qu'il s'agit d'un acte important, quel que soit le caractère, on s'adresse à qui? Aux trois pouvoirs auxquels la constitution a déféré la souveraineté, a déféré les actes les plus importants» (House of Representatives, 20 August 1842, in «Le Moniteur Universel», 21 August 1842, p. 1829).

[66] De Tocqueville, *Democracy in America*, vol. 1, cit., p. 170. «The laws of 1830 do not, any more than those of 1814, indicate any means to change the constitution. Now, it is clear that the ordinary means of legislation cannot be sufficient for that. From what does the king derive his powers? From the constitution. From what the peers? From the constitution. From what the deputies? From the constitution. How then would the king, the peers and the deputies be able, by uniting, to change something in a law by the sole virtue of which they govern? Outside the constitution they are nothing; so on what ground would they stand in order to change the constitution? One of two things: either their efforts are powerless against the charter, which continues to exist in spite of them, and then they continue to rule in its name; or they succeed in changing the charter, and then, since the law by which they exist no longer exists, they are no longer anything themselves. By destroying the charter, they are destroyed. That is still much more obvious in the laws of 1830 than in those of 1814. In 1814, the royal power put itself, in a way, outside and above the constitution; but in 1830, by its own admission, it is created by the constitution and is absolutely nothing without it. Thus a part of our constitution is immutable, because it has been joined with the destiny of a family; and the whole of the constitution is equally immutable, because no legal means are seen to change it» (Ivi, vol. 2, p. 258).

[67] D. Serrigny, *Traité du droit public des Français, précédé d'une introduction sur les fondements des société politiques*, Paris, 1846, t. I, p. 37). See also Ch. Hello, *Du régime constitutionnel dans ses rapports avec l'état actuel de la science sociale et politique*, Bruxelles, Meline, 1849, p. 265: «Today there is an unanimous reprobation of these both organized and organizers powers, always standing, useless if they are inert, redoubtable if they are active, and whose hand full of storms is constantly open on the constituted powers». Cfr. also O. Jouanjan, *La Constitution de 1791 dans la doctrine constitutionnelle libérale française du XIX*ème *siècle*, in *1791, la première Constitution française*, cit., pp. 437-442.

[68] F. Laferriere, *Cours de droit public et administratif*, Paris, Joubert, 1841-1846², p. 5.

[69] *Ibidem*.

[70] Serrigny, *Traité de droit public*, cit., t. I, p. 72.

[71] On this point see Schmitt, *Constitutional Theory*, cit., pp. 85 ff., 103 ff., 328-329.

[72] F. Guizot, *Histoire des origines du gouvernement représentatif en Europe*, Paris, Didier, 1851, t. 2, p. 150.

[73] «Le Moniteur Universel», 23 March 1847, p. 616. See Rosanvallon, *Guizot et la question du suffrage universel*, cit., pp. 129-145).

[74] Archives Nationales, 42, AP, 297, *Letter* (private) of Guizot to Pellegrino Rossi, Paris Friday 7 May 1847).

[75] Starzinger, *The Politics of the Center*, cit. On the parallel debate in France and England after 1830 on the limited suffrage see A.S. Kahan, *Liberalism in Nineteenth-Century Europe. The Political Culture of Limited Suffrage*, Basingstoke, Palgrave Macmillan, 2003, pp. 21 ff.

[76] Craiutu, *Liberalism under Siege*, cit., p. 140. See also J. Graham, *Donoso Cortés. Utopian Romanticist and Political Realist*, Columbia, University of Missouri Press, 1974, p. 42.

[77] See Del Corral, *El liberalismo doctrinario*, cit., on the Spanish doctrinaire liberalism, especially on Cortés and Cánovas.

[78] Translated into English with the unsuitable title *A Defense of Representative Government*, North

York-Ontario, Captus Press. Cousin, 1991.

79 References in Craiutu, *Liberalism under Siege*, cit., pp. 44-45.

80 J. Drentje, *Thorbecke. Een filosoof in de politiek*, Amsterdam, Boom, 2004.

81 New York, 1996.

82 C. Balbo, *Della monarchia rappresentativa in Italia. Saggi politici*, Firenze, Le Monnier, 1857, p. 209.

83 A. Voßkuhle, *Die Verfassung der Mitte*, München, Carl Friedrich von Siemens Stiftung, 2015, pp. 10 ff.

84 «La gestion de la complexité constitue la tekné de l'esprit libéral, dont la vertu de modération forme la face morale: il faut combiner en vue du meilleur possible» (Jaume, *L'individu effacé*, cit., p. 546). See Craiutu, *Liberalism under Siege*, cit., pp. 291-295 and more widely Id., *A Virtue for Courageous Minds. Moderation in French Political Thought, 1748-1830*, Princeton and Oxford, Princeton University Press, 2012.

85 Quoted by Craiutu, *Liberalism under Siege*, cit., p. 189.

86 On this aspect see, for further references, L. Lacchè, *Il canone eclettico. Alla ricerca di uno strato profondo della cultura giuridica italiana dell'Ottocento*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», XXXIX, 2010, pp. 153-228.

87 C. Balbo, *Dell'uso delle parole moderazione, opinione moderata e parte moderata. Lettera al signor****, Torino, 19-23 giugno 1847, in Id., *Lettere di politica e letteratura edite ed inedite di Cesare Balbo precedute da un discorso sulle rivoluzioni*, Firenze, Le Monnier, 1855, p. 46.

88 «[…] s'efforce d'opérer le progrès sans recourir aux moyens révolutionnaires […]» (Letter of 4 february 1846, in C. Cavour, *Epistolario*, ed. by C. Pischedda, III, 1844-1846, Firenze, Olschki, 1973, pp. 274-275). On this vision of the Italian Liberals in Turin in 1848-1849 see R. Ferrari Zumbini, *Tra norma e vita. Il mosaico costituzionale a Torino 1846-1849*, Roma, Luiss University Press, 2016.

89 Jones, *The French State in Question*, cit., pp. 23-24.

90 Hofmann, *Rappresentanza – rappresentazione*, cit., pp. 539-542.

91 M. Stolleis, *Storia del diritto pubblico in Germania. II. Dottrina del diritto pubblico e scienza dell'amministrazione 1800-1914*, Milano, Giuffrè, 2014 (1992), pp. 542 ff. See also Jakab, *Neutralizing the Sovereignty Question*, cit., p. 379.

92 Cf. C. Schmitt, *Hugo Preuß. Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre*, Tübingen, J.C.B. Mohr, 1930, pp. 8 ff.

93 O. Jouanjan, *What Is a Constitution? What Is Constitutional History?*, in K.L. Grotke, M. J. Prutsch (eds.), *Constitutionalism, Legitimacy, and Power. Nineteenth-Century Experiences*, Oxford, Oxford University Press, 2014, p. 328.

94 A. Laquièze, *État de droit e sovranità nazionale in Francia*, in P. Costa, D. Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Milano, Feltrinelli, 2002, p. 287.

95 «C'est que la souveraineté du peuple ne fonde pas le gouvernement constitutionnel. L'État, ainsi établi à la française, est trop fort, loin de garantir toutes les libertés, il absorbe toutes les libertés; sa forme est la Convention ou le despotisme » (E. Renan, *La monarchie constitutionnelle en France*, in «Revue des Deux Mondes», 1er novembre 1869, then in *La réforme intellectuelle et morale*, Paris, Michel Lévy, 1872, p. 240). For an overview L. Jaume, *L'Etat administratif et le libéralisme. Une histoire française*, Fondation pour l'innovation politique, Paris, June 2009.

96 For a critical analysis of Carré de Malberg's theory of national sovereignty see O. Beaud, *La souveraineté dans la "Contribution à la théorie générale de l'État" de Carré de Malberg*, in «Revue du droit public et de la science politique en France et à l'étranger», 5, 1994, pp. 1264 ff.

97 E. Maulin, *La théorie de l'État de Carré de Malberg*, Paris, PUF, 2003, p. 119.

98 On national sovereignty as supremacy of the Constitution see Beaud, *La souveraineté dans la "Contribution à la théorie générale de l'État"*, cit., pp. 1289 ff.; on the ambiguity of the use of the concept of "constitution" in Carrè de Malberg, Ivi, pp. 1300-1301.

99 On the evolution of the concept of *Rechtsstaat* in Germany after 1848 and the distinction between *État légal* and *État de droit* according to Carré de Malberg, see J. Hummel, *Le constitutionnalisme allemand (1815-1918): le modèle allemand de la monarchie limitée*, Paris, PUF, 2002, pp. 123-127.

100 Beaud, *La souveraineté dans la "Contribution à la théorie générale de l'État"*, cit., pp. 1266, 1269-1273.

101 P. Brunet, *Entre représentation et nation: le concept d'organe chez Carré de Malberg*, in O. Beaud, P. Wachsmann (eds.), *La science juridique française et la science juridique allemande de 1870 à 1918*, Strasbourg, Presses Universitaires de Strasbourg, 1997, pp. 273-293.

102 Laquièze, *État de droit e sovranità nazionale in Francia*, cit., pp. 297-299.

103 C. Schönberger, *Penser l'État dans l'Empire et la République: critique et réception de la conception juridique de l'État de Laband chez Carré de Malberg*, in Ivi, pp. 255-271; Id., *De la souveraineté nationale à la souveraineté du peuple. Mutations et continuité de la théorie de l'Etat de Carré de Malberg*, in «Revue française de l'histoire des idées politiques», 4, 1996, pp. 297-316; E. Maulin, *Carré de Malberg et le droit constitutionnel de la Révolution française*, in «Annales historiques de la Révolution française», 328, 2002, pp. 5-27. For a general overview on the French debate during the Third Republic see M.-J. Redor, *De l'État légal à l'État de droit. L'évolution des conceptions de la doctrine publiciste*

française (1870-1914), Paris-Aix, Economica-PUAM, 1992.

[104] Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, cit., pp. 131-136. See also P. Brunet, *Vouloir pour la nation. Le concept de représentation dans la théorie de l'état*, Paris, L.G.D.J, 2004, pp. 32-36.

[105] R. Carré de Malberg, *Contribution à la théorie générale de l'État*, Paris, Sirey, 1920, t. I, pp. 159-160. See A. Petrone, *Carré de Malberg e l'eredità della Rivoluzione: sovranità nazionale versus sovranità popolare*, in «Journal of Constitutional History», 33, I, 2017, pp. 262-263.

[106] For some insights see Maurizio Fioravanti, *Stato e Costituzione. Materiali per una storia delle dottrine costituzionali*, Torino, Giappichelli, 1993; Id., *Appunti di storia delle costituzioni moderne. Le libertà fondamentali*, Torino, 2014, pp. 118-133; Id., *La scienza del diritto pubblico. Dottrine dello Stato e della Costituzione tra Otto e Novecento*, Milano, Giuffrè, 2001, 2 vol.

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

ANDREAS TIMMERMANN, ULRIKE MÜSSIG

1. *Introduction*

Subsequent to the research results of *ReConFort 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 century[1]. 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 legitimation[2]. 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 sovereignty[3].

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 king[4]. 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 king[6]. The reference to national sovereignty in Tit. 1, Art. 3[7] 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' burlesque[10] 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 actions[12]. 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 supralegal 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 spirit[15]. 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 monarchy[17]. The *Cortes* were inaugurated on 24 September 1810[18]. 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 Navy[19].

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 sovereignty[20]. 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 basis[22].

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 else[23]. 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 it[24]. 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 collective[26].

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» afterwards[27]. 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 monarch[28]. 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 represented 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 impact[29]. 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. Allison[30]. 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 arbitrarily[32]. This absoluteness of constituent sovereignty was communicated in France (1791) as well as in 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 defense y resistencia a la opresión*) and the reason Martínez Marina ascribes this revival to the sphere of liberty rights[33]. 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 extent[34]. 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 avoided[35]. 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 state[36].

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 context[37]. 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 community[38].

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 benefits[39], since this expropriation is in favour of the whole community; consequently, every member's position is strengthened[40]. 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 himself[41].

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 will[42]. 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, representing different and antagonistic interests, that the national sovereignty in the Cádiz constitution required. In addition to this anti-Rousseauan 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 representation[45]. 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 wellspring of his legitimacy; his rights derived from his citizenship, and his power from his position in the state hierarchy, rather than from birthright[46].

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 representation[47]. 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 nation[48]. 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 nation[49].

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-critico* 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 moderation[50], 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 people[51].

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 society[54]. 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 bourgeois[55].

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 kingdom[56]. 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 regulation[58].

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 unit[59]. 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 1791[60]. 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 whole[61].

Conversely, some propose that at least the liberal delegates in the *Cortes* understood "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" citizens[62]. 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 century[64].

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 (*asociacíon*)[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 people[68]. 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 constitution[69].

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 territory[70]. 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 power[71]. 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 groups[72].

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 inhabitants[74]. 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 entitles, which together build the sovereignty of the nation (or rather of the kingdom), are represented equally, proportional to the number of the single sovereign provinces[75]. 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 nation[76]. 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 place[78]. 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 interest[79]. 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 nation[80], 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 constitution[81]. 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 national*), a monarchical union was founded on a number of autonomous administrative units that had already been implemented as pre-national entities[82]. 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 body[83].

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 privileges[84]. 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 sense[87].

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 king[88]. 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 characteristic[90].

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 pamphlets[91]. 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 indivisible[92].

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 exile[93]. 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 (*supremacía*), 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 control[95].

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 restore[96]. 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 nation[97]. This idea of the division of sovereignty persisted even to the royal statute of 1834[98]. 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 itself[99]. 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 illegal[100].

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 Spain[101].

The *Cortes* of Cádiz repealed the patrimonial jurisdiction by decree on 6 August 1811, before the approval of the constitution[102]. This included the abolition of the personal charges and special privileges, as well as sovereinty (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 land[104]. 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 agreement[105]. 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 apply[106]. 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 ensured[107]. 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 king[108]. The representatives in the *Cortes* saw no contradiction in the inalienability and indivisibly 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 soberana junta Gubernative*), but also claiming the title «majesty», which had previously been reserved only for monarchs. This set the tone for further developments in Spanish America[109]. Emancipation soon found success in the Viceroyalty of Rió 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 descendants[110]. 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 monarch[111]. If the civil servants acted unjustly, the king did not, and resistance against local authorities did not necessarily imply resistance against

the monarch[112]. 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 Virey-nato*)[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 altogether[114]. 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 constitution[115]. 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 1811[116].

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 control[117]. 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 inhabitants[119]. 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 texts[120]. 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 afterwards[123]. 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 debates[125].

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 secularization[126] 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 power[127]. 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 constitutionalism[128], the prevailing discourse patterns with regard to national sovereignty relied on the mutual power of people and king[129]. 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 conflict[130]. The metaphorical equivalence between the human organism and the political community in late Scholasticism[131] led to the understanding of the nation as an organic unity[132]. 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 monarch[133], which still matched the particular preconditions that characterized nineteenth-century Hispanic-American constitutionalism[134]. 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 provinces[135].

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 nation[137], 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 Spain[143]. With this lack of a separation of law and religion, the *Cortes* contradicted the cosmopolitan and religious principles of the Enlightenment[144], 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 conceivable[147].

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 century[148]. 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 significance[151]. 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 Córtes*, 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 política y de la soberanía del pueblo*, Madrid, Imprenta de Fermin Villalpando, 1813, vol. I, p. XL; M. Artola Gallego, *Los origenes de la España contemporánea*, vol. 2, Madrid, Sílex, 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 monarquia 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 soberania de la nacion*, Madrid, Imprenta de D. Eusebio Aguado, 1830, p. 23.

[11] «*epectáculo 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, *Modernidad 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 origenes de la España contemporánea*, vol. 2, Madrid, Instituto de Estudios Politicos, 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 política 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, Crítica, 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 (*juntas provincials*) set up to organize the guerrilla war and to coordinate the British aid. J.L. Brey Blanco, *Liberalismo, nacíon y soberanía en la Constitución española de 1812*, in I. Álvarez Vélez (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 reasume la soberanía*, in I. Czeguhn and F. Puértolas (ed. by), *Die spanische Verfassung von 1812. Der Beginn des europäischen Konstitutionalismus*, Regenstauf, 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 instalacion 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 ningun valor ni efecto la cesión de la corona que se dice hecha en favor de Napoleon, no solo por la violencia que intervino en aquellos actos, injustos é ilegales, sino principalmente por falterle 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 neuzehnten 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, *Orígines del regimen 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 Politicos 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 tambien 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 Cientificas, 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 Almargo, *Orígines 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, *¡ Libraos de Ultramaria ! el fruto podrido de Cádiz*, in «Revista de Estudios Políticos», 97, 1997, p. 58.

59 F. Martínez Marina, *La Constitución española de 1812*, Madrid, Villapando, 1813, p. 308.

60 J. Cadart, *Institutions politiques et droit constitutionnel*, vol. 1, Paris, LGDJ, 1979, p. 189 ; H. Kurz, *Volkssouveränität 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 des 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., especially 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, baxo de una constitución o gobierno monárquico, y de su légitimo soverano*».

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 províncias de una misma nación, los pueblos de una misma província 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 decis proporcional á la suma de soberanias de sus províncias*». 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: «[…] *quí son los pueblos de España, sino los membros 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 província particular, si algún Pueblo o corta família pretende distinciones que no le corresponda, y solicita mayorías y privilégios sobre otras, pertuba 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 C.f. 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 ejercisio 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 Arizipe, *Memoria presentada a las Cortes por D. Miguel Ramos Arizpe, sobre a situación de las Provincias de Oriente*, in J.M. Ramos Arizipe, *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 moderative 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 membros de toda comunidade 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 Garcia Herreros, 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. I, pp. 619 f.; and appendix: *apêndices a la memoria em 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: *apêndices a la memoria em 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 setiembre de 1811 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 Augustín 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 princípios 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 Cámera de Diputados, *Constituciones políticas del Perú 1821-1919*, Lima, Imprenta Torres Aguirre, 1922, p. 28; also later: *Constitución política de la Républica 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 lbertad 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. Stoetzer, *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. Pölitz, *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 Pölitz, 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 Española», n. LXV, 1995, pp. 127-218; R.P.Fr. Magin Ferrer, *Las Leyes Fundamentales de la Monarchía Española, segun Fueron antiguamente, y segun 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 *Discorso 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. Iñurritegui Rodrígez, 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 Encyklopädie 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.

Constitutionalism as a force of popular loyalty: Constitutional and unconstitutional Württemberg in the early nineteenth century

BODIE ALEXANDER ASHTON

Nationalism and the theories that govern it are difficult to the point of being impenetrable. While nationhood is best defined quite simply as a «concept of unity», that concept — after Michael Hughes — is «something of a quagmire, deep and muddy, frequently not worth the struggle»[1]. In Benedict Anderson's immortal phrasing, the nation is little more than an «imagined community», defined less by geography and more by the creative and sometimes inscrutable means by which people feel as though they belong[2]. Often, these feelings take the form of the equally slippery idea of shared values. This is a staple of modern political rhetoric; «make America great again», for example, works as a concept only if there is a general consensus of what America is and what made (and will make) it great. Additionally, the shift towards an anti-migrant «love it or leave» mentality regarding citizenship in the Anglosphere and elsewhere implies a certain immutability: a country or nation demonstrates characteristics that should not change for newcomers or critics.

These national characteristics are, of course, comfortable (and, sometimes, uncomfortable) fictions, though their role in creating an identity consciousness (the community aspect of Anderson's «imagined communities») is indisputable. But they are predicated upon a sort of eternity or longevity, of an identity stretching back into history. On the other hand, the upsurge in nationalist sentiment that was catalysed by and resulted from the Revolutionary and Napoleonic Wars (1792-1815) occurred within a context in which such longstanding identity markers were impossible. With the post-1815 central European map redrawn beyond pre-1789 recognition, Restoration governments in the German hinterland sought to harness burgeoning national consciousnesses in order to supplement and bolster state loyalties among their subject populations, even while the complexion of those populations remained in flux[3]. In many cases, they were singularly unsuccessful. However, as this paper argues, the southwestern Kingdom of Württem-

berg was one of the few German states for whom the invention — or reinvention — of the state identity was successful in capturing the spirit of the population as a whole. Particularly in the crucial years between the collapse of Napoleon's reign in Europe and the end of the revolutions of 1848-9, a succession of Württemberg state governments, and indeed the crown itself, refashioned Württemberg identity, engendering its subjects not with a patriotism based on the coincidence of territory (*Territorialpatriotismus*), but rather a patriotism based on a commonly-held idea that was portrayed as unique to Württemberg, in this case its constitutional history and heritage. It was this «constitutional patriotism» (*Verfassungspatriotismus*) that maintained a genuine popular faith in the institutions of state and crown during the tumultuous years between the end of the Napoleonic Wars (1815) and the formation of the German Empire (1871). It was also, conversely, the liberties afforded by this constitutionalism that permitted prominent Württembergers to become leading figures in the liberal-nationalist unification movement that presaged the 1871 *Reichsgründung* and argued for the foundation of a unitary German state. In the final analysis, a good Württemberger could also be a good German — but to be a good constitutionalist was central to being a good Württemberger.

1. *Introduction to Württemberg constitutional history*

The history of Württemberg constitutionalism as a whole is actually the history of *two* constitutions — the *Tübinger Vertrag* (Treaty of Tübingen, 8 July 1514), and the *Ludwigsburger Verfassung* (Ludwigsburg Constitution, 25 September 1819). Both documents were, for their times, extraordinary in word as well as spirit, not only because they afforded rights and liberties heretofore unparalleled upon the citizenry, but also because they embodied a concrete check and balance upon royal prerogative. Both were initiated during crisis points in the state's history, and both were intended to provide stability in the context of regional uncertainty. Furthermore, the earlier Treaty of Tübingen acted as a blueprint for the later, and far more modern, Ludwigsburg example. Yet they were fundamentally different in both their intentions and their results.

Codified in 1514 as a power-sharing arrangement between Duke Ulrich of Württemberg and the landed estates (*Landstände*), the *Tübinger Vertrag* followed the English *Magna Carta* by some three centuries. Even so, it stood largely alone in early modern Europe as an example of a treaty and agreement between the duke and the occupants of the land he governed. To each Württemberg citizen, it guaranteed certain fundamental rights and privileges, including freedom of movement and migration, rights to ordinary justice, and the right to bear arms. At the same time, it determined that the duke's ability to harness the resources of his state were curtailed by the requirement that these be coordinated in conjunction with the agreement of the estates. Thus, no tax could be imposed by the duke unless it was agreed to by the assembled estate representatives in the Stuttgart State Assembly (*Landtag*). In times of emergency and for the purposes of the «salvation of the state», the duke could call upon the citizenry for military service, but only «with the advice,

knowledge and will of the general estates» (*mit rat, wissen und willen gemainer landschaft*)[4]. What this meant in practice was not adequately expressed; as James Allen Vann notes, much of it was formulated in order to address specific issues relevant to the context of 1514 and, in other cases, the document was frustratingly vague[5]. Nevertheless, the spirit of the contract was one of balance. The *Landtag* of 1584, at which the question of balancing state budgets was a key issue, provides an example of this. At the conclusion of this assembly, Duke Ludwig III thanked the estate representatives for their «willing readiness» to accept and elevate him as the «rightful father of the land» (*rechter Landesvater*), but also insisted that they were bound by the laws of the state and would be encouraged to limit their expenses. «The estates accepted this address "thankfully and with joy"», we are told, «but they reminded the duke at the same time that it would not be enough for them to have appropriated the debts [of the state], he himself would also have to rightfully save»[6].

Financial issues were often at the forefront of estate concerns, and were a frequent source of tension between the ducal house and the *Landtag*. In 1692, for instance, Friedrich Karl, Duke of Württemberg-Winnental and regent of Württemberg since 1677, attempted to raise a standing army by activating the emergency military duty clause in the Treaty. In spite of the fact that Württemberg was, indeed, in the midst of a regional emergency, he was repudiated by the estates. The legal advisor to the *Landtag*, Dr. Johann Heinrich Sturm, argued forcefully that the raising of a permanent Württemberg army was a gross violation of the traditional liberties and rights guaranteed by the Treaty of Tübingen, would place an unreasonable financial burden on the estates, and was nothing less than a mockery of «all legitimate Christian, German, non-Machiavellian polity»[7]. On much the same issue, one of Sturm's successors, Johann Dietrich Hörner, argued in 1724 that a standing army would require the hiring of foreign mercenaries, who would be able to influence state politics and, potentially, undermine the authority constitutionally guaranteed the estates[8].

It is true that the constitution was an asymmetric application of power distribution. That is to say, while the constitution conferred rights upon the ordinary citizenry, it did not concentrate power in those citizens' hands. That was left to the members of the so-called *Ehrbarkeit* (worthies). This was a socioeconomic group consisting of select, close-knit, and intertwined families, from which representatives were selected for the Württemberg *Landtag*. Theoretically, Württemberg historically lacked enduring traditions of primogeniture, which in turn precluded the development of the noble houses found elsewhere. In practice, the *Ehrbarkeit* dominated the estates and therefore the political process entrusted to the estates. Its monopoly of power had the added effect of closing the *Ehrbarkeit* to outside influences; as Peter H. Wilson notes, by the 1680s «it was almost impossible for any individual to join them either from the lower social orders within the duchy, or from other groups outside it»[9].

The implication with regards the actual implementation of the Treaty of Tübingen was twofold. Firstly, it conditioned the Württemberg political process towards an inherent institutional defence of vested es-

tate interests. This occasionally brought the estates into conflict with the duke, as in the example of Friedrich Karl's appeal to expand the standing army. The *Landtag*'s reticence may have forsaken prudent security in favour of vested financial interests. But this does not entirely do justice to Dr. Sturm and his contemporaries, who had reason to hold the regent under suspicion. The *Ehrbarkeit* represented itself as the defender of constitutionalism, and in some respects it was correct. The Württemberg dukes were frequently overambitious in their aims, often at the expense of the duchy. In 1688, Friedrich Karl he had attempted to raise three cavalry regiments to lend to William of Orange against the French. This he did without consulting the *Landtag*, a flagrant breach of the Treaty of Tübingen made even worse by the fact that the French responded by invading Württemberg and imposing financial reparations upon the estates. Successive dukes' attempts to fulfil Friedrich Karl's ambition to transform Württemberg into a regional military power also failed on the estates' refusal to approve new taxes and conscriptions and, when they were given free reign, the results were invariably financially ruinous[10]. This also meant that the *Ehrbarkeit* became a lightning rod for public opinion. After all, the same provisions that guaranteed the representation of the estates in the *Landtag* also provided for the judicial rights of the public at large. Estate reluctance to approve any new taxations or levies, while probably motivated out of self-interest, also had positive consequences for non-*Ehrbarkeit* citizenry.

It would be glib, perhaps, but still not entirely incorrect, to suggest that Württemberg constitutionalism continued in much this vein until the early nineteenth century[11]. In spite of the efforts of some of the Württemberg dukes who, in the mould of Friedrich Karl, attempted to exert a greater monarchical influence over the state than the constitution allowed, the Treaty of Tübingen remained in force (though its boundaries were periodically tested). However, the process by which Württemberg's constitutional history and identity were transformed began in 1797, upon the death of Duke Friedrich II Eugen. His successor — his eldest son Friedrich II — was, by most accounts, coarse, vulgar, and given to a violent temper; in 1785, his first wife, Augusta von Braunschweig-Wolfenbüttel, had sought sanctuary in St. Petersburg, on the grounds of frequent and violent abuse. Friedrich was also deeply suspicious of the estates and, in particular, their constitutional ability to rein in his own exercise of power. The most obvious example of this was Friedrich's withdrawal of the Treaty of Tübingen in 1806, shortly after his elevation to kingship by Napoleon Bonaparte in return for Württemberg's alliance with the French of 5 September 1805. This, he argued, was a result of the complicated relationship between the traditional territories of Württemberg (*Altwürttemberg*) and the new acquisitions — territories annexed by virtue of Friedrich's bond with Napoleon (*Neuwürttemberg*). It would be difficult, perhaps impossible, Friedrich argued, to extend the constitutional guarantees of the Treaty of Tübingen to populations who had never been subject to it. In light of «the altered state of things», the king argued, it would be both foolish and manifestly unfair to apply a state constitution to only half of Württemberg[12]. With this pretence, nearly three centuries of constitutionalism came to a close, with the constitution itself sus-

pended indefinitely. However, Friedrich had never made a secret of his disdain for the Treaty and its checks and balances. As crown prince, he has written (albeit anonymously) a novel, *Schach Baham*, in which he dismissed the *Landtag* as «the eternally and completely meaningless Assembly of High Cattle [being the *Ehrbarkeit*] and representatives of individual towns»[13]. After his ascension to the throne, Friedrich's relationship with the estates became more and more strained, as he attempted to wrest more legislative oversight away from those empowered by the 1514 constitution[14]. In 1803, coinciding with his elevation to the role of elector of the Holy Roman Empire, Friedrich began to extend his influence over local politics. This he did by directly appointing the district scribes (*Schreiber*). These scribes, typically «unsupervised and unregulated», fulfilled something akin to a *de facto* role of local administrator and arbiter within regional towns and districts, while maintaining autonomy from the state centre. By 1803, Friedrich had begun eroding this local institutional independence, ultimately doing away with it completely after the repudiation of the Treaty of Tübingen.

Friedrich's anti-constitutional movements coincided with significant developments with regards his power relationships on the geopolitical stage. His ascension to electorship in 1803 afforded him a greater degree of prestige than his dukedom; his elevation to king, facilitated and supported by the arrival of French troops in Württemberg territory, did likewise. Moreover, whatever pretensions Napoleon might hold in the historiography as a «symbol of lost liberty», or the totem of «liberal Bonapartism», he had little need or use for an indigenous constitution — especially not one already defunct — in a state that, while theoretically an ally, was hardly more than a vassal[15]. Thomas Nipperdey's path-breaking survey of German history of the nineteenth century begins with the prosaic words: «*Am Anfang war Napoleon*» («In the beginning there was Napoleon»)[16]. While the Franco-Württemberg Alliance of September 1805 was not, in fact, the starting point for the destruction of Württemberg constitutionalism, it did provide impetus to both internal and external forces that hastened the dismantling of the edifice of the *Tübinger Vertrag*. The privations forced upon the citizenry soon outstripped anything that even Friedrich Karl had attempted when Sturm had criticised him as «Machiavellian». The immediate levies imposed by the French — to the tune of some eight million francs and 2,000 horses — were soon outstripped by their demands on Württemberg manpower[17]. Between 1805 and 1813, for instance, more than 80,000 French troops were stationed in Württemberg, in what was essentially an occupation in all but name. Just as French soldiers arrived, Württemberg men were dragooned into service in the *Grande Armée*. In the Russian campaign alone, beginning in 1812, some 15,800 Württembergers took to the field. Of these, approximately 500 returned. The casualties suffered in the Russian campaign made up the lion's share of the roughly 27,000 Württembergers killed during the Napoleonic Wars[18].

It would, of course, be spurious to suggest that a more constitutionally dedicated king than Friedrich would have been able to keep the *Tübinger Vertrag* intact in the years of Napoleonic subservience. Had it survived, the constitution would certainly

have offered no resistance whatsoever to Napoleon's designs. Even so, its absence was keenly felt. Whatever Friedrich's true power in his relationship with the French — negligible at best[19] — the advent of the French alliance had permitted Friedrich the occasion to rid himself of the very constitution he had been railing against for years. Moreover, while it would have offered no *realistic* protection against the privations suffered between 1805 and 1813, the fact that these would have been deemed unconstitutional under the letter and spirit of the Treaty of Tübingen afforded the dissolved constitution a further measure of theoretical (or emotional) relevance, as a symbol of hypothetical, anti-Napoleonic and anti-despotic resistance. Gradually, as the war and public opinion turned against Napoleon, Friedrich began looking for means to extricate himself from what had become an unpopular conflict. The occasion of this defection was the Battle of Nations, outside Leipzig, in 1813. From this point until Napoleon's final defeat at Waterloo, Württemberg counted itself a member of the allied Sixth Coalition.

The end of the Napoleonic Wars left Württemberg in a precarious political position. Externally, Friedrich faced a complex diplomatic situation. The major victorious powers of the Sixth Coalition were hardly well-disposed towards him, given his role as one of Napoleon's allies for the best part of a decade. To this end, the Congress of Vienna became a curious mixture of Federician bravado and atonement, as the Württemberg king tried to consolidate and even expand the gains he had made under Napoleon, while at the same time mending fences with his once-foes. In this regard, he was at least partially successful, though on the surface he appears to have been wholly inept at currying favour. In spite of numerous entreaties to the Russian delegation, for example, he was dismissed by Maria Nesselrode, the wife of the Russian diplomat Charles de Nesselrode, as a despot, and by the Prussian statesman Karl vom und zum Stein (then in Russian service) as «the Württemberg tyrant or sultan»[20]. On the other hand, and in spite of the personal opprobrium that he attracted, Friedrich was at the very least able to secure the territories, resources, and population that Württemberg had gained by 1806 (although his proposal to annex a portion of eastern Baden met with no success at all).

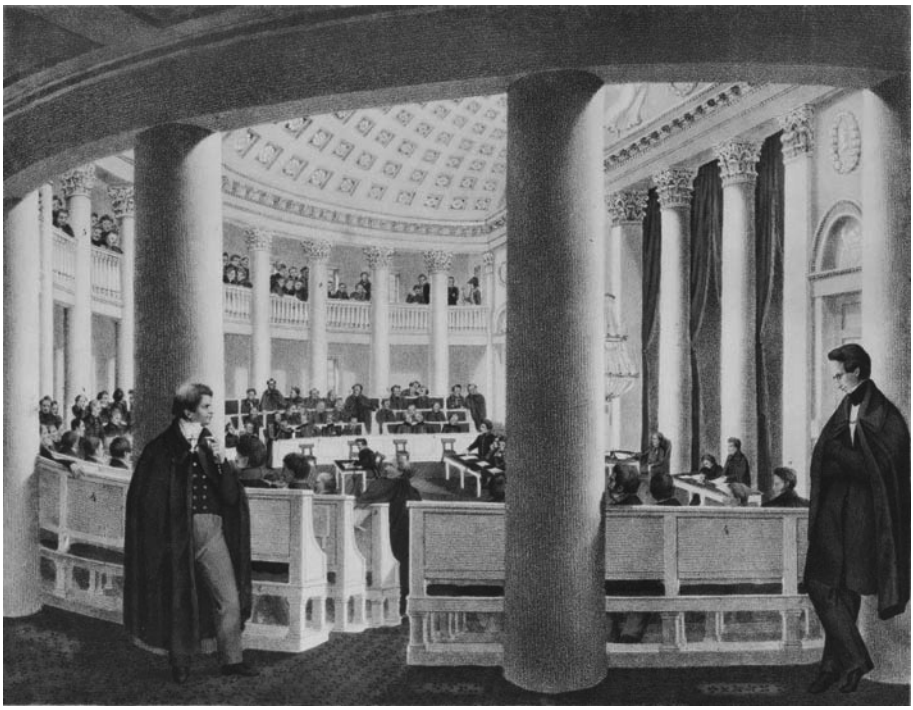
Having safeguarded Württemberg's continued external existence — which had hardly been a given when the Congress convened — the crown now faced an internal crisis. The ratification of the German Confederal Acts (*Deutsche Bundesakte*) on 10 June 1815 stressed the requirement that «in all confederal states an estate-based constitution will be enacted»[21]. Even before this, however, Friedrich had surprised many, both within his state and those sitting on the German Committee in the Congress, by announcing his intention to draft a new constitution. This constitution, provisionally announced on 18 January 1815, appeared on the face of it to contradict most of Friedrich's established behaviour as a neo-absolutist king. After all, he had been quick to grasp any opportunity to minimise the constitutional borders imposed on him by the Treaty of Tübingen, and one of his first acts as king had been to do away with the constitution completely. But with his newfound constitutional interests, Friedrich was attempting to maintain control of a process that was beginning to slip

away from him. Certainly, he could not afford to alienate his allies in the Congress, nor ignore a groundswell of estate-based opposition at home, led by the Stuttgart mayor Heinrich Immanuel Klüpfel and the prominent lawyer and poet Ludwig Uhland. However, by this point, Friedrich himself was ailing and, on 30 October 1816, he died. Undoubtedly Württemberg's most successful king in terms of territorial acquisition and the accumulation of power, Friedrich nonetheless passed unlamented by a population almost universally alienated by its king. His successor, Crown Prince Friedrich Wilhelm, adopted both the throne — as King Wilhelm — and the unresolved and complex constitutional rivalry.

The Ludwigsburg Constitution, enacted by Wilhelm in 1819, was neither universally praised nor condemned; throughout its existence, it remained a battleground of opinion both within and outside the state. Yet its importance can hardly be doubted. With its introduction, the constitutional struggles (*Verfassungskämpfe*) in the aftermath of the Napoleonic Wars came to an end; in comparison to the other states around Württemberg, however, this caesura was not a false dawn but a true beginning of consensual, holistic governance. Only once, in the latter part of the maelstrom of the 1848-9 revolutions, was the constitution suspended by the crown (and then only briefly). Otherwise, from 1819 until the foundation of the German Empire in 1871, Württemberg remained an oasis of relative political and social calm. At a base level, the reason for this can be found in the manner by which Württemberg political identity intermixed with that of social identification. The end result was a society that was unusually politically aware, permissive in its ability to express that awareness, and conscious of the relationship between constitutional mechanisms and a political milieu that made this awareness and engagement not only possible, but desirous.

2. *Fostering pride in constitutionalism*

A constitution is unlike any other legislative document, and it holds a special place within the pantheon of laws and statutes. Gladstone's famous commentary on the United States Constitution — that it is the «most wonderful work ever struck off at a given time by the brain and purpose of man» — interests us here less because of the specific constitution it praises, and more because of what it tells us about the nature of constitutions as a whole. Gladstone's meaning becomes more intelligible once his point on the American example is taken within the context of its preamble, which claimed that the «British Constitution is the most subtle organism which has ever proceeded from progressive history». Here, Gladstone was not criticising British constitutionalism in favour of American, but rather comparing two superlatives of the different methods by which constitutions could be realised: either through an artifice of conscious genius (as in America), or else through a quasi-organic process that developed gradually over time, embodying a synthesis of acquired and assembled knowledge and rights[22]. The necessary addendum to this point is that a constitution's genius (whether artificial or organic) is of little relevance if it is not recognised to be such. In other words: constitutional guarantees of rights and liberties



1833 lithograph showing the Halbmondsaal, the Plenary Hall of the Second Chamber of the Wurttemberg Landtag, opened in 1819

mean very little unless the population subject to them recognise their importance.

In Württemberg, constitutional heritage and its requisite guarantee of the rule of law became a totem of cultural state identification. This identification was already well-established in the years between Duke Ulrich's founding of the Treaty of Tübingen in 1514, and King Friedrich's abrogation of it in 1806. But the establishment of the Ludwigsburg Constitution in 1819 initiated a new phase of constitutional appreciation, in which Württemberg constitutional history in its totality became a point of distinction and pride. This distinction was encouraged by the state; because of this, while most German state apparatuses suffered existential crises after the Napoleonic Wars, Württemberg's remained for the most part intact and secure.

This stability was all the more surprising, given the relatively disparaging view of the state from the outside. Indeed, visitors tended not to think kindly of Württemberg. In the 1760s, Giacomo Casanova's brief but typically scandalous stay in the capital, Stuttgart, led him to write that Stuttgart was «wretched», the state populated by «dull peasants and workmen of the lowest class», and the duke given to indulgence and debauchery — a curious charge for Casanova, of all people, to level against him, but perhaps representative of many prevailing opinions of the time. Around the

same period, the journalist Wilhelm Ludwig Wekherlin agreed that Stuttgart was «a mass of ugly buildings», while the inhabitants were «uncivilised». The English novelist Frances Milton Trollope, writing in the 1830s about her travels through the south of Germany, thought the Württemberg capital was much like «any other [...] ordinary village»[23]. The Prussian brothers Jacob and Wilhelm Grimm, meanwhile, included in their collection of German folktales the story of the «Seven Swabians», a band of dim-witted and cowardly Württembergers who ended up drowning in the Moselle when they mistook the croaking of a frog for a command to ford the river[24].

While the apparent view of Württembergers was one of backwardness and a lack of sophistication, within the state this was not the case, though a distinct identity had indeed developed. This identity was recognised in 1781 by the author and publicist Friedrich Nicolai who, like Casanova and Wekherlin before him, and Trollope afterwards, had undertaken a tour of the south German provinces. After returning to Berlin, he published a volume of his travel reports shortly before the outbreak of the French Revolution. These reports, collectively entitled *Unter Bayern und Schwaben*, offer a glimpse of Württembergers fundamentally different to that offered by the jaded Casanova, the acerbic Trollope, or the comical fairy-stories of the Grimms. Perhaps expecting the coarse-mannered and poorly-educated yokels reported years earlier by Wekherlin and Casanova, Nicolai found instead a population unusually well-versed in the state's body politic. Central to this was a core belief in and understanding of the state's unique constitutional heritage. Much to Nicolai's amusement, this pride was reflected in the Württembergers' piteous attitude towards this Prussian visitor. «Many Württembergers not only have a special confidence in their country's constitution, which is very laudable, but also a very high opinion of its benefits», Nicolai wrote. «With a smile I noted that these free citizens, while praising their unique constitution, look upon us poor Brandenburgers as though we were slaves»[25]. Nicolai sought to explain why the Württembergers seemed to be so cheerful and contented that they «cause in me [...] such a comfortable feeling». This feeling he contrasted with «those who complain about their situation, which is sure to [be heard by] any stranger in Ulm or Nuremberg»[26]. Later, the English Whig statesman Charles James Fox would remark that Württemberg's was one of only two 'genuine' constitutions in Europe (the other being Britain's)[27]. In fact, this observation predated both Fox and Nicolai, the latter of whom cited the «naïveté» of «the editor of the *Geographie Württembergs* for claiming that «the form of government in Württemberg is like the English in miniature»[28].

The observations of Nicolai, Fox, and others are important here for a number of reasons. Firstly, they demonstrate that a discourse already existed that prized the constitution as something that, on the Continent at least, was different to any other. Perhaps the unnamed author of the *Geographie* was naïve, as Nicolai suggested, but the fact that his search to find a comparator for the *Tübinger Vertrag* took him across the Channel and to the vaunted pages of the *Magna Carta* shows the «special» nature of this document. More relevant to our purpose here, Nicolai showed that the Württembergers were aware of this legislative

uniqueness, and cherished it. Indeed, the general contentedness of the people, which Nicolai contrasted sharply to the dissatisfaction he found in other states and the imperial cities, was — in his estimation — the fundamental result of constitutionalism.

This was also evident during the period in which the constitution was withdrawn. In general, the prevailing attitudes in 1806 followed two trends. The first was embodied by the *Schreiber* Heinrich Bolley, from the town of Waiblingen. It will be remembered that Friedrich had already intruded upon the political autonomy of the *Schreiber* tradition. But the total removal of the constitution inspired Bolley and his fellow Waiblingers to write a petition addressed to the king, demanding its reinstatement[29]. The other response to the end of constitutionalism was characterised by the Stuttgart publisher Johann Friedrich Cotta. Cotta, himself a liberal, continued to espouse the beliefs and opinions that many others in and around his circle of intellectuals had held upon the outbreak of the French Revolution: namely, that French intervention in the German hinterland might herald a sociopolitical renaissance. Even after Napoleon had changed the course of the revolution, and even as late as 1808, Cotta wrote to Johann Wolfgang von Goethe, predicting that Napoleonic influence on the House of Württemberg would compel Friedrich to grant a further liberalisation of domestic politics, broaden the rights and liberties enshrined in the constitution, and countenance a greater degree of direct popular engagement in the *Landtag*[30]. Neither of these branches of thought had any chance of coming to fruition. In the first case, the Waiblingen complaint was a constitutionally-bound measure that, in order to be effective, presupposed that the constitution to which it adhered was still in force. In effect, it acted as a complaint against a *breach* of the constitution. The fact that it was actually a protest against the *dissolution* of that same constitution adds a level of farce to proceedings; Friedrich was playing from a different set of rules than the Waiblingen constitutionalists. As for Cotta and his hoped-for liberalisation, his was an unfortunate misreading of the meaning of Bonapartism, which he soon recognised. By 1813, Cotta was acting as a confidential courier between the courts of Austria and Württemberg, and helped to facilitate Württemberg's defection to the Sixth Coalition.

The «special confidence» in the Treaty of Tübingen, as remarked upon by Nicolai, was also, as F.L. Carsten notes in his seminal *Princes and Parliaments in Germany* (1959), «a marked pride» on the part of the citizenry as a whole[31]. Because of this, its abrogation was seen not as a transaction of state, but as a tremendous stain upon the honour of the state as a whole, and a reflection on Friedrich himself as untrustworthy and shameful. Such was recognised by an anonymous pamphleteer who, writing his essay *Würtembergs Rechte* as the «first word of an appeal to the high liberators of Germany», asked his readers how much Friedrich's kingly crown had cost, and then provided the answer: «an outrageous breach of an oath, many thousands of people coerced, exercises of force innumerable, suppressions of the [public] will and exuberance. The purchase of the crown cost: human blood of 30 to 40 thousand of the most hopeful youths of the children of the land». The responsible party, and the act that facilitated this calamity, are

also identified: «Friedrich the First, the first tyrannical lord of Würtemberg [sic.], through the *breach of the oath of his sovereign word*»[32]. Other voices of protest soon followed. Politically, the most prominent of these was Karl August von Wangenheim. As the chancellor of the University of Tübingen, Wangenheim had been a state appointee. But Wangenheim, an intellectual in his own right, was also heavily influenced by one of his philosophy professors, Karl von Eschenmayer, who himself closely followed the humanistic philosophical tenets of Friedrich Wilhelm Joseph von Schelling[33]. Wangenheim's 1815 treatise, *The Idea of the State Constitution* (*Die Idee der Staatsverfassung*), is one of the most prescient masterpieces of Restoration-era political thought, made even more remarkable by Wangenheim's relationship to the crown that he was criticising both obliquely and acutely. Wangenheim's work was essentially a demand to return to constitutionalism, arguing that the basis of the ideal civil society was «three principles», namely freedom, equality, and security, which were established and expressed through property, the sociopolitical contract between state and *Volk*, and the maintenance of popular representation in politics via electoral suffrage. To the treatise's author, these were the selfsame principles that were enshrined in the Treaty of Tübingen, which had guaranteed «the personal and political freedom of the Wirtembergers [sic]»[34]. Moreover, though the king was afforded powers, these were «law-given», and constrained by «the constitutionally accepted agreement with the representatives of his people»[35].

Wangenheim's defence of the Treaty of Tübingen as a vital component to the state's legitimacy was therefore an assault on the lack of constitutional rule in Württemberg such as it existed when he wrote his treatise. But if this was extraordinary from the political-philosophical perspective, it was soon matched by one more accessible to the public outside of Wangenheim's academic community. In a series of «Fatherland Poems» (*Vaterländische Gedichte*), first published in 1816, Ludwig Uhland mourned the «old good law» (*altes gutes Recht*) that had been stripped away by the withdrawal of the constitution. Much as the anonymous author of *Würtembergs Rechte* saw the abrogation as the moment of rupture that suppressed the «exuberance» of the public, Uhland recognised it as the event that sullied all of Württemberg's otherwise praiseworthy physical beauty and cultural richness[36]. Uhland spared no blushes in his works, and his anger towards the crown for abrogating the Treaty is palpable from the very opening poem of the *Vaterländische Gedichte*. Entitled «Am 18. Oktober 1815», this honoured the mayor of Stuttgart, Heinrich Klüpfel, who had become the totemic figurehead of estate opposition to Friedrich, and the leading voice in the calls to reinstate constitutional law. Here, Uhland delivered an impassioned (albeit implicit) criticism against the king by hailing Klüpfel as a «forever faithful» representative of Stuttgart, who «guards that most precious to us», and as a result became the man «to whom we are most closely bound»[37]. Uhland took Klüpfel to be the embodiment of the spirit of the *altes gutes Recht*, and thus of the Treaty of Tübingen; the ties between poet, people, and politician suggested a close popular relationship with and will for the reinstatement of the constitution.

Friedrich's death in 1816 came at a vital moment. With the ascension of King

Wilhelm, Württemberg now had a younger monarch, who had emerged from the Napoleonic Wars with his image relatively unsullied (he had, after all, led the Württemberg 'liberation army' against the French in late 1813 and 1814). Wilhelm inherited a state bordering on both a crisis of identity and an even more pressing, material catastrophe. In the first place, a divide between the inhabitants of *Altwürttemberg* and *Neuwürttemberg* remained. Indeed, the only thing that bound the New Württembergers to the old state (beyond the bureaucratic realities of annexation) was a shared history of recent suffering in the Napoleonic Wars. If ever the suspension of the constitution had helped to ameliorate the problems of absorption, as Friedrich had claimed in 1805, then this was certainly no longer the case. This was hardly a question of minor importance; annexed territories in other states were hotbeds of insurrection and unrest. During the Napoleonic Wars, for example, a rebellion against the Bavarian government was carried out by a band of Tyrolean guerrillas led by Andreas Hofer[38]. In Baden, the political situation was best described as incendiary. In coming years, public disorder was so endemic that, on several occasions, it verged on civil war. Deadly clashes swept throughout the major population centres in 1819, with further violence experienced in Tauberbischofsheim, Heidelberg and Pforzheim in 1832, 1838 and 1839 respectively. This was something to be avoided and, as opposed to what Friedrich had argued in 1805, some argued that the only solution was not only a reinstatement of the constitution, but also an extension of its competences. Before Friedrich's death, this argument had already been tendered by the protagonists of the constitutional movement. Wangenheim, for example, had conceived of unity both embodied in and encouraged by constitutionalism. He conceived of the ideal state as a «spiritual organism» characterised by «freedom» rather than «excessive force» — which, without the Treaty of Tübingen in force, was not what the Kingdom of Württemberg represented to the New Württembergers who had seen their own states involuntarily absorbed in the name of Friedrich. Finally, Wangenheim insisted that there was a necessity of the state to promulgate loyalty, both for its own good and the common good of the public and the individual: «If Man is to love the state more than he loves himself – and this he must do, for this is to him a matter of culture – then he must himself help to build the state»[39]. More publicly, on the streets of the capital, the mayor Heinrich Klüpfel led a demonstration 8 July 1816, the three hundred and second anniversary of the Treaty. This demonstration had two objectives. The first was the familiar appeal to the *altes gutes Recht*. The second was to raise concerns that New Württembergers might be relegated to the status of second-class citizens, without protections built into whatever constitution eventually resulted. «May the differentiation between Old and New Württemberg cease», one of the catch-cries of the demonstrators ran, «and every New Württemberger become an Old Württemberger!»[40]. In this way, Klüpfel tied the concept of the *altes gutes Recht* to the equalisation of Old and New Württemberg rights. His prominent supporters, including Uhland, only served to popularise the issue.

On top of these issues, the beginning of Wilhelm's reign was marked by a deep existential crisis. No fighting had occurred

in Württemberg since 1805 and the state had not been laid waste by the privations of war. However, having accrued major public debts during the war, the government had pursued aggressive trade policies from 1814 onwards; in a state founded largely on agrarian commerce, this largely meant the exportation of surplus grain. Initially this policy found some success, but 1816 was a poor year for agricultural yields, and the state not only suffered a shortfall in its export market, but also endemic food shortages that resulted in malnutrition and widespread related illness[41]. A combination of government malaise under Friedrich and jealous protectionism by the landed gentry resulted in the state reacting only belatedly to the crisis. Because of this, in spite of the universal privations of the «Year without Summer», Württemberg stood alone among the German states in terms of mortality, with the death rates exceeding those born in the same period[42]. However, Wilhelm's initial attempts to alleviate the hardships of this *Hungerzeit* met with little success. He was unable to convince the Diet of the German Confederation to lift or ease tariff barriers, which would allow economically viable importation of emergency food supplies, the representatives from Prussia and Austria both contended that this would impinge on their sovereign rights to set their own taxes, tariffs, and duties. At home, Wilhelm sought means by which a future *Hungerzeit* could be avoided. To this task he appointed Ferdinand Heinrich August von Weckherlin, a state councillor, prominent figure within the treasury and, later, Wilhelm's finance minister between 1821 and 1827. Weckherlin was a forward-thinking economist with a keen eye for detail. He was also no respecter of privilege, and he saw the traditional landed estates as a financial millstone around Württemberg's neck. The vested agrarian interests of the gentry were antiquated, he decided, and in the present crisis unconscionable. Württemberg now had double the mouths to feed, but the majority of the casualties from the wars had come from the young, able-bodied men who usually tilled the fields. Coupled with the inclement weather, Württemberg's dependency on agriculture was simply too unreliable. A much better proposition was to follow the example of Great Britain, in particular with regard to its emphasis on mechanised industry. The appropriation of steam power and other facets of industrialisation could revitalise some sectors of the Württemberg export market (such as the textile centres of Calw and Heidenheim), and perhaps open new ones, such as metal production. This, however, would necessitate a large state investment in industry, which in turn would require a decrease in crown subsidies in agriculture. For these reasons, the estates responded with vehement opposition, deeming Weckherlin's proposed reforms to be yet another assault on whatever remained of the *altes gutes Recht*. Consequently, only a handful of innocuous reforms were enacted[43].

These events, however, brought into sharp relief the problems facing both Wilhelm and the state that he now helmed. It was in this context that he launched an ambitious programme of political reform which, in September 1819, resulted in the introduction of a new constitution[44]. This «Ludwigsburg Constitution» clearly used the *Tübinger Vertrag* as its foundation, but elaborated considerably upon it in matters of the rights of the citizen and the manner of the balance between crown and *Landtag*.

The «General Relationship of Rights of the State Citizens» (chapter III) assumed a particular significance, directly following the chapter «of the King, of the Heir to the Throne and the Imperial Administration» (chapter II), and appearing well before the discussion of the privileged rights of the estates (chapter IX). Furthermore, the new constitution realigned the role of the king. True, the constitution began with the customary salutation «Wilhelm, by the Grace of God King of Württemberg», and Article 4 articulated that «[the king's] person is holy and inviolable». But the same article placed restrictions on the king's behaviour. In particular, it stipulated that «[t]he king is the head of state, unites in himself all rights of the state executive, and exercises them in accordance with the regulations set through the constitution». The rights of the citizen, too, were expanded under this legislatively-bound protection. «All Württembergers have the same state civil rights», Article 21 specified, followed by Article 24's guarantee that «the state guarantees to every citizen individual freedom, freedom of belief and thought, freedom of property, and movement freedom», and Article 25's reassurance that «serfdom remains forever annulled». Of particular interest, too, was Article 28, which guaranteed «freedom of the press and the book trade [...] to its fullest extent».

Other innovations, too, made it clear that the Ludwigsburg Constitution was a different beast from its 1514 predecessor. Indeed, if the king's privileges were to be regulated by constitutional articles, then so too were those of the estates. Specifically, Wilhelm introduced a bicameral *Landtag*. The First Chamber (*Kammer der Standesherren*; Chamber of the Estate Lords), fulfilled a function similar to that of Britain's House of Lords, and comprised the leading members of the *Stände*. The Second Chamber (*Kammer der Abgeordneten*; Chamber of Representatives) comprised twenty-three «privileged» members (nobles, the highest officials of the Lutheran and Catholic Churches and the chancellor of the University of Tübingen) and seventy «people's representatives», made up of seven from Stuttgart, Tübingen, Ludwigsburg, Ellwangen, Ulm, Heilbronn and Reutlingen, and another sixty-three from the remaining electoral districts. Also, the *Landtag* enjoyed new vested powers. While the old Treaty of Tübingen, for example, had provided the estates with the ability to veto new taxes, its successor gave them the right of approval or disapproval for both direct and indirect taxation, as well as the three-yearly government budget (chapter VIII). This also required that ministers explain in detail their budgetary requirements, and that a yearly accounting of the state treasury be prepared by a commission jointly appointed by the crown and the estates; this report would then be made available publicly (Article 123). In effect, the estates now had near-total oversight over the crown's financial affairs.

These alterations were hardly accidental. It is clear to see Wangenheim's influences on Wilhelm's formulations; this is not surprising, as Wangenheim was (briefly) Wilhelm's education minister, and thereafter took up Württemberg's representative seat in the Frankfurt Diet. In keeping with Wangenheim's *Idea of the State Constitution*, Wilhelm had expressly laid a groundwork for the expansion of rights to the citizenry, the representation of that citizenry in the political process to a degree

that far exceeded the Treaty of Tübingen, and the voluntary binding of the crown to permissive constitutionalism. The estates had gained new powers, but these were expressly not limited to the Old Württemberg powers-that-were; indeed, the privileged positions afforded the traditional power centres of Württemberg (such as Stuttgart, Tübingen and Ludwigsburg) were now extended to New Württemberg towns, such as Reutlingen. Moreover, the requirement of the public treasury reports, as well as the ministerial justifications, introduced a measure of transparency; to put it bluntly, taxpayers could now see precisely where their florins went, and why. This, coupled with the expansive rights of the citizens as stipulated in chapter III, afforded the Ludwigsburg Constitution an air of anti-absolutism heretofore unprecedented in central Europe in general, and among the states that now made up the German Confederation in particular.

The reaction to the introduction of the Ludwigsburg Constitution, both domestically and outside Württemberg's borders, also demonstrates the degree to which it was a liberalising document. At home, it did much to repair much of the damage done by Friedrich the decade before. Uhland, who had been so vocal in his demands for the return of the *altes gutes Recht*, now took his place in the *Landtag* as a representative. Klüpfel's protestations also faded into the background. Wangenheim, who had argued that the state enjoyed no legitimacy if it were not backed by fair constitutionalism, continued to serve that state in a conspicuous capacity as its spokesman in the Confederal Diet. At the ministerial conference in Vienna in March 1820, Wangenheim showed the esteem in which he held Wilhelm by greeting him as «the king of the Germans»[45]. But perhaps the most telling response was from reactionary Austria. On the eve of the constitution's approval, Clemens von Metternich wrote to the emperor, Franz, expressing his fear that «the balance of the Württemberg assembly may perhaps decide the destiny of Germany»[46]. Franz, evidently moved by Metternich's fears, warned Wilhelm in a letter that a constitution as liberal as the Ludwigsburg Constitution would likely encourage a «scourge of revolution». In response, Wilhelm employed an argument straight from the pages of Wangenheim's *Die Idee der Staatsverfassung*: liberal constitutionalism would not foment rebellion, he wrote, but would instead bind the people, the estates, and the monarch, in a holistic and symbiotic relationship that could only serve the wellbeing of the whole[47].

3. *Maintaining constitutional identification in an era of crisis*

Wilhelm and the Württemberg state apparatus conceived of the Ludwigsburg Constitution as a twofold mechanism. The first aspect of it was the «ordinary» function of constitutive legislation: it acted as concrete regulation for the rights and liberties afforded Württemberg citizens. The second aspect, however, was arguably more important. As Wangenheim had argued in 1815, and as Wilhelm reaffirmed to Emperor Franz in 1819, the constitution was the medium through which a loyalty between the leadership of the state and the subjects of that leadership could be formed and encouraged. Friedrich Nicolai had already noted the importance

of this role when he claimed that, by virtue of the Treaty of Tübingen, «the Württembergers have always loved their dukes, even when they were not particularly satisfied with some decrees»[48]. In Vienna, both Metternich and Franz feared that the danger of the Ludwigsburg Constitution lay in the fact that it was more permissive than its predecessor, and that it introduced greater regulations on state power in relation to the citizenry. Moreover, it was explicitly so. In other words, the Ludwigsburg Constitution was not only liberal, but it could be *seen to be* liberal. This, they feared, would weaken both the state in fact as well as in perception. The result of this would be an undermining of the state's legitimacy to govern and, inevitably, the outbreak of revolution. Wilhelm and Wangenheim, on the other hand, believed that the very opposite would be the case: the more the state surrendered to the oversight and jurisdiction of the people, the more the people would, in turn, trust the state.

The Austrian fears were not without some grounding. Indeed, permissive constitutionalism in and of itself was no guarantor of safety. The Grand Duchy of Baden, for example, faced similar challenges to Württemberg and, in 1818, it introduced a constitution that was arguably «Germany's most advanced and liberal document» at the time, as well as also being intended as a glue to meld the New Badenese with the Old[49]. Yet, as we have seen, Baden was habitually a hotbed of revolutionary sentiment. Its most dramatic examples of this were yet to come; in 1848, for instance, the Badenese *Landtag* deputy Gustav von Struve formed a «revolutionary army» in the Black Forest, with the intention of marching on the capital, Karlsruhe, and thereafter the seat of the Confederal Diet in Frankfurt am Main[50]. But even in 1819, there were strong indicators that Baden would continue to suffer public disorder and unrest, the constitution notwithstanding. Six months before Wilhelm unveiled the Ludwigsburg Constitution, the New Badenese city of Mannheim was the site of the assassination of August von Kotzebue by the student liberal-nationalist Carl Ludwig Sand, the act which had prompted Metternich to introduce the anti-nationalist Karlsbad Decrees[51]. The fact that Württemberg actively opposed these decrees, in spite of the apparent danger of what Baron vom Stein called «this accursed sect», further caused concern amongst the more conservative reactionaries in the German Confederation, which turned to alarm when Wangenheim refused to ratify the Verona Circular. This was a proposal denouncing radicalism in general and, though it did not specifically mention Germany, Wangenheim opposed it on the grounds that it could be used not just as an instrument of law and order but also of oppression. As a result, in 1823 both Austria and Prussia demanded he be recalled to Stuttgart, leaving Wilhelm little choice but to acquiesce. In 1824, fearing the influence of radical liberalism, and perhaps remembering Wangenheim's significant influence there, the Prussian government further issued an edict banning Prussian students from attending the University of Tübingen. Other observers, such as the British diplomat Edward Cromwell Disbrowe, denounced the nature of the electoral franchise, which allowed «unprincipled Agitators», «factious Demagogues», and «very considerable numbers» of liberals to be elected to the Second Chamber[52].

For all these fears, however, Württemberg neither erupted into violence nor be-

came a staging post for revolution. Indeed, even though the period in between the introduction of the Ludwigsburg Constitution and the outbreak of the 1848 revolutions was one of general regional unease, Württemberg was almost singularly unaffected. Indeed, one of the most dramatic acts in 1848 was more reminiscent of Heinrich Bolley's civil attempts to protest the end of the Treaty of Tübingen; on 2 March, 1,000 citizens of Tübingen signed a petition, addressed to the Landtag, requesting that the electoral laws be liberalised to allow for greater direct participation in the constitutionally-regulated political process[53]. To be sure, there were some public demonstrations, but none of these came close to resembling the genuine unrest experienced in Baden, Bavaria, Prussia, Austria, and the Rhenish states. The reason for this can be seen in the very constitutionalism that Metternich and others feared would lead to disaster. Württemberg had a constitutional history on which to fall back, and the Federician years could be interpreted as an interregnum in an otherwise consistent special path. Such could be seen even in the response to Friedrich's authoritarianism, whereby opponents to the king's reign, such as Uhland and Klüpfel, consistently referred back to the Treaty of Tübingen as the solution to the problems they had perceived. From the outset, Württemberg constitutionalism was presented by its proponents as inclusive; Klüpfel, while promoting the *altes gutes Recht*, stipulated that its renewal should dissolve the barriers between Old and New Württembergers, while Wangenheim (and Wilhelm, following Wangenheim's argumentation) saw the state constitution as a measure to unify the country and create a holistic organism comprising crown, parliament, and population. No equivalent to Carl Ludwig Sand emerged in Württemberg, nor any similar outrage to the Kotzebue assassination, in spite of Württemberg's marked intransigence when it came to following the letter of the Karlsbad Decrees. On only one occasion in these years did public violence of any significance erupt, and then it was still relatively minor. In 1846, Württemberg once more suffered food shortages. Though this was significantly less severe than the 1816-17 *Hungerzeit*, this event nevertheless sparked bread riots in Ulm, where two people were killed, and Stuttgart, where the king himself was attacked with stones. Yet even this demonstrates the stable nature of the state; as the British *charge d'affaires* in Stuttgart noted in a telegram to the Foreign Office, this thunderclap of «anger and discontent» was quite remarkable because Wilhelm «had always been regarded with adoration by His People»[54]. This was hardly the revolutionary violence of liberal «Agitators» that Disbrowe had warned against, but rather a brief and spontaneous expression of popular discontent in the face of specific hardships.

In many ways, the crown appropriated even radical liberalism for its own ends. In 1820 and 1821, two pamphlets were published, under the names «George Erichson» and «Karl Heinrich Kollmanner». Both publications — the *Manuscript from South Germany* (1820)[55] and *About the Current Situation in Europe* (1821)[56] — followed similar lines; the future peace and prosperity of the German region, they argued, were at risk from the authoritarian tendencies of the great powers (Austria and Prussia). The solution to this was to follow the lead of Württemberg, which had «more for the cause of freedom and independence of the

Germans than all of the lovely words at the Congress [of Vienna] did». This it had done by adopting a «contemporary constitution […] as […] fundamental law»[57]. In the event, both «Erichson» and «Kollmanner» were revealed to be Friedrich Ludwig Lindner, an infamous ultra-liberal agitator. Circumstantial evidence suggests that Lindner may have been commissioned by Wilhelm for the purpose of writing the documents. Either way, however, they are landmark publications, solidifying (either with secretive official backing or otherwise) a legislative narrative, in which the crown, the constitution, and the people's well-being were all explicitly linked. This link provided for reciprocal obligation, much as Wangenheim had intended when he argued for the holistic «spiritual organism» of the state through constitutional law-making. In 1843, for instance, Wilhelm interceded with the Prussian government on behalf of the Württemberg poet and liberal-nationalist activist Georg Herwegh. Herwegh was hardly a darling of Württemberg state-bureaucratic opinion; a deserter from army service, he had taken to wandering through the German hinterland espousing radical political opinions and generally making a nuisance of himself. Somehow, he had managed to secure an audience with King Friedrich Wilhelm IV of Prussia, in whose presence he spouted such «obnoxious» republican sentiment that Friedrich Wilhelm had ordered him immediately expelled. While Herwegh was hardly a likely figure for Stuttgart's sympathy, the incident earned Friedrich Wilhelm an official complaint from the Württemberg capital on Herwegh's behalf. This was especially surprising given Wilhelm's continuing attempts at the time to maintain good diplomatic relations with Berlin; nevertheless, the Ludwigsburg Constitution afforded Württemberg citizens rights and protections under Württemberg law and Herwegh remained a citizen worthy of protection under constitutional law.

It is a tribute to the enduring vitality of the Ludwigsburg Constitution (and its forebear, the Treaty of Tübingen) that opposition, when it manifested, generally followed a pattern of remaining within the constitutional bounds. In other words, while Wilhelm had his critics, by and large they retained enough of the 'special confidence' that Friedrich Nicolai had identified at the end of the eighteenth century to trust that the constitution — whatever its flaws might be — could be positively reformed. While Disbrowe and others concerned themselves with «considerable numbers» of «factious Demagogues», the Ministry of the Interior was able to confidently claim in a retrospective report that, before the 1848 revolutions, «there was no talk of a republican movement»[58].

One must be careful regarding the use of the term «republican» or «republicanism». Here, the ministry correspondent cannot have meant the term in the sense used among German late-Enlightenment and early Idealist circles, in which the concept of a republic was synonymous with popular representation and liberty[59]. Indeed, taking Kantian conceptions of republicanism as the baseline, it is immediately apparent that the Ludwigsburg Constitution was (broadly speaking) «republican» in intent, in turn effectively defining the Württemberg state apparatus and the crown itself as «a republican movement». If, instead, the ministry intended «republican» as a euphemism for «reformative»,

then here, too, its report was misleading. The opposition in Württemberg, beginning with the three liberals whom Disbrowe considered «very considerable number» in the 1831 *Landtag*, was indeed willing and intended to enact sweeping changes. Yet here, we can perceive the wisdom of the ministry's unnamed reporter, insofar that, while these liberals pushed for change, they did so within the confines of the constitution; the aim, it seems, was to improve a constitution rather than scrap it, since it had become central to what it meant to be a Württemberger. The prominent liberal-nationalist Robert von Mohl was one of the most frequent and ardent critics of the Ludwigsburg Constitution, arguing that its emphasis on representation denied the people «the right to govern themselves»[60]. Nevertheless, not only was he also a frequently elected member of the *Landtag*, but he also entered the government of the so-called «March Ministry» (*Märzministerium*) appointed by King Wilhelm during the crisis of the outbreak of Europe-wide revolutions at the end of February 1848[61]. Prior to this, during his tenure as a professor at Tübingen he had also been the personal tutor of Crown Prince Karl. Other highly visible opposition figures, including Paul Pfizer (one of the original «factious Demagogues») and David Friedrich Strauß, were no less influential but again, unlike frustrated and disenfranchised radicals like Struve in Baden, their opposition was aimed not to undermine their state but to invigorate, support, and strengthen it[62]. They, like Mohl, also joined the *Märzministerium*. So, too, did the liberal republican Friedrich Römer, who was invited by Wilhelm to form the *Märzministerium* and act as *de facto* state minister on 9 March 1848. Yet here, too, we see the profound confidence in and loyalty to the constitution. The *Märzministerium* was made up of political radicals with an unprecedented degree of political agency. Nevertheless, the most they agreed on was that the Ludwigsburg Constitution required some amendments, and these took the form of relaxed regulations in electoral franchise and property laws. At the same time, popular loyalty was expressed in surprising ways. When Römer called elections to the Frankfurt National Assembly, and ran for the seat of Göppingen, some twenty-six voters appear to have believed that they were in fact voting in a referendum on the future of the monarchy, and scribbled in Wilhelm's name in support of the king's governance[63].

Conclusion

In 1850, the official state-run *Staats-Anzeiger* (*State Gazette*) ran the first of a series of articles that would continue to appear regularly in the paper's pages for more than a decade. These articles focused on the constitution as an institution of Württemberg political identity. This constitutionalism, the newspaper's editors insisted, was far more advanced than anything else to be found in Germany and was the product of a singular heritage that dated back to 1514. What this meant for Württembergers was that the state enjoyed a «healthy political life» that resulted from the joint powers of the «prudence and wisdom» of the monarch, and the protections afforded his subjects in the word and spirit of the Ludwigsburg Constitution[64].

These articles go some way to demonstrating the importance of the constitution; it is notable, for example, that they began to appear in print so soon after the revolutions of 1848 and 1849, as well as the constitutional crisis that developed in Hesse-Kassel (in which Württemberg took part). In a period of profound political uncertainty and instability, the *Staats-Anzeiger* (and, by extension, the state) could point to a constitutional history that began with the *Tübinger Vertrag* and continued, albeit with some interruption, into the contemporary era. They acknowledged that Württembergers were, in general, politically engaged, and that this was a product of both of monarchical sagacity and constitutional progressiveness. What the articles also demonstrate, in taking such a prominent position within the pages of the state media apparatus, is how central the constitution was, or had become, in the conceptualisation of Württemberg, Württembergers, and «Württemberg-ness». Throughout the preceding decades (and, indeed, centuries), Württembergers had turned in times of crisis and uncertainty to the constitution as a form of sociopolitical «safety valve» and identifier. Consistently, both internal and external commentators reflected on the vitality of the Württemberg constitutional heritage. Charles James Fox and the author of the *Geographie Würtemberg* may have been overly simplistic in considering the Treaty of Tübingen as the equivalent of the *Magna Carta*, but with respect to the centrality of the document within the state's conception of self, their understanding of the uniqueness and importance of Württemberg *Verfassungspatriotismus* was repeated time and again. The happy Stuttgarters Friedrich Nicolai met on his travels in 1781 attributed their satisfaction to it, just as Wangenheim, Lindner, and eventually the *Staats-Anzeiger* newspaper would do. Ludwig Uhland would immortalise Württemberg constitutionalism in the same verses that would make his name as a poet. Liberal activists of a type feared in other states regularly took part in public life. Lindner's claims of the unique desirability of Württemberg constitutional heritage was echoed elsewhere by non-Württembergers; Philipp Jakob Siebenpfeiffer, among others, saw Württemberg as a potential unitary nucleus for German nationalism for just this reason[65].

At the crux of this understanding of Württemberg constitutionalism was the realisation that the constitution was designed specifically to provide a positive, binding mechanism of identification. A measure of the success of this mechanism can be found in the fact that Fox, Nicolai, Wangenheim, Siebenpfeiffer, and others believed it to be so, as well as the fact that a succession of liberals of various stripes saw the constitution not as document to be replaced, but rather to be reformed and improved. Another, more prosaic indicator was provided by Karl Julius Weber who, in 1826, visited former territories of the Duchy of Swabia. Afterwards, he reported that, having asked whether the people he met identified with their old *Territorialpatriotismus*, as Swabians, the response he received, albeit in the broad Swabian dialect, was invariably: *Noi, i bin a Wirtaberger*[66].

[1] M. Hughes, *Nationalism and Society: Germany 1800-1945*, London, Edward Arnold, 1991, p. 8.

[2] B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London, Verso, 2006.

[3] Typically, English-language histories of Germany refer to the period beginning with the fall of Napoleon in 1815 (or else the establishment of the German Confederation in 1819) as Restoration. German-language histories tend to use *Vormärz* (Pre-March), denoting that the period ended with the outbreak of revolutions throughout Germany in March 1848. See, for example, M. Fulbrook, *A Concise History of Germany*, Cambridge, Cambridge University Press, 2004, pp. 104-115; T.S. Hamerow, *Restoration, Revolution, Reaction: Economics and Politics in Germany, 1815-1871*, Princeton, Princeton University Press, 1954, pp. 1-93; J.J. Sheehan, *German History 1770-1866*, Oxford, Clarendon, 1989, pp. 389-654.

[4] *Tübinger Vertrag*, 8 July 1514. Both original copies of the constitution have since been lost; one was destroyed during the Second World War, while the other's location is unknown. Duke Ulrich's confirmation of the treaty survives, and is reproduced as: Duke Ulrich von Württemberg, *Urkunde über den Vertrag zu Tübingen vom 8. Juli 1514, dessen Bestätigung und dessen Vollzug* (23 April 1515), in G. Adriani and A. Schmauder (eds.), *1514: Macht, Gewalt, Freiheit. Der Vertrag zu Tübingen in Zeiten des Umbruchs*, Ostfildern, Jan Thorbeke, 2014, pp. 194-9.

[5] J.A. Vann, *The Making of a State: Württemberg 1593-1793*, Ithaca and London, Cornell University Press, 1984, pp. 45-6.

[6] K. Pfaff, *Geschichte des Fürstenhauses und Landes Württemberg*, Stuttgart, Verlag der J.B. Metzler'schen Buchhandlung, 1839, p. 164.

[7] Johann Heinrich Sturm to Duke Friedrich Karl von Württemberg, Stuttgart, 3 June 1692. HStAS. A203 Bü.27.

[8] P.H. Wilson, *War, State and Society in Württemberg, 1677-1793*, Cambridge, Cambridge University Press, 1995, p. 56.

[9] P.H. Wilson, *The Power to Defend, or the Defence of Power: The Conflict between Duke and Estates over Defence Provision, Württemberg 1677-1793*, in «Parliaments, Estates and Representation», n. 1, 1992, p. 39.

[10] Ivi, p. 32.

[11] This is not to say that there were not constitutional conflicts; indeed, these were prevalent particularly in the eighteenth century. None of them, however, directly threatened ducal legitimacy, nor the privileged position of the estates. For a comprehensive analysis, see F.L. Carsten, *Princes and Parliaments in Germany*, Oxford, Clarendon, 1959, pp. 123-48.

[12] I.U. Paul, *Württemberg 1797-1816/19: Quellen und Studien zur Entstehung des modernen württembergischen Staates*, Munich, R. Oldenbourg, 2005, pp. 370-5.

[13] Cited after P. Sauer, *Der schwäbische Zar: Friedrich, Württembergs erster König*, Stuttgart, Deutsche Verlags-Anstalt, 1984, p. 128.

[14] H. Fenske, *Der liberale Südwesten: Freiheitliche und demokratische Traditionen in Baden und Württemberg 1790-1933*, Stuttgart, W. Kohlhammer, 1981, pp. 32-3.

[15] S. Hazareesingh, *Napoleonic Memory in Nineteenth-Century France: The Making of a Liberal Legend*, in «MLN», n. 4, 2005, pp. 747-73; Theodore Ziolkowski, *Napoleon's Impact on Germany: A Rapid Survey*, in «Yale French Studies», 1960, pp. 94-105. There is no doubting some of the liberalising effects of Napoleonic hegemony over central and southern Europe. The introduction of the *Code Napoléon*, for example, gave Feuerbach the impetus to differentiate between «moral» crimes and «human» crimes, thus paving the way for the first European decriminalisation of homosexuality in Bavaria in 1805. In Spain, the arrival of French troops swept away a repressive absolutism that hearkened back to the Inquisition, to the approval of the small number of *afrancesados*. See also A. Roberts, *Napoleon the Great*, London, Penguin, 2014.

[16] T. Nipperdey, *Deutsche Geschichte 1800-1866: Bürgerwelt und starker Staat*, Munich, C.H. Beck, 1998, p. 1.

[17] *Kurpfalzbaierische Staats-Zeitung von München*, n. CCLIX, 2 November 1805.

[18] L.S. James, *Witnessing the Revolutionary and Napoleonic Wars in German Central Europe*, London, Palgrave Macmillan, 2013, p. 38; J.R. Elting, *Swords around a Throne: Napoleon's Grande Armée*, New York, Da Capo, 1997, p. 387; H.-J. Harder, *Militärgeschichtliches Handbuch Baden-Württembergs*, Stuttgart, Kohlhammer, 1987, p. 62.

[19] Prior to the signing of the alliance, and concerned that Friedrich might not agree, Napoleon and his foreign minister, Talleyrand, discussed deposing Friedrich and replacing him with Crown Prince Friedrich Wilhelm, in return for rank and honours. In the event, this was not necessary. See B.A. Ashton, *The Kingdom of Württemberg and the Making of Germany, 1815-1871*, London, Bloomsbury, 2017, p. 24.

[20] Maria Nesselrode to Hélène Gourief, Stuttgart, 14 January 1814, in A. de Nesselrode (ed. by), *Lettres et papiers du chancelier comte de Nesselrode, 1760-1850*, vol. V, Paris, A. Lahure, n.d., pp. 153-4.

[21] *Die teutsche Bundesacte vom 8. Juny 1815* (1815), in E.R. Huber (ed. by), *Dokumente zur deutschen Verfassungsgeschichte*, vol. I, Stuttgart, Kohlhammer, 1961, n. 19, pp. 75 ff.

[22] A comprehensive discussion of Gladstone's remarks can be found in *The Originality of the United States Constitution*, in «Yale Law Journal», n. 6, 1896, pp. 239-46.

[23] See here, in lieu of many, G. Casanova, *The Memoirs of Jacques Casanova de Seingalt*, vol. III, New York, G.P. Putnam's Sons, 1961, pp. 369-84; F. Trollope, *Vienna and the Austrians; with Some Account of a Journey through Swabia, Bavaria, the Tyrol and Salzbourg*, London, R. Bentley, 1838, p. 42; W.L. Wekherlin, *Anselmus Rabiosus Reise durch Oberdeutschland*, Salzburg, 1778, p. 56.

[24] J. and W. Grimm, *Kinder- und Hausmärchen*, vol. III, Göttingen, Dieterische Buchhandlung, 1843, pp. 185-8.

[25] F. Nicolai, *Unter Bayern und Schwaben: Meine Reise im deutschen Süden* 1781, Stuttgart and Vienna, Erdmann, 1989, pp. 166-7.

[26] *Ibidem*. Ulm became a Württemberg city after Friedrich's alliance with Napoleon. Nicolai could contrast it unfavourably with Württemberg as a whole because, at the time of his travels, it was an imperial free city.

[27] M. Fulbrook, *Piety and Politics: Religion and the Rise of Absolutism in England, Württemberg and Prussia*, Cambridge, Cambridge University Press, 1983, p. 67. See also F.L. Carsten, *Princes and Parliaments in Germany: From the Fifteenth to the Eighteenth Century*, Oxford, Clarendon, 1959, p. 5.

[28] Nicolai, *Unter Bayern und Schwaben* cit., pp. 166-7.

[29] I.F. McNeely, *The Emancipation of Writing: German Civil Society in the Making, 1790s-1820s*, Berkeley, University of California Press, 2003, pp. 96-7.

[30] Johann Friedrich Cotta to Johann Wolfgang von Goethe, 16 November 1808, in M. Neugebauer-Wölk, *Revolution und Constitution. Die Brüder Cotta: Eine biographische Studie zum Zeitalter der Französischen Revolution und des Vormärz*, Berlin, Siedler, 1989, p. 347.

[31] Carsten, *Princes and Parliaments in Germany* cit., p. 147.

[32] *Würtembergs Rechte: erstes Wort einer Appellation an die hohen Befreyer Deutschlands*, 1810, pp. 2-3, emphasis mine. While neither the author nor the publisher are identified, the pamphlet presumably had some prominence; the extant copy in the Bavarian State Library was presented as a «present of His Majesty the King Ludwig I, from His Highness' Private Library».

[33] Ashton, *The Kingdom of Württemberg*, cit., p. 66. Schelling had also been a student at Tübingen, receiving his doctorate there in 1795. He was never a professor there, though in 1810 he did arrive in Stuttgart to give some lectures. At the time Wangenheim was chancellor at Tübingen, however, Schelling was based in Munich.

[34] K.A. von Wangenheim, *Die Idee der Staatsverfassung in ihrer Anwendung auf Wirtembergs alte Landesverfassung und den Entwurf zu deren Erneuerung*, Frankfurt/Main, Bernard Körner, 1815, p. 68.

[35] Ivi, p. 21.

[36] L. Uhland, «Das alte, gute Recht», *Vaterländische Gedichte n. 2*, in *Ludwig Uhlands Gedichte*, Stuttgart, Verlag der J.G. Cotta'schen Buchhandlung, 1867, p. 50. The same sentiments are expressed in other *Vaterländische Gedichte*, most notably «Württemberg» and «Gespräch» (*Vaterländische Gedichte n. 3* and *n. 4*, in Ivi pp. 50-1). Of note, too, is the fact that Uhland referred to the traditional balance as the «old good law», rather than the more linguistically sound «good old law». This suggests that Uhland saw the goodness of the Treaty of Tübingen as being primarily asserted by its age and customary use; in other words, the «oldness» of the law legitimised its «goodness». Similar constructions and ideas are particularly common in English legal constructs, where the primacy of «custom» has held prominence for many centuries.

[37] L. Uhland, *Am 18. Oktober 1815: Herrn Bürgermeister Klüpfel, Landständischem Abgeordneten der Stadt Stuttgart, Vaterländische Gedichte n. 1*, in Ivi, p. 49.

[38] Hofer was killed in 1810 and, later, his rebellion was coopted into the national myth of the 'Liberation Wars' (*Befreiungskriege*) that became something akin to the proto-foundational legend of the united German nation. None of this should distract from the fact that Hofer's guerrillas fought specifically against *Bavaria*, in favour of *Tyrolean* rights.

[39] Wangenheim, *Die Idee der Staatsverfassung* cit., p. VII.

[40] D. Langewiesche, *Magna Charta der Württemberger — vom Kampf ums alte gute Recht zur geschichtlichen Erinnerungsformel*, in Adriani and Schmauder (eds), *1514* cit., pp. 477-8.

[41] Ashton, *The Kingdom of Württemberg* cit., p. 39.

[42] D. Krämer, *«Menschen grasten nun mit dem Vieh»: Die letzte große Hungerkrise der Schweiz 1816/17*, Basel, Schwabe, 2015, pp. 46-7.

[43] King Wilhelm I. of Württemberg, *I. Edikt, mehrfache Änderungen im Abgabenwesen betreffend*, Stuttgart, 18 November 1817, in *Königlich Württembergische Staats- und Regierungsblatt*, 1817; Walter Grube, *Der Stuttgarter Landtag 1457-1957. Von den Landständen zum demokratischen Parlament*, Stuttgart, Ernst Klett, 1957, p. 511.

[44] All references to the Ludwigsburg Constitution relate to: *Verfassungsurkunde für das Königreich Württemberg 25. September 1819*, reproduced at Universität Würzburg, <http://www.jura.uni-wuerzburg.de/lehrstuehle/dreier/verfassungsdokumente_von_der_magna_carta_bis_ins_20_jahrhundert/verfassung_des_koenigreichs_wuerttemberg_25_sep_1819/>, 5 October 2016.

[45] Karl Wilhelm Heinrich du Bos du Thil to Foreign Ministry (Hesse-Darmstadt), n. 99, Vienna, 27 March 1820. Hes.StAD.C1/147/7.

[46] H. Brandt, *Parlamentarismus in Württemberg, 1819-1870: Anatomie*

eines deutschen Landtags, Düsseldorf, Droste, 1987, p. 31.

47 P. Sauer, *Reformer auf dem Königsthron: Wilhelm I. von Württemberg*, Stuttgart, Deutsche Verlags-Anstalt, 1997, pp. 180-2.

48 Nicolai, *Unter Bayern und Schwaben* cit., p. 169.

49 L.E. Lee, *Liberal Constitutionalism as Administrative Reform: The Baden Constitution of 1818*, in «Central European History», n. 2, 1975, pp. 91-2. As Lee points out, this was perhaps even more pressing than in the Württemberg example, since Badenese territory had quadrupled by virtue of the state's ties to Napoleon.

50 Ashton, *The Kingdom of Württemberg* cit., pp. 78-9.

51 Sheehan, *German History 1770-1866* cit., p. 407. Cf. also Ashton, *The Kingdom of Württemberg* cit., pp. 43-4.

52 In fact, there were only three during the 1831 election to the *Landtag* — the subject of Disbrowe's report. Edward Cromwell Disbrowe to Palmerston, n. 8, Stuttgart, 15 February 1832. FO 82/26.

53 Ashton, *The Kingdom of Württemberg* cit., p. 76.

54 Augustus Loftus to Palmerston, n. 6, Stuttgart, 5 May 1847, in Markus Mösslang, Sabine Freitag, and Peter Wende (eds.), *British Envoys to Germany*, vol. 2, Cambridge, Cambridge University Press, 2002, p. 403.

55 The edition used here is the same document, albeit printed in England the following year. F.L. Lindner [G. Erichson], *Manuskript aus Süd-Deutschland*, London, James Griphi, 1821.

56 F.L. Lindner [K.H. Kollmanner], *Ueber die gegenwärtige Lage von Europa*, Frankfurt/Main and Leipzig, Friedrich Ludwig Lindner, 1821.

57 Lindner [Erichson], *Manuskript* cit., pp. 236, 256-7.

58 Ministerium des Innern (Württemberg), *Wochenbericht*, Stuttgart, 24 November 1851, in Wolfram Siemann (ed. by), *Der Polizeiverein deutscher Staaten: Eine Dokumentation zur Überwachung der Öffentlichkeit nach der Revolution von 1848/49*, Tübingen, Max Niemeyer Verlag, 1983, p. 210.

59 It is difficult to trace the origins of this 'republic = freedom' model of political paradigm, though by the time of the Interior Ministry report the terms had largely become synonymous through usage. In literary-philosophical circles, the link was implied on many occasions by Friedrich Schiller, most notably in his second play, *Die Verschwörung des Fiesko zu Genua* (1783). Frederick Beiser has argued that Schiller's *On the Aesthetic Education of Man* (1795), which he himself described as an 'analytic of the beautiful', can only be properly understood as a political treatise rather than aesthetic one, within the republican tradition of the French political philosophers Jean Jacques Rousseau and Charles-Louis de Montesquieu. More explicitly, the link was identified by Immanuel Kant in his 1795 essay *Zum Ewigen Frieden*, and later by Friedrich von Hardenberg (Novalis) in his 1798 collection of fragments, *Glauben und Liebe, oder Der König und die Königin*. In the former, Kant defines republican constitutionalism as 'firstly, the principle of *freedom* for all members of a society […]; secondly, the principle of the *dependence* of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal *equality* for everyone (as citizens).' Novalis agreed with Kant that monarchical rule was not incompatible with republicanism and, in fact, that the legitimacy of a king would be marked by the fact that his society would be republican: 'The true king will be a republic, the true republic a king.' F. Beiser, *Schiller as Philosopher: A Re-Examination*, Oxford, Clarendon, 2008, particularly ch. 4, pp. 119-68; I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795); En. tr. *Perpetual Peace. A Philosophical Sketch*, in H.S. Reiss (ed.), *Kant Political Writings*, Cambridge, Cambridge University Press, 2016², p. 99; Novalis. *Glauben und Liebe, oder Der König und die Königin* (1798); En. tr. *Faith and Love or The King and Queen*, in M.M. Stoljar (ed.), *Novalis Philosophical Writings*, Albany, State University of New York Press, 1997, p. 89.

60 Robert von Mohl, *Die Geschichte der württembergischen Verfassung von 1819*, in «Zeitschrift für die gesamte Staatswissenschaft», n. 1, 1850, pp. 47-51.

61 It was also at this point that Wilhelm suspended the constitution. However, this was only ever intended as a temporary means in view of the extant state of emergency at the time. This can also be seen by the fact that Wilhelm's other actions at the time still reflected a commitment to liberalism.

62 Strauß, in fact, condemned Struve's actions as endangering the wellbeing of the Badenese population. *Schwäbische Kronik*, n. 109, 19 April 1848.

63 B. Mann, *Die Württemberger und die deutsche Nationalversammlung 1848/49*, Düsseldorf, Droste, 1975, pp. 399-409.

64 *Staats-Anzeiger für Württemberg*, n. 167, 14 July 1850; *Staats-Anzeiger für Württemberg*, n. 40-41, 15-16 February 1850; *Staats-Anzeiger für Württemberg*, n. 296, 14 December 1861.

65 P.J. Siebenpfeiffer, in *Die Bote aus Westen*, 19 February 1832.

66 K.J. Weber, *Reise durch das Königreich Württemberg*, Stuttgart, J.F. Steinkopf Verlag, 1978, p. 144.

Rethinking the electoral and constitutional system: the works of Palma and Brunialti on the Norwegian constitution

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1. *The enactment of the 1814 Norwegian constitution*

During the last decades of the nineteenth century two influential jurists, Luigi Palma[1] and Attilio Brunialti[2], both dedicated studies to the Norwegian constitutional system in the framework of their researches in the fields of electoral legislation and of movements towards parliamentary governments.

The existence of a cultural reference to a country so geographically far and culturally different can maybe be explained by the features of the charter of Eidsvold and by the particular circumstances of its enactment. The Norwegian constitution attracted the attention of foreign politicians, scholars and magazines since its implementation in 1814. The main reason for this interest could have been related to the fact that, when the Norwegian constitution was published, Europe was experiencing the Restoration and going in a strikingly different direction with respect to Norway. Norway enacted a constitution based on the sovereignty of people, the division of powers and comprehensive of fundamental rights that stood out as even more liberal when other European constitutions became more authoritarian during the nineteenth century[3].

The Norwegian constitution was the result of external events that led to the cession of the country from the throne of Denmark to the one of Sweden, according to the treaty of Kiel. This agreement was signed on the 15th of January 1814: the king of Denmark relinquished his claims on the kingdom of Norway and, in return, the Norwegians were to be secured in all their rights and privileges, and Pomerania and the island of Rugen were incorporated with Denmark[4]. Norway, even if «too remote and humble» had experienced its share of the consequences of the changes and struggles of the great belligerent powers[5]. The Danish Court was aware of the impossibility of successfully resisting the combination of force

projected by the Allies, and wanted to spare «brave and generous Norwegian people» from experiencing the horror of famine. In particular, it must be underlined that Norway was ceded to the Swedish King and not the Kingdom of Sweden, so the Norwegian people were to continue the enjoyment of their own laws, rights, privileges and liberties[6].

In a report about the Norwegian constitution dated back to 1836, the English travel writer Samuel Laing stated that Norwegian people were not happy to be «handed over like a herd of black cattle»[7]. In the same period, a journalist of the magazine *Il Corriere Milanese* shared the same impression, when he wrote that «the people of Norway were handed over as if they were a private property». In 1878, also the English *Fraser's Magazine* affirmed that Norway «was not ready tamely to submit to a change of masters, for which the consent of the nation had not been asked»[8].

The Danish prince Christian Frederik, regent of Norway, received by the Norwegian people «the warmest ebullitions of attachment to his person and independence», and subsequently convoked an Assembly of Notables in the city of Eidsvold with the goal of assigning a representative constitution to Norway and acknowledge his hereditary rights[9]. The most prominent Norwegian people gathered there and, in a few days, framed and adopted the Constitution of the 17th of May 1814. The path towards the Charter of Eisdvold is resumed in the words of Andreas Elviken, who affirmed that, until that moment, «Norwegians had been groping toward the ideas of 1789. Facing stark reality, the notables, acting on behalf of the Norwegian nation, repudiated the old basis of sovereignty»[10].

As soon as the Swedes realized that the Norwegians would not submit to their demands, they invaded the southern part of Norway, led by the Swedish Crown Prince, Karl Johan Bernadotte, formerly one of Napoleon's generals, who had been adopted by the childless King Charles XIII[11]. King Christian Frederik, considering the possibility of winning a battle against Sweden very unlikely finally accepted to cede Norway to Sweden with the convention of Moss, upon the condition of the upkeep of the constitution. Christian Frederik abdicated and an extraordinary *Storthing* (the national Assembly) was summoned at the capital Christiania and, on the 4th of November of the same year, Norway was declared to be a «free, independent, and indivisible kingdom, united with Sweden under one king»[12]. In fact, the Act of Union did not change the first paragraph of the Norwegian constitution, which stated that Norway was a free, indivisible, inalienable realm[13].

The events that led to the implementation of the Charter of Eidsvold were the outcome of the European historical developments but it should be emphasized how «the constitution was not regarded as an innovation and a new experiment in government»[14]. Samuel Laing had also stated that «the new constitution was but the superstructure of a building of which the foundations had been laid [...] by the ancestors of the present generation»[15]. In fact, the source of the democratic nature of this constitution was often traced to Norway's equal distribution of land and wealth[16].

The claims to national and popular sovereignty were stemming from the inclination of the Norwegian social condition; in particular, the study by Samuel Laing[17] confirmed that opinion by affirming that the

reason that made a constitution possible was «not cemented with blood, but taken from the closet of the philosopher and quietly reared and set to work» was that «all the essential parts of liberty were already in the country»[18].

In 1851, the Italian historian Cesare Cantù thought that the constitutional system of the country was well in accordance to the ancient inclination of Norway and to the fact that it did not experience feudal property and enjoyed, as a consequence, a large sharing-out of wealth[19]. These social conditions enabled, in Cantù's opinion, a smooth transition to a representative government. In 1870, the Italian constitutional jurist Guido Padelletti[20] shared the same view about the Norwegian constitution, which he expressed stating that the Charter of Eidsvold matched the social conditions of the country[21]. The importance of the element of the division of private property was stressed also by Braekstad who affirmed «they live under ancient laws and social arrangements totally different in principle from those which regulate society and property in the feudally constituted countries»[22]. The equal distribution of wealth was highlighted also by the French jurist and lawyer Pierre Dareste who wrote, in 1884, that «la propriété foncière est extrêmement divisée»[23]. Norway's egalitarian and law-abiding history made possible for the framers of the Charter of Eisvold to share key features of the European revolutionary constitutions of the 1790s, in particular the French 1791 constitution, even if they did not follow the standard revolutionary patterns as no social revolution took place[24]. Pierre Dareste found a possible reference to the Spanish constitution of 1812 and to the American one: «les rédacteurs avaient pris principalement pour modèle les constitutions françaises de 1791 et de l'an III, celle de la république batave de 1798, la constitution espagnole de 1812 et celle des États-Unis de 1787»[25]. In addition, Guido Padelletti seemed to recognize the Norwegian constitution as an ideal sequel of the Spanish constitution of Cadiz when he said that, when the *Cortes* were dismantled, a liberal stream was developing in the extreme north of Europe[26]. The well-known Italian *Nuova Enciclopedia popolare italiana* shared these opinions on the influence of the models of the 1791 French and of the Spanish constitution on the Norwegian constitution[27].

The constitution of Eidsvold had been pronounced «the most liberal of constitutions, one of which any modern nation may boast»[28] and, in the famous French *Revue encyclopédique*, one of the best in Europe[29]. The Italian jurist Enrico Cenni even defined it an almost republican constitution[30].

For what concerns the ruling of powers, the Italian constitutionalist Luigi Palma underlined that the Charter of Eisvold respected the theory of the division of powers and provided the Parliament with complete control over the legislative function as the article 49 of the constitution stated that «the people shall exercise the legislative power through the Storthing, which consists of two divisions, a Lagthing and an Odelsthing»[31]. It is important to call attention to the fact that the King was allowed to initiate legislation and to adopt provisional legislation when the *Storthing* was not in session but could only delay legislation and ultimately did not have the right to prevent its enactment. In fact, when the same draft law had passed by three successive *Storthings*, it became law without the assent

of the king. In this way, the King only had the power to delay the approval of a legislative draft but could not prevent its enactment. Therefore, the constitution provided Parliament with «a right not known in any other Monarchy»[32]. In addition to this, the King did not have the right, as it happened in most representative systems, to dissolve the Parliament.

This kind of allotment of powers caused many problems and led to the constitutional crisis that marked the eighties of the Nineteenth century[33].

It is important to underline that Italian scholars had at their disposal the complete *Collection des constitutions, chartres et lois fondamentales des peoples de l'Europe et des deux Amériques*[34] published in Paris in 1830.The second series dedicated a chapter to the constitution of Norway, with an introduction to its constitutional history and a translation in French of the document issued by the Diet of Eidsvold. The authors of the *Collection des constitutions* affirmed that their translation from Norwegian to French was trustworthy, as opposed to other available translations, and that they had tried to use expressions similar to the originals. The knowledge of French was common in the intellectual class at that time so it did not represent an obstacle to its diffusion among the intellectuals of the region. Only one translation in Italian was available and it dated back to 1820 by Angelo Lanzellotti, published in Naples[35]. It was likely not a translation from Norwegian to Italian but a translation from French to Italian since the main works of this author are translations from French to Italian[36].

The *Collection des constitutions, chartes et lois fondamentales des peuples de l'Europe* had a liberal approach: in fact, the author of the introduction of the first volume of the edition of 1821 underlined that those volumes were addressed not only to the people devoted to law-making and public law, but to all categories of citizens who had the intention to discover more about «their rights and their normative grounds»[37].

This work offered to the reader a vivid picture of the development of the constitutional system in Norway: the description given was based on a report by M. Heyberg who was portrayed as a person with «the talent of a writer and the enthusiasm of a good patriot». The constitution was defined as based on liberal principles and on national independency and the author underlined the fact the members of the Diet of Eidsvoll had had little time to write down the declaration but, notwithstanding this constraint, they had been able to accomplish their task successfully[38].

The open-minded attitude of the writer of the *Collection des constitutions* was shared in the paragraph dedicated to Norway in the magazine *Ricoglitore* mentioned above: the authors tried to sum up the main lines of the Norwegian constitutional structure and affirmed that Norway was a free and independent State, united to Sweden in a tempered monarchy[39]. The only critical point in the constitutional legislation of the country was, in the author's opinion, the fact that it prohibited Jewish people from entering the country, marking a stark difference with respect to the general liberal attitude of the document. The journalist suggested that the reason for this rule alleged by the Norwegian legislator was the maintenance of social and religious cohesion of the country, supported by the presence of people of only one religion (in this case, Christian Lutherans).

This particular facet of the constitution in Norway must have interested Italian readers because, ten years later, in the magazine *Annali universali di statistica, economia pubblica, geografia, storia, viaggi e commercio*[40] the author reported that the King, during a stay in Cristiania, designated the Minister of justice to prepare a legislative draft for the admission of Jewish people in Norway and that this project should have been presented to the *Storthing*[41]. In 1866, the *Corriere Israelitico*[42] (a monthly magazine of Jewish history and literature) greeted the constitution of the first Israelite community in Norway and reminded its readers of how, twenty years before, a Jewish scientist – going to Norway for scientific purposes – had had issues entering the country and was forced to request special permission.

The Norwegian constitutional system attracted then the attention of Italian jurists, in particular Attilio Brunialti and Luigi Palma, for what concerns the subjects of the electoral legislation and the one of the transition to a parliamentary type of government: thanks to its long lasting experience, Norway offered a fruitful field of study also many years after the enactment of the constitution.

2. *The debate about the Norwegian electoral system*

The Norwegian constitution established a quite liberal voting right for the time, even though it did introduce property and income requirements. The Charter of Eidsvold ensured that legislative power laid in the hands of the Norwegian people: the article 50 granted suffrage to three types of residents – public officials, town citizens and freeholders – and the latter two categories were defined with explicit property requirements[43]. In fact a Norwegian citizen, in order to have the right to vote, had to be twenty-five years old, to have resided five years in the country, to be living there at the time of the election, and either be or have been an official. If living in a country district, citizens had to own or have cultivated for more than five years registered land; if living in town, they had to be «burgess», or to own house property or ground of the value of 300 *kronor*[44].

Even if the suffrage was only extended in 1898 to all men, regardless of property and circumstance, the Norwegian electoral system had been regarded as a very liberal one. Italian scholars displayed a particular interest for the study of electoral laws during the last decades of the eighteenth century, in particular after 1882 when the right to vote was widely spread. Once again, Italian scholars thought that the possibility to grant such a wide diffusion of the right to vote in Norway depended on the conditions of the country, marked by relatively low social disparities[45].

Attilio Brunialti, who was professor of constitutional law at the University of Turin, had already shown some interest for the Norwegian constitutional order before he started his academic career. In fact, he was well known for his studies of the representation of minorities and in 1871 published a book with the title *Libertà e democrazia: studi sulla rappresentanza delle minorità* [translated as "Liberty and democracy: Studies about the representation of minorities"]. Brunialti had founded, together with the lawyer Francesco Genala, the *Società per*

lo studio della rappresentanza proporzionale (that can be translated with "Association for the study of proportional representation"): members of the association were other important scholars of constitutional law such as Guido Padelletti, Carlo Ferraris and Luigi Palma[46]. The need to study the political and electoral systems of foreign countries was underlined in 1878 by Brunialti who affirmed that the experience of every country could be a good example in order to avoid mistakes and to choose the best possible policies in the constitutional life of the state[47]. Carlo Ferraris recalled the activity of Brunialti in this field and his effort to spread the knowledge of the European and American constitutions[48]. In fact, Brunialti was the director of a collection of one of the most important Italian and foreign works, la *Biblioteca di Scienze politiche*, in the field of political science[49]. He was chosen for this position probably also because he had always been convinced of the importance of linking the study of constitutional law to the one of politics: in his opinion, no one could deny the fact that constitutional law was a political science[50].

The second series of the *Bilioteca di Scienze politiche* collected works concerning administrative and constitutional law with a specific focus on the study of the Italian system in comparison to other foreign political orders[51]. The second volume of the second series contained contributions by Attilio Brunialti and Luigi Palma: in this book, the two scholars both paid specific attention to the Norwegian constitutional system in relation to the Italian one and to other countries.

The specific interest of Brunialti for the representation of minorities gave him the chance to discover more about the charter of the Diet of Eidsvold: in fact, he dedicated a paragraph to the conditions for the right to vote adopted by the Norwegian constitution and he counted Norway among the States that adopted a system of universal suffrage. He added that the rules contained in that constitution allowed the right to vote to those who were at least 25 years old and had either a certain amount of wealth or were charged with a public function[52].

Brunialti specified in his work that, starting from a law dating back to 1821 for the «very poor Department of Finmark», the right to vote had been widened to include people who had resided in the country for at least five years and who were at least 25 years of age. He specified then that this broadening of the right to vote had been, in his opinion, cut down by the recent introduction of indirect elections of the representatives of the *Storthing*[53].

In addition, the jurist Emilio Serra Gropelli affirmed that the Norwegian constitutional system established a suffrage that could have been considered as 'almost universal' but that the introduction of indirect elections had reduced the democratic nature of that system because, in this way, the voters only had the chance to choose other voters. In his opinion, the Norwegian constitutional regulation allowed a proper use of the political rights that the country offered to the citizens[54].

With regard to the electoral law in Norway, the German Biedermann stated that the indirect system that had been chosen was far more conservative than the general approach defined by the constitution[55].

Luigi Palma was also interested in the specific field of electoral law: he underlined, in his work *Del potere elettorale negli Stati liberi* [translated as «On electoral

power in the free States»][56], that the Norwegian electoral system should have been counted among those that granted the right to vote based on the two alternative requirements of wealth and competency, the latter gathered from the charge of a public function. Luigi Palma thought that the indirect election of representatives was not to blame: in fact, according to the professor, this system did not cause the dreaded effects that had been expected. On the contrary, he affirmed that Norway was one of the most prosperous and liberal countries in Europe «notwithstanding the difficulties due to bad climate»[57].

In addition to this, Luigi Palma quoted the Norwegian model with reference to his criticism against the existence in the Kingdom of Italy of a chamber composed of nominated members. He underlined that in Norway, when a legislative proposal had to be discussed and approved, the *Storthing* was split into two chambers: the first, the *Odelsthing*, discussed the project of law while its elected representatives chose from among the same members of the *Storthing* the components of a second chamber, the *Lagthing*, who were charged with the approval of laws. According to Luigi Palma, this system was meant to control the power of the chamber elected in a direct way; he assumed that this system was better than the one in Italy (a second chamber of members nominated by the King), but he thought that this was not the best possible model because the members were not elected but selected among the representatives of the *Storthing*, who would promote the values and instances they already support in the other chamber.

He concluded that these reflections did not lead him to criticize the Norwegian model following the maxim *non omnis fert omnia tellus*; in his opinion, the Norwegian people approved the model based on only one chamber grounded in popular representation but this system was not the best for each and every country.

With regard to the Italian situation, Attilio Brunialti was persuaded that universal suffrage was close and he underlined that it was impossible to stop the rising of democracy, he felt that the coming of democracy would be an apocalypse for the group of people who had the power and he said that, with a growing financial wealth, the population would also strive for power[58].

Guido Padelletti criticized the fact that Brunialti presented the importance of the representation of minorities only as a possible setback for the assertion of universal suffrage. In his opinion, the point that should have been underlined was the importance of the introduction of an electoral system that offered the chance to represent also the minorities in order to have the best representatives possible and not in order to avoid universal suffrage[59]. Actually, also Brunialti was aware of the need to have the leaders with the best political and cultural background possible, but he was afraid that the broadening of the right to vote would have lead in the opposite direction[60].

In the opening lecture held for the beginning of his course at the University of Turin, Brunialti affirmed that the constitutional government was the biggest accomplishment for public law[61]. He asked himself if the problems of this type of government were not underestimated and if a change was needed. Answering this difficult question, he said that, besides the Constitution, two elements helped in the development of public law: science and

tradition. Brunialti thought that a balance between these three elements had to be found: the written constitution should meet the population requirements and be in line with the history of the country[62]. Regarding this subject, he said that the *Statuto Albertino* affirmed that local institutions had to be organized by the law and that the law that was then written contributed to the lack of political and administrative culture. He underlined that custom is important in the study of constitutional law[63] and affirmed that in no other field as the one of constitutional law, it was so necessary for scientific improvements to be welcomed by general consent[64].

With reference to the electoral system, he thought that an election reform was possible for Italy and that the *Statuto Albertino* allowed for changes[65]. In fact, he stated that the *Statuto Albertino* had some articles that should not be changed but many others that should or could be changed in order to follow the development of the country[66]. On the other hand, professor Brunialti thought that constitutional politics should respect more strictly the constitution: for example, he affirmed that the *Statuto Albertino* specified that each deputy represents the Nation, not just the district in which he was elected[67]. Therefore, Brunialti thought that the deputy had a trust relationship with his voters, but his parliamentary mandate did not have an imperative nature[68]. Guido Padelletti agreed with his opinion and he affirmed that each representative should worry about the fulfilling of the interests of the whole nation because his charge was qualified as a *munus publicum* and not as a civil law mandate[69].

The multiple references to the Norwegian regulation of the right to vote show the reader how its features, marked by a relative broad diffusion of the right to vote and a democratic approach in the share of powers, interested Italian and European scholars engaged in the debate about the ruling of representation. In fact, the broadening of the right to vote led the Italian jurists to study the experiences of the States that had already experienced similar policies in the field of the electoral legislation and the Norwegian model was an interesting case study in this field.

3. *The Norwegian constitutional conflict, 1880-1884*

The transition to a parliamentary type of government was a subject that enlivened the constitutional debate in the last decades of the nineteenth century in Italy and in Europe. During this period, Norway offered an interesting case study with the constitutional conflict that opposed the king and his ministers and the *Storthing*.

The Norwegian constitutional conflict drew the attention of many jurist such as the French Pierre Dareste who affirmed:

> jusqu'à ces dernières années, la Norvège n'avait pas coutume d'occuper le monde de sa politique intérieure. Le récent conflit qui tient de se terminer par la victoire de l'opposition a excité quelque curiosité en Europe: le bruit qu'il a fait a surpris les Norvégiens eux-mêmes, peu habitués à voir le public étranger s'instruire de leurs affaires particulières[70].

Luigi Palma, in a contribution contained in the collection directed by Attilio Brunialti and cited above[71], also studied the Norwegian constitutional conflict of the period 1880-1884.

The specific interest in this field was determined by the presence of similar problems in the Italian political debate. Moreover, reporting about what happened in a foreign country was a good chance in order to express a true opinion on that subject. Palma was a supporter of the transition to a parliamentary type of government; he summarized its features saying that in that kind of system the parliament had the power to impose to the king which were the ministers that should form the government[72]. Even though he thought the parliamentary one was the kind of government that better mirrored the will of the country, Palma was aware of the presence of many problems. The scholar feared, in particular, that the Parliament could assume an unrestrained power. He was convinced that it was important for the Crown to maintain its *super partes* position that represented a safeguard for the good ruling of the country: the exercise of the royal prerogatives could represent a restraint to the power of the legislative assembly[73]. Brunialti also underlined the importance of the powers of the King who represents the unity of the nation and whose powers were exercised in the interest of the country[74].

Palma offered to the readers a first insight into the Norwegian constitutional system. He explained that the original approach was inspired by a stiff separation of powers and marked by the model of the French constitution of 1791; that meant that the King and his ministers the state counselors) held executive power while the *Storthing* held legislative power. He emphasized that in Norway the King did not even have the power to dissolve the Parliament; on the contrary, the provisions of the *Statuto Albertino* granted this option to the Italian monarch. In addition to this, article 62 of the Norwegian constitution prevented the ministers from being elected in the *Storthing* in order to safeguard the separation of powers.

After this introduction, Professor Palma summed up the facts concerning the constitutional conflict: in 1872, the politician Sverdrupp promoted a draft law that allowed the ministers the chance to take part in the assemblies of the *Storthing*, without the right to vote.

The proposal of the King was approved by the Parliament but the King rejected it using his veto power; then, in 1874, the King himself endorsed the faculty for his ministers to enter the Parliament, laying down the condition that the *Storthing* should have granted to the monarch the right to dissolve the Parliament. The *Storthing* rejected this proposal and, in 1877, promoted again the project dating back to 1872. The King opposed again using his veto driving the opposition party of the Parliament to propose that the project had to be considered law, even if it did not have the royal authorization. On this subject, Samuel Laing affirmed that «the constitution of Norway nearly resembles the constitution of the United States, the king having merely a suspensive veto»[75]: once again the influence of the American constitution on the Norwegian one was noticed.

Luigi Palma underlined that the Norwegian King addressed the Faculty of law of *Cristiania*, considered the most important scientific authority in this field, in order to have an answer to the question of whether or not the King had the power of 'royal sanction' in the field of constitutional changes.

The scholars of the University of *Cristiania* acknowledged that the monarch

held an absolute veto power. Palma stated that this answer sounded appropriate in this field. He thought that, in a monarchy, the King had to represent the nation and to maintain a detached position above the different parties: he observed that his royal sanction was the act that enforced each law and it was even more necessary that the monarch held this power in the field of constitutional changes.

On the other hand, he observed that this constitutional conflict was the sign of an attempt of evolution from a 'royal constitutional' government to a parliamentary one: according to Luigi Palma, this kind of development aimed to change the function of the ministers, who were first interpreters of the will and personal judgement of the King and should have become representatives of the Parliament[76].

Palma concluded that this kind of transformation could not be stopped with the help of influential scholars or keen law reasoning but that it depended upon a political conflict that should had been solved with political measures: it would have been better not to apply strictly the law but to analyze the political change. On this issue, Palma agreed wih Brunialti when he said that in no other field as the one of constitutional law, it was so necessary for scientific improvements to be welcomed by general consent: in fact, he affirmed that a skilled and competent public opinion was important in order to sustain the political and constitutional activities[77].

Luigi Palma described the further development of the constitutional conflict and highlighted how the *Storthing* upheld a charge against the ministers who had approved the denial of the royal authorization for the resolutions of the Parliament.

The judgement in this field was assigned to the *Rigsret*, composed by 28 members of the *Storthing* and the 9 members of the Norwegian Supreme Court, the *Hojesteret*: the minister were judged guilty and condemned by the *Rigsret*. The King did not want to continue the conflict: he considered the convicted ministers as resigned and nominated as leader of his Counselors the head of the opposition party, Svendrupp. The *Storthing* subsequently approved the article 74 of the Constitution that granted the ministers the possibility to take part in the assemblies of the Parliament, without the right to vote, and to join in the discussions when they were public[78].

Luigi Palma stated that this was not to be intended as a defeat of the King, but that the growing awareness of the population that aimed at a change in the political system had to be respected: the art of the government in his opinion, was not merely to apply the law, but to fulfil the needs of the population. Brunialti agreed with Palma on this point, because he thought that politics was an important part of the constitutional science that could not deal only with law[79]. It is interesting to underline that, in another work dated back to the same period, Palma affirmed once again that the sanction of the King had to be considered fundamental for the building of the will of the State and that the parliamentary majorities could represent sometimes fleeting needs while the King had to represent and sustain the enduring welfare of the country[80].

The study of the specific features of the Norwegian constitutional life shows how Italian scholars, living in a country that was geographically far and different for what concerned habits and culture, studied and

mentioned the Norwegian constitutional structure.

Notwithstanding the differences in the lifestyle of the population, and the fact that Italian and Norwegian institutions arose from a completely unlike historical and political development, in the second half of the eighteenth century the themes emerging in the political debate encouraged Italian scholars to deepen the study and the research on the history and the functioning of other political models, like the one of Norway. This interest could have been motivated by different reasons, but it prompted politician and scholars to broaden their knowledge and their studies to the constitutional models of other countries, giving them the chance to face problems with an open-minded approach. Norway proved to be an interesting example and model of study for its electoral system – in an historical setting in which there existed widespread concern about the effects of the extension of the right to vote – both regarding the transition towards a parliamentary system of government and the role of the monarchy.

The works of two prominent Italian jurists like Palma and Brunialti underlined how the features of the Norwegian constitution embodied a case study that offered many hints for the legal debate, because it was the one – with the American constitution – that presented the more long-lasting constitutional experience.

[1] Luigi Palma was born in Corigliano Calabro 1837 and he taught for many years constitutional law at the University of Rome and he became also councilor of the Council of State. For further biographical news: G. Melis, *Palma Luigi Prospero*, in I. Birocchi, E. Cortese, A. Mattone, M.N. Miletti (eds.), *Dizionario Biografico dei Giuristi Italiani*, Bologna, il Mulino, 2013, pp. 1492-1493; F. Lanchester, *Palma Luigi Prospero*, in *Dizionario Biografico degli Italiani*, vol. 89, Roma, Istituto dell'Enciclopedia Italiana Treccani, 2014, pp. 582-584 and L. Borsi, *Storia, nazione, costituzione. Palma e i preorlandiani*, Milano, Giuffrè, 2007.

[2] Attilio Brunialti was born in Vicenza in 1849 and he graduated in law in 1870. He was well known for some studies about the representation of minorities: in 1871, he published a book about *Libertà e democrazia: studi sulla rappresentanza delle minorità*. In 1881, he arrived at the University of Turin. He kept his place as professor of constitutional law until 1893, when he became councilor of the Council of State. He also had a political career: he was deputy for nine legislatures and he dealt mostly with topics of foreign politics and the colonial problem. A complete biographical portrayal is presented by A. De Gubernatis, *Dizionario biografico degli scrittori contemporanei*, Firenze, Le Monnier, 1879; G. D'Amelio, *Attilio Brunialti*, in *Dizionario biografico degli italiani*, vol. XIV, Roma, Istituto dell'Enciclopedia Italiana Treccani, 1972, p. 636; G. Cazzetta, *Una costituzione "sperimentale" per una società ideale. I modelli giuridico-politici di Attilio Brunialti*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», n. 15, Milano, Giuffrè, 1986; G. Cazzetta, *Brunialti Attilio*, in I. Birocchi, E. Cortese, A. Mattone, M.N. Miletti (eds.), *Dizionario Biografico dei Giuristi Italiani* cit., pp. 349-351.

[3] In the contribution by D. Michalsen, *The Norwegian constitution of 1814 between European Restoration and Liberal Nationalism*, in Kelly J. Grotke, M. Prutsch, (edited by), *Constitutionalism, legitimacy and power: nineteenth century experiences*, Oxford University Press 2014, p. 210, the Norwegian constitution is defined a revolutionary one.

[4] G.L. Baden, *The history of Norway*, London, Hamblin and Seifang, 1817, p. 315.

[5] Ivi, p. 312.

[6] F. Nansen, *Norway ad the union with Sweden*, Bungay, Richard Clay and sons, 1905, p. 14.

[7] S. Laing, *Journal of a residence*

in Norway during the years 1834, 1835, and 1836 made with a view to inquire into the moral and political economy of that country, and the condition of its inhabitants, London, Longman-Rees,-Orme-Brown-Green, & Longman, 1836, p. v.

[8] W.D.T. (the author had signed the article only with his initial letters), *The constitution of Norway*, in «Fraser's Magazine», vol. XVIII, London, Longman- Green and co, 1878, p. 62.

[9] G. Astuti (ed.), *Le costituzioni della Svezia e della Norvegia*, Firenze, Sansoni, 1946, (Testi e documenti costituzionali, 13), p. 113; A. Elviken, *The genesis of the Norwegian nationalism*, in *The Journal of modern History*, vol. III, n. 3, September 1931, p. 378: «the prince claimed *de jure* the throne of Norway ad heredity. But Professor Georg Sverdrup voiced the sentiments of the notables by declaring that "the claims which Frederick VI has renounced revert to the nation. Only from the hands of the nation you will receive the crown.». Also the German Friedrich Karl Biedermann affiirmed that «comme les Norvégiens aspiraient à former un royaume indépendant, ils demandèrent à leur lieutenant qu'il leur donnât une Constitution comme à un peuple libre» (F.K. Biedermann, *Die repräsentative Verfassungen mit volkswahlen, dargestellt und geschichtlich entwickelt* (1864), tr. fr. *Les systèmes représentatifs avec élections populaires historiquement exposés et développés en rapport avec les conditions politiques et sociales des peuples*, Leipzig, F.A. Brockhaus, 1864, p. 197.

[10] Elviken, *The genesis* cit., p. 378.

[11] H.L. Braekstad, *The constitution of the Kingdom of Norway. An historical and political survey*, London, David Nutt, 1905, p. xi.

[12] Ivi, p. xii. It must be underlined that: «The preamble to the Act of union stated that the union between the two countries was accomplished "not by force of arms, but by free conviction", and the Swedish Minister of foreign affairs announced to the European powers that the Treaty of Kiel had been abandoned, and that it was not to this Treaty, but to the confidence of the Norwegian people in the Swedish» (Elviken, *The genesis*, cit., p. 380).

[13] Elviken, *The genesis*, cit., p. 382.

[14] Ivi, p. 380.

[15] Laing, *Journal of a residence in Norway*, cit., p. 480.

[16] J.W. Moses, *Emigration and political development*, Cambridge, Cambridge University press, 2011, p. 93.

[17] This text should have reached a wide audience as it was translated and published in the Italian magazine *Il Ricoglitore Italiano e straniero*; even if no hint of the original author is included in the *Ricoglitore*, the reader can notice that the text has some paragraphs that are the plain translation of the English text. («Ricoglitore italiano e straniero ossia rivista mensile europea di scienze lettere, belle arti, bibliografia e varietà», IV anno, parte seconda, Milano, 1837, pp. 301-321).

[18] Laing, *Journal of a residence in Norway*, cit., p. 479.

[19] C. Cantù, *Storia di cento anni 1750-1850*, vol. III, Firenze, Le Monnier, 1851, p. 89.

[20] For some biographical information, cfr. G. Ferri, *Padelletti Guido*, in *Dizionario Biografico degli Italiani*, vol. 80, Roma, Istituto dell'Enciclopedia Italiana Treccani, 2014, pp. 178-181; G. Negri, *Padelletti Guido*, in *Dizionario Biografico dei Giuristi* cit., p. 1482.

[21] G. Padelletti, *Teoria della elezione politica*, Napoli, Stamperia della Regia Università, 1870, p. 84.

[22] Braekstad, *The constitution*, cit., p. ix.

[23] P. Dareste, *La dernière crise politique en Norvège*, in «Revue des deux mondes», vol. LXVI, Paris, 1884, p. 354.

[24] E. Holmøyvik, *The Norwegian 1814 constitution*, in P.C. Müller Graff, H. P. Gravver, O. Mestad (eds.), *European law and national constitutions*, Berlin, Berliner Wissenschafts Verlag, 2016, p. 34.

[25] Dareste, *La dernière crise politique*, cit., p. 348.

[26] «Mentre un movimento liberale si spegneva in questa guisa nel mezzogiorno di Europa, era assai più fortunato un paese dell'estremo settentrione, la Norvegia, che nel riunirsi alla Svezia si dava una costituzione tanto democratica», G. Padelletti, *Teoria della elezione politica*, cit., p. 83.

[27] *Nuova enciclopedia popolare italiana ovvero dizionario generale di scienze, lettere, arti, storia, geografia ecc. ecc. Opera compilata sulle migliori in tal genere inglesi, tedesche e francesi coll'assistenza e col consiglio di scienziati e letterati italiani*, V edizione, vol. XV, Torino, Unione tipografico-editrice, 1870, p. 64.

[28] Laing, *Journal of a residence in Norway*, cit., p. 480.

[29] «Une des meilleures chartes que possèdent les peuples de l'Europe», «Revue encyclopédique ou analyse raisonnée des productions les plus remarquables dans la littérature, les sciences, les arts par une réunion de membres de l'institut et d'autres hommes de lettres», A. Julien, A. Petetin (eds.), Paris, Sedillot libraire, 1831, p. 414.

[30] E. Cenni, *Delle presenti condizioni d'Italia e del suo riordinamento civile*, Napoli, Stabilimento tipografico dei classici italiani, 1862, p. 94.

[31] Braekstad, *The constitution*, cit., p. 25.

[32] Ivi, p. xvii.

[33] Luigi Palma wrote a specific contribution on this subject, that I dealt with in depth in paragraph 3: L. Palma, *Le costituzioni moderne*, in A. Brunialti (diretta da), *Scelta collezione delle più importanti opere moderne italiane e straniere di scienze politiche ed amministrative*, serie 2, vol. 2, Torino, Unione tipografico-editrice, 1894, pp. 337-344.

[34] P.A. Dufau, J.B. Duvergier, J. Guadet, *Collection des constitu-

tions, chartes et lois fondamentales des peuples de l'Europe et des deux Amériques: avec des precis offrant l'histoire des libertes et des institutions politiques chez les nations modernes, tome III, Paris 1830.

35 A. Lanzellotti (translated by), *Costituzione di Norvegia del 1814 sotto Carlo XIII*, Napoli 1820.

36 In fact, Lanzellotti was the author of many translations from French to Italian: A. Lanzellotti, *Costituzione della repubblica francese del 1799*, Napoli 1821; Id., *Costituzione degli Stati Uniti d'America tradotta in italiano*, Napoli 1821; Id., *Costituzione francese del 1791 sotto Luigi XVI*, Napoli 1820; Id., *Costituzione inglese o sia gran Carta del Regno britannico del 1815*, Napoli, 1820; Id., *Costituzione francese e carta costituzionale del 1814 sotto Luigi XVIII*, Napoli 1820.

37 P.A. Dufau, J. B. Duvergier, J. Guadet, *Collection des constitutions, chartes et lois fondamentales des peuples de l'Euraope et des deux Amériques: avec des precis offrant l'histoire des libertes et des institutions politiques chez les nations modernes*, tome I, Paris, Pichon et Didier libraires, 1821, p. XII.

38 Ivi, pp. 314-317.

39 «Ricoglitore italiano e straniero ossia rivista mensile europea», cit., p. 21.

40 «Annali universali di statistica, economia pubblica, geografia, storia, viaggi e commercio», volume 14 of the second series, October-November-December 1847, Milano, pp. 46-47. This magazine was founded in 1824 in Milan and had the goal to spread in Italy scientific and socio-political knowledge: it obtained a good success not only in Italy but also in the other European countries and was often quoted in the French «Revue encyclopedique» and in the «Edinburgh Review» and in the «Quarterly review».

41 The law dated back to 21st July 1851 repealed the article concerning the prohibition for Jewish people to enter the country.

42 «Corriere israelitico, periodico mensile per la storia e la letteratura israelitica e per gl'interessi generali del giudaismo», A.V. Morpurgo (published under the direction of), fifth year, Trieste, stabilimento Libr. Tip. Lit. Music. e Belle arti di Colombo Coen, 1866, p. 116.

43 Moses, *Emigration and politica*, cit., p. 95.

44 W.D.T., *The constitution of Norway*, cit., p. 70.

45 Padelletti, *Teoria della elezione*, cit. p. 84.

46 A. Brunialti, *La costituzione italiana*, *Prolusione al corso di Diritto Costituzionale letta nella Regia Università di Torino il giorno 7 febbraio 1881*, Torino, Loescher, 1881, p. 25.

47 A. Brunialti, *La giusta rappresentanza di tutti gli elettori*, Roma, Stab. G. Civelli, 1878.

48 C.F. Ferraris, *Nuovi studi sulla rappresentanza delle minoranze nel Parlamento*, in «Archivio Giuridico "Filippo Serafini"», vol. 8, Pisa, 1871, p. 24.

49 I. Porciani, *Attilio Brunialti e la Biblioteca di scienze politiche*, in A. Mazzacane (ed.), *I giuristi e la crisi dello stato liberale in Italia fra Otto e Novecento*, Napoli, Liguori, 1986, pp. 191-230.

50 A. Brunialti, *Il diritto costituzionale e la politica nella scienza e nelle istituzioni*, vol. I., Torino, Unione tipografico-editrice, 1896, p. 31.

51 A. Brunialti (dir.), *Scelta collezione delle più importanti opere moderne italiane e straniere di scienze politiche ed amministrative*, series 2, vol. 2, Torino, Unione tipografico-editrice, 1894.

52 A. Brunialti, *Libertà e democrazia: studi sulla rappresentanza delle minorità*, Milano, E. Treves editore, 1871, pp. 100-102.

53 It is interesting to see that this paragraph contained the book by professor Brunialti, published in 1871, was reported, almost literally, in the book T. Arabia, *La nuova Italia e la sua costituzione, Studii*, Napoli 1871, p. 347. This citation testifies the spread of the works of the professor Brunialti.

54 E. Serra Gropelli, *Della riforma elettorale*, Firenze, Cotta e compagnia Tipografia del Senato del Regno, 1868, pp. 63-65.

55 «La Norvége a une Constitution des plus démocratiques de l'Europe sous le rapport des droits des représentants du peuple et le peu de privilèges de la couronne, mais par contre assez conservative en ce qui concerne le droit électoral»; (Biedermann, *Les systèmes représentatifs*, cit., p. 184).

56 L. Palma, *Del potere elettorale negli Stati liberi*, Milano, E. Treves editore, 1869, p. 76.

57 Ivi, p. 118.

58 Brunialti, *Libertà e democrazia*, cit., pp. 106-108; «col pane queste masse vorranno anche il potere»: the sentence quoted might be translated "once obtained the financial wealth (the bread) people will struggle also for the power".

59 G. Padelletti, *La rappresentanza proporzionale in Italia. A proposito di recenti pubblicazioni*, in «Nuova antologia di Scienze, lettere ed arti», anno VI, volume XVIII, fascicolo IX, 1871, p. 166.

60 A. Brunialti, *Legge elettorale e politica commentata*, Torino, Unione tipografico-editrice, 1882, pp. XXXVI.

61 Brunialti, *La costituzione italiana*, cit., p. 7.

62 Ivi, p. 11.

63 Ivi, p. 21.

64 «La scienza è il più odioso dei despoti quando non se ne fa ministro responsabile la pubblica opinione», *ibidem*.

65 Ivi, p. 25.

66 Ivi, p. 26.

67 *Ibidem*.

68 Ivi, p. 30.

69 Padelletti, *La rappresentanza proporzionale*, cit., p. 168.

70 Dareste, *La dernière crise politique*, cit., p. 347.

71 L. Palma, *Le costituzioni moderne*, in A. Brunialti (dir.), *Scelta collezione delle più importanti opere moderne italiane e straniere di scienze politiche ed amministrative*, series 2, vol. 2, Torino, Unione tipografico-editrice, 1894, p. 339. In the

same work, also Attilio Brunialti offered to the reader a short description of the Norwegian constitutional conflict (pp. LXIII-LXIV).

72 Palma, *Le costituzioni moderne*, cit., p. 99.

73 L. Palma, *Il diritto costituzionale negli ultimi cento anni. Discorso per l'inaugurazione degli studi dell'Università di Roma il 9 novembre 1882*, in *Questioni costituzionali: volume complementare del Corso di diritto costituzionale*, Firenze, G. Pellas, 1885, pp. 34-36

74 Brunialti, *La costituzione italiana*, cit., p. 36.

75 Laing, *Journal of a residence*, cit., p. 125.

76 Palma, *Le costituzioni moderne*, cit., pp. 339-340.

77 A. Brunialti, *La legge nello Stato moderno*, Torino, Unione tipografico-editrice, 1888, p. CCLIV.

78 Ivi, p. 342.

79 Brunialti, *Il diritto costituzionale*, cit., p. 35.

80 L. Palma, *Corso di diritto costituzionale*, vol. II, Firenze, Pellas, 1884, p. 389.

The Treatment of Italians Abroad in the Legal Opinions of the *Consiglio del Contenzioso Diplomatico* of the Italian Ministry of Foreign Affairs (1861-1907)*

MATTEO ZAMBONI

1. *Sovereignty and the Treatment of Aliens in XIX Century International Law*

The paper seeks to reconstruct the development of international law rules concerning the protection of individuals through the discussion of several cases in which the Kingdom of Italy was requested to intervene in diplomatic protection on behalf of its nationals residing abroad between 1861 and 1907.

From the point of view of international law theory, the paper thus covers the subjects of the treatment of aliens, state responsibility and diplomatic protection.

At the time, none of these subjects had been thoroughly analysed by international law scholarship, which was still an «amateur science»[1].

In contrast, cases related to the treatment of foreign nationals were ever so common in practice, as yet another consequence of «the creation of a single global economy» which was one of the «major facts» of the XIX century, and in particular of its second half, and of the unprecedented movement of people and capital which followed[2].

It is no surprise, then, that the topic received increasing attention by writers throughout the second half of the Century.

In outline, lacking any mechanism to provide rights and place for individuals at the international stage, international lawyers of the time thought that individual rights could be vindicated through the intervention of their state of nationality, drawing upon the Vattelian fiction that «quiconque traite mal un citoyen porte indirectement préjudice à l'Etat qui doit protéger ce citoyen»[3].

There are, of course, differences and exceptions. But one could nonetheless say that, by the beginning of the XX Century, the general view among mainstream international lawyers was that there existed rules of international law concerning the treatment of individuals, sanctioned in treaties of friendship, commerce and navi-

gation, and (albeit very limited) in custom. Only, these rules did not address individuals, but states alone: their violation from the part of a state (the state of residence of the individual) triggered international responsibility toward another state (the state of nationality) and could be vindicated by «the instrument [of enforcement] *par excellence*» of diplomatic protection[4].

This position was shared by most of the international lawyers of the time, their dogmatic differences notwithstanding, as, for instance, Robert Phillimore, Johann Kaspar Bluntschli, Paul Pradier-Fodéré, Augusto Pierantoni, William Edward Hall, Jean Thomas, Iouda Tchernoff, John Westlake, Pasquale Fiore, and was perfected by Dionisio Anzilotti at the turn of the Century[5].

This is also the doctrine behind the discussions and resolutions of the *Institut de droit international* on the treatment of aliens, such as those relating to the damages suffered by aliens during civil wars and those on the right to expulsion[6].

Having said that, and however interesting the analysis of these writings and resolutions, the paper takes a more concrete approach and focuses on actual cases of diplomatic protection from the perspective of the legal opinions delivered to the Italian Government by the *Consiglio del contenzioso diplomatico*. It seems, indeed, that such an approach would render more understandable the mix of legal and political arguments that lie behind the subject. At the same time, such an approach does not aim, primarily, at establishing whether, or to what extent, this advice was taken into consideration, or whether, or to what extent, the legal opinions bent to political needs. It, rather, seeks to follow the development of the distinct set of rules concerning state responsibility for damages suffered by private aliens, pondering the importance of international law scholarship against political needs in a set of actual disputes[7].

2. *The "Consiglio del Contenzioso Diplomatico"*

In accordance with the above, the paper uses, as primary sources, the legal opinions delivered by the *Consiglio del contenzioso diplomatico*, an advisory body established at the ministry of foreign affairs of the then kingdom of Sardinia on November 29, 1857[8].

According to the decree that established it, the *Consiglio* is a special committee of diplomats, high bureaucrats and lawyers who are appointed by the King, at the proposal of the minister of foreign affairs, and entrusted with the task of giving advisory, non-binding opinions on questions of international law at the request of the ministry of foreign affairs[9].

According to the *Consiglio*'s rules of procedure, adopted on December 13, 1857, the opinions are drafted by a rapporteur (chosen by the president among the members), whose conclusions are then approved either unanimously, or by a majority[10]. Albeit not provided for by the rules of procedure, dissenting members may attach their individual opinion.

Even though it underwent several reforms during the period that spans from its foundation to its suppression in the wake of WWI (the major of which is the Mancini reform of 1883), the *Consiglio* preserves the same composition and task[11]. As to the former, albeit increased from 7 to 15, mem-

bers of the *Consiglio* will always be chosen among the above-mentioned categories, the most important of which seems to be the one composed by «the most renown lawyers and law professors of the kingdom» (as stated in Article 4 of the 1857 decree). This is very important for the present paper, which relies upon a set of legal opinions drafted by prominent members of the Italian school of international law (including Esperson, Pierantoni and Fusinato). As to the latter, a survey of the over 200 opinions given by the *Consiglio* between 1857 and 1915 reveals subject matters covering almost any international law issue. Among them, some opinions concerning the treatment of Italian nationals residing abroad have been selected.

Eight of these opinions are dealt with in the paper.

Two of them (dating back to 1861 and 1893) relate to questions of nationality, and are to be addressed at the outset, since nationality constitutes the primary requirement to diplomatic protection.

A third opinion of 1899 relates to the *protégés* system, and, by the example of the different solutions adopted by two renown international lawyers sitting in the *Consiglio*, highlights the uncertainties of the doctrine of the international responsibility of states for damages caused to private persons during the period under review.

The last four opinions (adopted between 1898 and 1907) relate to diplomatic protection claims in the narrow sense and refer to disputes occurred with South-American republics. As such, the last four opinions offer the opportunity to examine the different (and opposing) arguments developed by European international lawyers, on the one hand, and their South-American counterparts, on the other hand, in relation to the treatment of foreigners and diplomatic protection[12].

3. *Italian Nationality Before the Italian Kingdom*

Nationality constituted, at the time, the essential requirement for the individual to receive legal protection at the international stage[13]. It is only natural, then, that many claims were tackled on point of nationality[14].

For the new Italian kingdom, questions of nationality arose as a consequence of the interweaving of the process of unification with the historical, and yet on-going, emigration from the peninsula.

Generally speaking, the principle of *jus sanguinis* (sanctioned in Article 4 of the Italian civil code of 1865, and already applied in the majority of the Italian pre-unitarian states) secured a tight bond between the community of the Italians abroad (the «colonies») and the motherland[15]. Indeed, no one doubted that, under Italian law, the simple fact of emigration did not entail the loss of Italian citizenship. There is, admittedly, much rhetoric on the point. For instance, Esperson argues that he who leaves the «beautiful Italian sky» will not as such forfeits the nationality he acquired by blood. But there is also a political side to it. In fact, according to this doctrine, the King of Italy inherited the right to protect all the individuals of Italian descent residing abroad, albeit raised and possibly born overseas, as made clear, for example, by Article 23 of the consular instructions issued on April 8, 1859, by the then King of Sardinia, which

ordered the consuls to afford protection to all those individuals of Genoan descent established in the Levant[16].

But, however clear that might seem in general terms, a survey of the opinions given on the subject by the *Consiglio* discloses some difficulties, especially when it comes to the question of establishing the nationality of individuals emigrated (long) before the Italian unification[17].

The *Consiglio* is referred a question to this effect as early as December 1860, in relation to some Jewish families (so-called Grana), who emigrated from Spain to Tuscany after the *Reconquista*, acquired the citizenship of the grand duchy of Tuscany and then moved to Tunis during the XVII century[18].

In its opinion, adopted on January 18, 1861, the *Consiglio* considers that all those who were subjects of the grand duchy of Tuscany at the time of the incorporation to the Sardinian states ought to be recognised as «subjects of the new sovereignty». Accordingly, the *Consiglio* advises the ministry to reclaim those individuals to the king's sovereignty, to guarantee that all «the Italians» residing in Tunis enjoy their «sacred rights of nationality»[19].

In sum, the *Consiglio* makes use of the "incorporation paradigm" to justify the automatic acquisition of Sardinian nationality for the ancient subjects of pre-unitarian Italian states. This is not surprising, considering the consistent stance taken by Italian legal scholarship[20]. Less predictably, though, the opinion under review applies this position irrespective of the residence within the peninsula of the individuals concerned. In other words, according to the *Consiglio*, after the unification all the individuals of Italian descent acquire Italian citizenship even though they resided outside the peninsula, provided that they retained their original citizenship up to the time of the incorporation. Still less predictably, the *Consiglio* recognises the Granas as Italians prior to the proclamation of the Italian kingdom (which famously took place on March 17, 1861)[21].

It is interesting to note how this conclusion merges the notion of nationality as a consequence of cultural and ethnical factors (such as language) with the voluntarist approach to nationality, stressing the individual's will to be part of the (Italian) community[22].

The Grana offer the perfect case for such a comprehensive approach. It has, indeed, been noted that they spoke Italian as their main language, and contributed in making it the *lingua franca* for commerce in Tunisia[23]. Moreover, they perceived themselves as an important part of the Italian bourgeoisie, sent their kids to Italian schools, fit important roles in the liberal professions both in Italy and in Tunisia.

At the same time, there is a clear economic interest both for the Grana to be recognised as Italian citizens and for the newly established Kingdom to be able to intervene in their protection. The former needed a citizenship to rely upon in their activity as cosmopolitan traders. The latter seeks to deploy the strategic position of the Grana in the Mediterranean trade for foreign policy purposes[24].

Admittedly, all this remains in the background of the 1861 opinion, which is still very concise and somewhat assertive. As will be seen below, however, these considerations will soon become part of the *Consiglio*'s opinions on nationality.

4. *The Connection Between Nationality and the Capitulations Regime in the Ottoman Empire*

The *Consiglio* addresses the same questions some 30 years later, in an opinion adopted in 1894 concerning the conformity to international law of two Turkish statutes: the regulation on consular service of 1863 and the law on nationality of 1869.

Both statutes were passed by the Sublime Porte to counter the abuses inherent in the capitulation regime, and in particular in the institution of protection, which allowed the European powers to extend the benefits stemming from the capitulations to Ottoman subjects employed by embassies, consulates, or merchants[25]. While not acquiring foreign nationality, these individuals (referred to as *protégés* upon granting of a certificate of protection by European ambassadors or consuls) enjoyed all the privileges recognised to foreigners and, in substance, were treated as such[26].

Over time, the institution could not but convey abuses. Certificates of protections were openly sold by western ambassadors and consuls to take these individuals away from Ottoman sovereignty[27].

To curb these misapplications of the institution, the regulation on consular service of August 10, 1863, provides that, from that moment onward, only interpreters (dragomans) and guards would have been recognised and accepted by the Sublime Porte as European *protégés*[28].

Tellingly, though, as soon as Turkey tackled the abuses of protection, the European powers started to abuse of nationality. Not being able to issue new certificates of protection, they would simply consider the former *protégés* as their nationals, sometimes issuing a certificate of naturalisation[29]. As a reaction, the law on nationality of January 18, 1869, provides that no certificate of naturalisation would have been deemed valid, unless it bore an authorisation by the Sultan (Article 5), and requires foreigners to provide clear evidence of their foreign nationality, if they were to be treated as such (Article 9)[30].

With a circular letter to the European representatives in Constantinople of March 26, 1869, the Sublime Porte clarified: (i) that these provisions did not aim to undermine the rights of foreigners, as established by the capitulations; (ii) that it only applied to cases where the local authorities had good reasons to believe that one individual were falsely claiming a foreign nationality, in order to avoid the consequences of domestic jurisdiction; and (iii) that it did not have retroactive effect[31].

These assurances notwithstanding, the Italian consul in Beirut, in a report to the ministry of foreign affairs of 1892 (then transmitted to the *Consiglio* and attached to its opinion) point out that Article 9 might prove detrimental to the individuals of Italian origin, whose ancestors established in the Levant under the Maritime republics, as they might not be able to produce clear evidence of their lineage to the ancestor who emigrated to Turkey, or of his birth within Italian territory, after such a long time from the original settlement. Yet, notices the consul, to require such a proof would be unfair, since these communities have historically claimed and enjoyed extraterritorial privileges in the Levant[32].

The committee appoints as rapporteur Pietro Esperson, whose draft is approved unanimously.

On the *protégés* issue, the opinion is very concise. It merely acknowledges the misapplication of the institution and shares the rationale behind the rule confining protection individually to guards and interpreters[33].

By contrast, the opinion elaborates on the law on nationality.

At the outset, it takes note of the positive assessment of that law that was expressed by the French *Comité du contentieux diplomatique* and by French scholarship[34]. It, then, provides an analysis of the two provisions at hand, having made it clear that it is each state's sovereign attribution to establish the conditions for the acquisition and loss of nationality, and that the principle applies to nationality at birth as well as naturalisation.

As far as Article 5 of the Turkish statute is concerned, it then follows that each state is free to make naturalisation conditional upon the requirements that it considers more apt. In other words, for Esperson (and for the *Consiglio*), the status of the person naturalised abroad is to be determined with sole regard to the domestic legislation of his country of origin. Granting of certificates notwithstanding, naturalisation is not perfected if the individual did not comply with his country of origin's regulation concerning loss of nationality; in the case at hand, the need to obtain the Sultan's authorisation. According to the opinion, such a sovereign prerogative could not be denied to the Ottoman empire which, though far from being relieved from the capitulations, had nonetheless been admitted to the concert of civilised nations with the treaty of Paris of 1856 and was, thus, entitled to control the «denationalisation» of its subjects and avoid them being taken away from its jurisdiction[35].

Article 9 is considered in light of the same principle that it is a state's sovereign and «unilateral» attribution to establish who are its nationals. Having said that, and having taken note of the Mémoire of March 26, 1869, in which the Sublime Porte guaranteed that it did not aim at imposing ottoman nationality on foreign subjects, Esperson and the *Consiglio* conclude that those who Italy deems as Italians are to be recognized as such, unless Turkey is able to prove that these individuals had lost their original nationality (for instance, since they accepted Ottoman nationality by naturalisation).

Therefore, the opinion accepts that Article 9 of the Turkish law on nationality complies with international law, and with the capitulation regime, only to the extent that it is interpreted as establishing a mere "presumption" of ottoman nationality upon the individuals there resident who are not able to prove their status of foreigner. Conversely, had it established a conclusive, non-rebuttable (*juris et de jure*) presumption of ottoman nationality, said provision would have breached international law and run afoul with the capitulation regime[36].

But, as always with the law, the devil is in the details. The nature of the conclusive evidence of foreign nationality envisaged by Article 9 becomes the matter for contention.

The answer is not univocal. The opinion draws a distinction between the evidence required to those individuals of Italian origin whose ancestors emigrated to Turkey at the beginning of the XIX Century and those whose ancestors established there at the time of the Italian Maritime republics. Only the former will have to prove their Italian nationality by title (birth certificate of the

ancestor who emigrated from Italy and evidence of lineage to that ancestor). The latter will be relieved from the *probatio diabolica* of the exact time of their ancestors' emigration and their lineage. For them, the *Consiglio* asserts, Italian nationality is to be presumed on the basis of the registration within the Italian consular registry[37].

It was, in fact, common ground at the time that, for an «uninterrupted and never disputed custom [...] in all the foreign communities in the Ottoman empire the descendants of the foreign subjects have always been regarded [...] in the lineage of the sovereign of the country from which the ancestor came»[38]. It is, therefore, only natural that the new Italian kingdom succeeded in the protection of the descendants of the communities of the Maritime republics that, first, quartered in the Levant and enjoyed extraterritorial privileges.

It seems, however, that in Esperson's views, and in those of other Italian scholars, the principle is not limited to the case of the Levant, but is of a general nature (as Esperson himself and other members of the Italian school of international law point out in their academic works)[39]. This is, perhaps, the reason why the opinion under review does not take into account the specific features of Ottoman nationality (which was originally tied to Islamic religion, in accordance with the confessional character of the Empire[40]) but addresses the question as though it related to the nationality of any other (Western) Country. Indeed, the principle of the continuity of Italian nationality is key to the new Kingdom's political and ideological foundations. As such, the *Consiglio* (that is tasked with the mission to bring consistency in Italy's foreign relations) strives to craft its conclusions in terms as general as possible.

This is, also, the reason why the opinion under review clearly identifies the different priorities of Italian foreign policy. The most pressing issue is doubtless the one relating to the nationality of members of the historical Italian colonies. The nationality of the "new" immigrants ranks second, naturalisation third, whereas the safeguards of the *protégés* is clearly of minor concern, as will be further proven by the analysis of another opinion given by the *Consiglio* on the issue.

5. *The Constitutive Elements of International Responsibility*: Fusinato v. Pierantoni

Five years later, in 1899, the abuses of protection return before the *Consiglio*. This time, the question asked by the ministry relates to a claim of an Italian company, operating in Morocco, that complains of the unlawful arrest of one of his *protégé* by the part of the Moroccan government, and demands compensation for the economic loss suffered in his absence[41].

It must be noted, at the outset, that the *Consiglio* advises the government not to press the claim in diplomatic protection. But the discussion to reach this conclusion discloses a conflict of opinions between two prominent international lawyers sitting in the *Consiglio*. For Fusinato (who drafts the report adopted by the majority), the claim discloses a violation, but does not deserve to be pressed in diplomatic protection since the damage alleged by the company would not be a direct and immediate consequence of that violation, whereas for Pierantoni

(dissenting from the opinion of the majority) the whole complaint is ill-founded, since there is no wrongful act from the part of the Moroccan government.

On the one hand, Fusinato takes the violation for granted, asserting that the arrest of the *protégé* infringed Italy's right to protection. However, he points out that, for a generally recognised principle of international law, reparation is confined to damages that are the direct and immediate consequence of the wrongdoing and recalls, in support of this statement, the findings of the Geneva arbitral tribunal in the *Alabama* case, which famously excluded reparation for the US indirect claims[42]. It, then, follows, in Fusinato's opinion, that the claim is not to be pressed in diplomatic protection lacking conclusive evidence of the direct causal link between the wrongful act complained of (*i.e.* the arrest of the protégé) and the damage allegedly suffered by the company (*i.e.* loss of commercial gain due to the absence of an agent). In substance, Fusinato argues that the company could have avoided damages by simply appointing another *protégé*[43].

On the other hand, while sharing the conclusion that the company is not entitled to claim damages, Pierantoni bases his separate opinion on completely different grounds[44]. To begin with, the author who wrote two monographs on the *Alabama* (and prides himself of having been quoted in the US case before the Geneva tribunal) considers that the principle of indirect claims does not apply to the case at hand, which is, instead, to be addressed from the point of view of the «foundation of international responsibility» (that is to say, the alleged violation of the right to protection)[45].

Pierantoni, then, notes that, in Morocco, protection was regulated by the treaty of July 3, 1880, concluded between Morocco and the great powers (including Italy, which ratified it on April 24, 1881). The first test is, thus, whether that treaty had been violated[46].

Before looking into the matter, however, Pierantoni calls for a restrictive interpretation of the treaty, in light of the «special character» of the institution of protection of natives, as opposed to the general character of every state's right to protect its nationals[47].

Having said that, he focuses on Articles 7 and 8 of the treaty, which prescribe a number of formalities in order to grant protection to a subject of the Sultan of Morocco, including the need to register him on a list, sealed by the consular authority, and transmitted to the local authorities[48]. He, then, points out that these formalities have not been complied with by the Italian Consulate in Morocco in the specific case. Therefore, he concludes that the agent of the company was not entitled to Italian protection in the first place and that, consequently, the arrest did not breach any international law provision[49].

In retrospect, Pierantoni's thesis seems more convincing. But in any event, while the agreement as to the substantive conclusions underlines the restrictive approach adopted by these international lawyers on the *protégés* issue, the discussion as to the merits of the case discloses the uncertainties which, still, dominate the doctrine of international responsibility for damages caused to private aliens at the end of the century.

6. *The search for general principles of international law on the treatment of aliens*

The uncertainties underlined in connection with the last-mentioned opinion grow exponentially when the *Consiglio* is requested to advise on claims relating to a subject matter which is not covered by treaty stipulations.

As pointed out by the *Consiglio* in an opinion given in 1898 on a complaint raised by some Italian nationals residing in Bahia who suffered damages to their properties at the hands of bandits, these cases are governed by the principles of international law on the treatment of aliens universally accepted by civilized nations[50]. It is not easy, however, to define the scope and content of such principles. All that the analysis suggests is that customary international law principles governing state responsibility for damages suffered by private individuals developed, in the period under review, «in pairs of opposites, reflecting contrasting ways to think about a problem»[51]. Notably, while «the classical antinomy underlying the subject», that between the principle of equal treatment and that of the international minimum standard of treatment, is fairly obvious, the survey of the opinions delivered in a number of actual disputes shows a more nuanced attitude on both sides[52].

For instance, the above-mentioned opinion concerning the damages suffered by the Italian community in the Brazilian state of Bahia accepts that international law does not bind states to afford a higher degree of protection to foreigners, than that granted to its nationals (thus, seemingly, acknowledging the principle of equal treatment), but points out that this conclusion applies only to the extent that the state concerned does everything in its power to protect the life and properties of both its subjects and the foreigners (thus echoing the doctrine of the international minimum standard of treatment)[53].

Against this background, in that case the *Consiglio* advises against diplomatic protection attaching importance to the following facts: (i) that the wrongful acts complained of were performed by bandits (rather than state agents); (ii) that they damaged Brazilians and Italians alike; and (iii) that federal and local authorities had made any effort to prevent them and punish the responsible[54].

Rather than from general principles, the conclusion thus ensues from the careful consideration of the facts of the complaint. Moreover, the conclusion of the *Consiglio* in that case is only provisional. Indeed, the opinion under review notes that criminal proceedings against the alleged perpetrators were pending before domestic courts and calls the government to watch over the proceedings to verify whether some sort of responsibility would be established upon the government: in that case, indeed, the claim would deserve to be pressed in diplomatic protection[55].

7. *The Problem of International Responsibility for Private Acts*

As a matter of fact, the issue of the then so-called indirect responsibility (*i.e.* international responsibility for wrongful acts performed by private persons) was a major source of controversies between European states and South American republics: the former arguing that, in some instances, even private acts trigger the international

responsibility of the territorial state; the latter, denying such possibility in absolute terms.

In practice, these disputes arose in cases of damages caused to aliens in the wake of rebellions, popular uprisings, or civil wars[56]. The *Consiglio* confronts with the issue in an opinion delivered in 1899 in relation to the responsibility of Peru for damages suffered by Italian nationals during the civil war of 1894-1895.

After the war, the South American republic established a special commission to adjudicate foreigners' claims for damages. On October 26, 1897, the Peruvian ministry of foreign affairs communicates to the states of nationality of the claimants the results of the commission's decisions. Italy had filed 82 claims with the commission on behalf of its nationals, only 32 among them had been granted compensation. Together with the results, the Peruvian ministry transmits a diplomatic note highlighting the criteria followed in the adjudication of the different claims[57].

The note is modelled on the monograph *Le droit international appliqué aux guerres civiles*, published in 1898 by Carlos Wiesse (former undersecretary to the Peruvian ministry). Just like the monograph, the note acknowledges the theoretical foundation of every state's right to protect its nationals abroad, but decries the practice of abusive claims[58]. Along the lines of one of the most traditional Latin American contentions, the Peruvian note emphasises that, once a foreigner decides to settle in a country different than his own, he must bear the defects in the organisation and in the welfare of that country, since foreigners are to be placed on equal footing with nationals and cannot claim any greater protection[59].

It follows, in the argument crafted in the Peruvian note, that foreigners are not entitled to diplomatic protection for damages suffered during popular uprisings, revolutions or civil wars. In the Peruvian ministry's reasoning, that would be tantamount to allow diplomatic intervention to recover damages suffered for an earthquake or other natural disasters, «como si fuesen los gobiernos sociedades de seguros contra riesgos y danos que de ellos no dependen ni pueden, en la generalidad de los casos, impedir»[60].

At the most, the government of Peru accepts international responsibility when domestic authorities were proven to have been negligent in preventing such damages and/or in punishing those responsible for them. However, it argues that, even in these cases, the domestic government escapes responsibility by disavowing the conduct of its agents and bringing them to prosecution[61].

It is on that note (namely, on its compliance to international law) that the Italian government seeks the advice of the *Consiglio*[62].

The *Consiglio* begins dealing with the task by questioning the actual equality between foreigners and nationals with an argument that ultimately relies upon the (in) famous doctrine of the standard of civilisation. Notably, the opinion argues that a state which fails in protecting the life and property of both citizens and foreigners would cease to be considered a civilised one. In that event, however, citizens may react through the exercise of their political rights, and ultimately through revolution, whereas foreigners, who do not enjoy political rights and are bound to neutrality, need some other safeguard against injus-

tice. That safeguard, for the *Consiglio*, is the diplomatic protection of their state of nationality[63].

The *Consiglio* shows more restraint on the subject of international responsibility for damages suffered by aliens during civil wars. It grants that the territorial State escapes responsibility, unless local authorities have been negligent in preventing them and/or careless in punishing the guilty parties, but, at the same time, it introduces a set of exceptions for cases in which the popular uprisings are specifically directed against foreigners of a certain nationality[64].

One has to keep in mind that mobs against Italian immigrants were not infrequent at the time. And it is noteworthy that, to counter the objection that European states apply different international law principles to their mutual relations than to those with South American states, the *Consiglio* supports his statement by recalling the precedent of Aigues Mort, when France paid an indemnity to the families of the Italians killed or wounded in a mob of 1893 (although that indemnity was actually paid out of humanity, not to fulfil an international legal obligation[65]).

On the same line of argument, when it comes to reject as «frankly unacceptable» the principle, predicated by Peru, that the territorial state evades responsibility, even were the wrongful act committed by its agents, by simply disavowing their conduct or bringing them to prosecution, the *Consiglio* prays in aid the arbitral award given by the Baltic international lawyer Friedrich Martens in 1897 in the *Costa Rica Packet* case, between the Netherlands and Great Britain[66]. The case is direct authority for the principle that a State cannot avail itself of the institutional independence of its organs to evade international responsibility. As such, the *Consiglio* uses it to reinforce the argument that the territorial State is always responsible for the acts and omissions of its agents, irrespective of the subsequent disavowal of their conduct and/or persecution.

Once again, in the understanding of the *Consiglio*, the fact that the *Costa Rica packet* case opposed two European states would disprove the South American contention that these States apply a double standard, thus reaffirming the universal character of international law principles governing state responsibility for damages suffered by aliens.

These efforts notwithstanding, the comparison between the arguments contained in the opinion under review (and in other opinions given on the subject matter by European legal advisers, such as that of the British and Spanish governments) and those affirmed in the Peruvian diplomatic note (and outlined in major international law works by South American scholars) highlights a conflict which seems hardly reducible to the sphere of legal reasoning, calling into question (opposing) ideological views[67].

8. *Denial of Justice as a «Workable Compromise»*

Starting from such different premises, it is only natural that disputes of the kind develop on technicalities to reach what has been portrayed as a «workable compromise». Eventually, that was to be found in in the longstanding public international law principle of denial of justice[68].

Indeed, the idea that every state is under an international duty to afford aliens the right to access domestic courts and seek justice could be accepted on both sides of the Atlantic[69]. Moreover, such legal construction seeks to avoid uncertainties concerning attribution of the wrongful act in cases of indirect responsibility: the territorial State is held accountable (not for the wrongdoing itself, but) for having failed in providing redress (or, at the very least, a reasonable prospect thereof)[70]. In addition, a claim for denial of justice implies an attempt to exhaust domestic remedies, thus securing some extent of respect for the sovereignty of the territorial state[71].

For these reasons, the provision that a state incur international responsibility for denial of justice was incorporated in virtually all treaties and came to be recognized as a customary norm of international law as well as «the fundamental basis of an international claim»[72].

As noted, though, «[this] compromise in words [...] amounts to a postponement of the decision»[73]. In other words, while the parties agree that denial of justice triggers international responsibility, they disagree on what exactly constitutes a denial of justice.

The committee is asked this question in 1898, in relation to a dispute between an Italian national and the government of Guatemala concerning the acquisition of some coffee plantation. In short, an Italian businesswoman based in Guatemala complains of the fact that, contrary to domestic law, local authorities overlooked her offer for purchasing some fallow fields and accepted the one advanced by a local businessman[74].

It is a crucial point in the dispute, that the constitution of Guatemala of 1879 provides, at Article 23, that foreigners shall not avail themselves of diplomatic protection, save for cases of denial of justice, adding that the mere fact that the final decision opposes the foreigner is, by no means, to be deemed as a denial of justice[75].

The *Consiglio* accepts the first provision contained in Article 23 of the Constitution of Guatemala only to the extent that it reflects a general and universally accepted principle of international law, being understood that foreign legislation does not bind a state in the exercise of its sovereign rights, including the right to diplomatic protection[76].

On the merits, the *Consiglio* advises against diplomatic intervention, noting that the Italian claimant had already instituted legal proceedings before domestic courts and was yet to obtain a decision[77]. Thus, the *Consiglio* applies the local remedy rule and shows its willingness to let the matter at the hands of the authorities of Guatemala prior to engage the Italian government in an international claim.

However commendable it may be, though, this conclusion allows the *Consiglio* not to confront with the second provision contained in Article 23 of the Constitution of Guatemala, the one that excluded once and for all that a Court decision against a foreigner constituted denial of justice.

9. *From Denial of Justice to Manifest Injustice*

In fact, the analysis of other opinions delivered by the *Consiglio* concerning the existence of a denial of justice suggests that such

a blunt proposition, as the one embodied in the second provision contained in Article 23 of the Constitution of Guatemala, could not be entertained.

In similar cases, the discussion rather focused on the conditions and the principles upon which a decision on the merits of a foreign court amounts to a denial of justice[78].

Unsurprisingly, the opinions of the *Consiglio* on the subject do not take a consistent stance.

Some cases disclose a very strict approach, with the *Consiglio* ruling out the possibility to raise a claim for denial of justice once a final decision had, rightly or wrongly, been delivered by domestic jurisdictions. This is the case of an opinion delivered in 1907 on the complaint of an Italian national ordered, by the Brazilian Supreme Court, to cover the debts contracted by his sons' company. There, the *Consiglio* states that a judgment's flawed reasoning does not open the door to diplomatic protection, as long as the domestic legal system in question provides judicial remedies which have been exhausted, albeit unsuccessfully[79].

In other, more elaborated opinions the conclusion is reversed. This is the case of an opinion delivered in the same year, 1907, in connection with a dispute between an Italian company and the government of Venezuela.

In short, the dispute concerned a big concession contract, concluded in 1898, between the government of Venezuela and the Italian company Martini. The former granted use of some coal mines, a railroad and the docks of the port of Guanta. The latter agreed to pay an annual rent and fulfil a complex set of obligations (*e.g.* guarantee tariffs for the transport of passengers and mail on the railroad, hire local workers, keep the railroad and the docks in order). The dispute peaked in 1905, when the Supreme Court of Venezuela found the company to have breached the contract and ordered it to pay damages to the government[80].

Between the concession agreement of 1898 and the Supreme Court's decision of 1905, Venezuela underwent popular uprisings and suffered the blockade of its ports, that was imposed by Great Britain and Germany, along with Italy, as a reprisal for the refusal to restore aliens who had been damaged during the revolution and for Venezuela's default on external debt. In 1903, the international crisis was resolved by setting up mixed commissions to adjudicate foreign claims, while the question relating to the bondholders' rights was referred to the Permanent Court of Arbitration, set in The Hague[81].

The same Martini company had filed a claim for the damages suffered at the hands of revolutionaries before the mixed commission, and had received compensation by an award of July 8, 1904[82].

Once the matter seemed settled, however, the Venezuelan government initiated legal proceedings against the company for breach of contract, alleging that the company did not fulfil its obligations (among other things, did not repair the railroad). In the counter-case, the Martini company argued that the railroad had, in fact, been destroyed by the revolts and that the government breached the concession agreement in the first place, by granting a monopoly for the carrying of goods to and from the port of Guanta to a rival company.

On December 4, 1905, the Supreme Court eventually found in favour of the government, declared the contract resolved for non-compliance on the part of the company and ordered it to pay damages[83].

It is in the aftermath of this decision that the ministry of foreign affairs refers to the *Consiglio* three questions to enquiry whether the Supreme Court judgment amounted to a denial of justice[84].

At the outset, the opinion delivered by the *Consiglio* notes that Article XVI of the Martini concession provided for a waiver of diplomatic protection. It was one of the yet many examples of so-called "Calvo clause", commonly agreed in South-American business practice of the time (for contracts between governments and private aliens) in order to rule out diplomatic intervention and secure respect for the sovereignty of the newly independent countries[85]. Ironically, it is precisely with an argument about sovereignty that Western international lawyers countered the validity of such clauses. Since diplomatic protection was an attribution of one state's sovereignty, they argued, it was not for a private individual to waive it.

The *Consiglio* takes this stance. Not only diplomatic protection is a right of the state (as such, non-disposable by private individuals), it is also an «essential» and «inalienable» one (and, thus, non-waivable):

> una delle due: o si tratta di uno di quei casi che l'intervento diplomatico non comportano, e allora la disposizione è inutile; o si tratta invece di uno di quei casi che, pel comune diritto delle genti, possono dar luogo a tale intervento, e in tal caso la disposizione manca di qualunque valore, non solo perché le parti contraenti mancavano di competenza a contrattare sui diritti di un terzo estraneo alla convenzione, quale si era lo stato straniero cui una di esse apparteneva; sia perché, tanto il diritto del cittadino di invocare, nei congrui casi, la protezione del proprio governo, quanto il diritto di quest'ultimo di esercitarla quando ne sia il caso, sono di quei diritti essenziali che si reputano inalienabili; e perciò non potrebbero essere in modo generale rinunziati, neppure in virtù di qualsiasi più solenne trattato internazionale[86].

Therefore, the clause does not bar the *Consiglio* from looking into the Supreme Court judgment to assess whether it falls within one of the «exceptional cases» in which a state's court decision entails the international responsibility of that state, and, consequently, entitle the intervention of the claimant's state of nationality in diplomatic protection[87].

Prior to undertake such an assessment, however, the *Consiglio* rephrase the question posed by the ministry. Technically, the case does not disclose an instance of denial of justice, meant as refusal to adjudicate, since a decision had indeed been delivered by the Supreme Court after having heard and evaluated (rightly or wrongly) arguments and evidence by both parties. Rather, the question is whether such a decision is so manifestly unjust as to amount, in substance, to a denial of justice[88].

Having said that (and recalling its previous jurisprudence), the *Consiglio* discards the presumption that favours the legal and factual reliability of foreign courts' decisions on two grounds.

First, because the Venezuelan judiciary is not trustworthy in adjudicating matters which, like the Martini case, oppose foreigners to the federal government (arguing, *a contrario*, that the 1903 mixed commissions would not have been otherwise established). Second, because that presumption rests on the assumption that, being more proximate to the disputed facts, local courts

are in a better position to evaluate them. Conversely, the presumption does not apply to cases, like the one at hand, which do not focus on facts, but on the application of «well established legal principles» to an uncontroverted set of facts[89].

Indeed, according to the *Consiglio*, «the Supreme Court based the solution of the knot of the dispute on two serious errors of law»[90]. On the one hand, it overlooked the general principle of contract law that, in mutual covenants, the parties cannot modify the object of the contract without agreement, as the Venezuelan government had done by granting a second concession to a rival company. On the other hand, it failed in administering the burden of proof, in violation of the general principle of law according to which «actori incumbit onus probatio, reus in excipiendo fit actor». In practice, the *Consiglio* argues that, since the government was plaintiff, it would have been for it to prove that the company did not fulfil its contractual obligations (*e.g.* did not repair the railroads), with the doubt benefiting the defendant, not vice versa.

These arguments lead the *Consiglio* to conclude that the Venezuelan Supreme Court decision amounted to manifest injustice, and that the Italian government was, therefore, entitled to vindicate the company's rights in diplomatic protection[91].

Eventually, the dispute will be settled in 1930, by another arbitration which finds in favour of the Martini company[92].

It is fair to say that, along with the argument on the manifest injustice of the Supreme Court's decision, the arbitral award ponders the question of whether and to what extent the Supreme Court's decision entailed a violation of the international obligations stemming from the 1904 award of the Italian mixed commission and from the treaty between Italy and Venezuela of 1861.

These questions were, also, referred to the *Consiglio* by the ministry. One might, thus, doubt whether the solution given to the question of the manifest injustice of the Supreme Court decision had been influenced by that of the other two questions (the *Consiglio* advising diplomatic protection on all three grounds), and even speculate on whether the same conclusion would have been reached, had it not been referred that question together with the other two.

Still, it is striking to see how the *Consiglio* looks at the merits of a final decision of a foreign country's Supreme Court in order to establish international responsibility on that state, and, in substance, offer legal justification to the diplomatic action of the government, aimed at vindicating the rights of an Italian company doing business abroad.

10. *Conclusions*

At first sight, these opinions of the *Consiglio*, as well as the cases to which they refer to, show such a degree of interference with the sovereignty of the territorial State as to justify the views of South-American international lawyers that, as held by the Brazilian legal adviser in an opinion given to his foreign ministry, equal diplomatic protection to a special instance of appeal for foreigners alone, not provided for by law and against its spirit: in sum, a privilege[93].

In retrospect, this position is understandable. After all, it is the Italian ministry of foreign affairs itself that, in 1894, decrying that individual claims of diplomatic

protection often bear unreasonable requests of indemnities, when they are not at once fictitious, instructs the Italian consuls in Brazil to apply a strict approach and dismiss every private claim to diplomatic protection, unless based on denial of justice or treaty violation[94].

From a different perspective, however, it seems interesting to register the rapid technical development of the opinions of the *Consiglio* on the treatment of Italian nationals residing abroad.

On the one hand, this development is due to (and at the same time reflects) the renovated attention of international law scholarship for the subject at the turn of the Century.

On the other hand, it is only natural that the growing emigration of Italian nationals to the Americas makes these disputes more common, and, in turn, the opinions more precise and more cautious. Indeed, it is the *Consiglio* that points out, almost invariably in its opinions on the subject, that it is precisely the mass Italian emigration which calls for a restrictive approach in establishing the cases in which to advise for diplomatic protection[95].

In light of the above, the provisional conclusion on the interference with the sovereign prerogatives of other (usually less developed) states can be amended.

Notably, while the fact that some agency of a state (such as the Italian *Consiglio del contenzioso diplomatico*) dares to look at the merits of another state's judicial decision surely seems to run counter the principle of the sovereign equality among States, the development in the solutions of these disputes, in the last decades of the XIX century and the beginning of the XX, shows a trend toward a more technical, and thus neutral (or professional), approach. In this regard, the progressive consolidation of the local remedy rule, and the related focus on the international wrongful act of denial of justice, provide a clear example. Indeed, looking at the merits of a sovereign state's court final decision, though invasive it may appear, is certainly an important progress against the practice of military intervention and reprisals, that were the common solutions to these disputes in earlier times.

Beyond this, it might prove useful to provide some final remarks on the different arguments underlying the disputes under review, as the analysis suggests a difference between the arguments that underline the disputes concerning nationality and those applied in diplomatic protection cases in the narrow sense.

When nationality is at stake, the core legal argument of both states of emigration, like Italy, and immigration, like the Ottoman empire (but similar arguments are raised by the South-American republics and even by the United States), is the same. Of course, it is based on sovereignty and, as said, predicates that every state enjoys an unfettered right to establish the modes of acquisition and loss of its nationality; in other words, to decide unilaterally who are to be regarded as its nationals.

Conflicting solutions, then, are due to the fact that states of immigration apply this doctrine to naturalisation, thus claiming to have a right to issue certificates of naturalisations as they please, whereas European states, and Italy in the first place, claim that nationality «expresses a free, voluntary and permanent bond», and even that «nationality is inalienable, because it is nature which ties an individual with the land of his birth». Hence, they claim that

the state of origin keeps the right to investigate the legitimacy of the naturalisation of one of its subjects in a foreign country (just like the *Consiglio* concluded in the opinion concerning Article 5 of the Turkish law on nationality)[96].

Differently, in cases where the nationality of the claimant is undisputed, arguments advance in a specular way: the doctrine of equal treatment opposes that of the minimum standard; the doctrine of irresponsibility of the states for private acts tackles that of the then so-called "indirect responsibility"; the local remedy rule finds both its reason, and its limit, in the elaboration of the traditional concept of denial of justice.

To be sure, all these doctrines are based on the disputing states' (personal, or territorial) sovereignty, which confirms to be the «ultimate source of international obligation» in the domain of state's responsibility (and, arguably, in public international law)[97].

It is, indeed, through the conceptualization of the subject as an instance of opposing or conflicting sovereignties that the international law rules on the treatment of foreigners have been developed and applied during the period under review, thus allowing to establish a certain set of exceptions to the principle of the unfettered power of the state over its territory and, in the last analysis, to «what was beginning to be called, significantly, the internal or reserved domain [of states]»[98].

* The present article is based upon my Ph.D. thesis in legal history defended at the University of Milan on March 17, 2017 titled *I sacri diritti di nazionalità. La giurisprudenza del Consiglio del contenzioso diplomatico del Regno d'Italia sui reclami degli Italiani all'estero* (available at https://air.unimi.it/handle/2434/486439#.Wc1w_yOLTZs, november 2017). I have addressed the two cases concerning nationality in a talk of September 8, 2014, at the Fourth session of the *Centre de recherché franco-italien en droit international* of the University of Nice. The talk has been published in A. Arcari, L. Balmond, A.S. Millet-Devalle (eds.), *La gestion des espaces en droit international et européen*, Napoli, Ed. Scientifica, 2016, pp. 20-49.

[1] See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2001, pp. 28-35. Following the last-mentioned author, the current trend in the history of international law acknowledges «the radical character of the break that took place in the field between the first half of the nineteenth century and the emergence of a new professional self-awareness and enthusiasm between 1869 and 1885» (*ibidem*, p. 3); see, for example, L. Nuzzo, *La storia del diritto internazionale e le sfide del presente. A proposito di Martti Koskenniemi, Il mite civilizzatore delle nazioni. Ascesa e caduta del diritto internazionale 1870-1960*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 42, 2013, pp. 681-701; Id., *Origini di una Scienza. Diritto internazionale e colonialismo nel XIX secolo*, Frankfurt am Main, Klosterman, 2012, p. 4; M. Vec, *From the Congress of Vienna to the Paris Peace Treaty of 1919*, in B. Fassbender, A. Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford, Oxford University Press, 2012, pp. 654-678, pp. 656-657; L. Nuzzo, M. Vec, *The Birth of International Law as a Legal Discipline in the 19th Century*, in L. Nuzzo, M. Vec, (eds.), *Constructing International Law. The Birth of a Discipline*, Frankfurt am Main, Klosterman, 2012, pp. IX-XVI, p. IX; M. Vec, *Universalization, Particularization, and Discrimination. European Perspectives on a Cultural History of 19th Century Internation-*

al Law, in «InterDisciplines», 2, 2012, pp. 79-102, pp. 83-93; E. Jouannet, *Le droit international liberal-providence. Une histoire du droit international* (2011), eng. tr. *The Liberal-Welfarist Law of Nations. A History of International Law*, Cambridge, Cambridge University Press, 2012, p. 113; M. Koskenniemi, *The Legacy of the 19th Century*, in D. Armstrong (ed.), *Routledge Handbook of International Law*, New York, Routledge, 2009, pp. 141-153, pp. 142-144; I. Hueck, *The Discipline of History of International Law, New Trends and Methods on the History of International Law*, in «Journal of the History of the International Law», 3, 2001, pp. 194-217, p. 200. Critical dates to underline the break may be that of the foundation of the Revue de droit international et de législation comparée (1869) and that of the Institut de droit international (1873). For references, see, for example, L. Nuzzo, *Ordine giuridico e disordine politico. Iniziative ed utopie nel diritto internazionale di fine Ottocento*, in «Materiali per una storia della cultura giuridica», XLI, 2, 2011, pp. 319-337; M. Koskenniemi, *Gustave Rolin-Jaequemyns and the establishment of the Institut de Droit International (1873)*, in «Revue Belge de Droit International», 37, 2004, pp. 5-11; G.G. Fitzmaurice, *The Contribution of the Institute of International Law to the Development of International Law*, in *Recueil des cours de l'Académie de Droit International de la Haye* (hereafter *Recueil des cours)*, 138, 1, 1973, pp. 203-260. For the contribution of an Italian international lawyer of the time, see A. Pierantoni, *La riforma del diritto delle genti e l'istituto di diritto internazionale di Gand*, Napoli, Jovene, 1874. As for the state of art on the specific subject of state responsability for damages caused to foreig nationals, it is worth remembering that it is commonplace in international law literature to state that «the subject is one in which guidance from previous writers is almost wholly wanting; it has never yet been treated as a whole» (E.W. Hall, *A Treatise on the Foreign Powers of the British Crown*, Oxford, Clarendon Press, 1894, p. VII). The same is reiterated by Anzilotti at the turn of the Century (A. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Firenze, Lumachi, 1902, reissued in Id., *Scritti di diritto internazionale pubblico*, Padova, Cedam, 1956, pp. 1-149, p. 7, footnote 1; see also Id., *La responsabilité internationale des Etats a raison des dommages soufferts par des étrangers*, in «Revue Générale de Droit International Public», 13, 1906, pp. 5-285) and by Borchard in the inter-war period (E. Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claim*, New York, Banks, 1925, p. 177. In fact, the subject was included in international law treatises and addressed in articles and monographs (see next footnote). It may, however, be conceded that it lacked a comprehensive analysis up to the works of the authors cited above. For the anglo-saxon tradition, Edward William Hall is «the first writer on State responsibility in a modern sense» (H. Spiegel, *Origin and Development of Denial of justice*, in «The American journal of international law», 32, 1, 1938, pp. 63-81, p. 79). It is undisputable, though, that «[i]t [was] Anzilotti's enduring achievement to have provided a theoretical framework for the law of state responsibility which reconciled the contemporaneous emphasis on sovereignty and the need to establish a clear system for this area of the law» (G. Nolte, *From Dionisio Anzilotti to Roberto Ago: the Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*, in «European journal of international law», 13, 5, 2002, pp. 1083-1098, in particular p. 1088). The same author acknowledges that «the most important practical issue of state responsibility at the time was the responsibility for injuries to aliens» (*ibidem*). The first issue of the third volume of the European Journal of International Law contains several contributions on the work of Anzilotti by such authors as Roberto Ago, José Maria Ruda, Giorgio Gaja, Pierre-Marie Dupuy, Antonio Cassese, Antonio Tanca (see «European journal of international law», 3, 1, 1992, pp. 92-162). More recently, the works of Anzilotti have been analysed by L. Passero, *Dionisio Anzilotti e la dottrina internazionalistica tra Otto e Novecento*, Milano, Giuffrè, 2010.

[2] See E. Hobsbawm, *The Age of Empire: 1875-1914*, London, Weidenfeld, 1987, p. 62. For an assessment of the relationship between economic progress, migration and the develpment of international law rules relating to the treatment of aliens, see, among many, Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 44-45; S. Laghmani, *Histoire de droit de gens. Du* jus gentium *au* jus publicum europaeum, Paris, Pedone, 2003, p. 175; V. Chetail, *Migration, droits de l'homme et souveraineté*, in Id. (ed.), *Mondialisation, migration et droits de l'homme: le droit international en question*, Bruxelles, Bruylant, 2007, v. 2, pp. 14-133 (in particular, pp. 23 and pp. 35-37); E. Augusti, *Protezione, sicurezza, assistenza, solidarietà. Politiche internazionali di controllo dello straniero in Europa tra Otto e Novecento*, in E. Augusti, A.M. Morone, M. Pifferi (eds.), *Il controllo dello straniero. I "campi" dall'Ottocento a oggi*, Roma, Viella, 2017, pp. 53-80 (in particular p. 56). For the development of a global market economy in the Italian Kingdom see H. James, K.H. O' Rourke, *Italy and the first Age of Globalization, 1861-1940*, in «University of Oxford, Discussion Papers in Economic and Social History», n. 94, 2012, avail-

able at <http://www.economics.ox.ac.uk/>, novembre 2017.

[3] For a recent contribution on XIX Century international law doctrines concerning the protection of individuals, see R. Kolb, *The Protection of the Individual in Times of War and Peace*, in Fassbender, Peters (eds.), *The Oxford Handbook of the History of International Law* cit., pp. 317-337, as well as A. Vermer-Kunzli, *As If: The Legal Fiction in Diplomatic Protection*, in «European Journal of International Law», 18, 1, 2007, pp. 36-68. The quote in the text comes from E. de Vattel, *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, v. III, London, 1758, p. 136.

[4] See A.A. Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law*, in «Philippine Law Journal», v. 53, 1978, pp. 404-421 (in particular, p. 407); in the same sense, see J. Dugard, *Diplomatic Protection*, in *Max Planck Encyclopedia of Public International Law* (hereinafter MPEPIL), available at <www.mpepil.com>, november 2017 (as all entries of the Encyclopedia), par. 8; C. Walter, *Subjects of International Law*, in MPEPIL par. 15 and, more recently, K. Parlett, *The Individual in International Law*, Cambridge, Cambridge University Press, 2010, pp. 13-16. The classic authority on the matter is G. Manner, *The Object Theory of the Individual in International Law*, in «The American Journal of International Law», 46, 1952, pp. 428-449. For one of the earliest reception of the theory in Italian international legal scholarship, besides the works of Anzilotti quoted above, see G. Diena, *L'individu devant l'autorité judiciaire et le droit international*, in «Revue generale de droit international public», 16, 1906, pp. 57-76.

[5] See the positions of the different authors: R. Phillimore, *Commentaries Upon International Law*, Philadelphia, T. & J.W. Johnson, 1854, pp. 23-25 and pp. 49-50; J.K. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten, als Rechtsbuch dargestellt* (1868), tr. fr. *Le droit international codifié. Traduit de l'allemand par M. C. Lardy et précédé d'une préface par M. Edouard Laboulaye, deuxième édition revue et corrigée*, Paris, Guillaumin, 1870, pp. 223-224; P. Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaine*, 8 vv., Paris, Pédone-Lauriel, 1885-1906, v. 1, pp. 329-351; A. Pierantoni, *I fatti di Nuova Orleans e il diritto internazionale*, Roma, Pallotta, 1891; J. Thomas, *La condition des étrangers et le droit international*, in «Revue générale de droit international public», 4 (1897), pp. 620-645; J. Tchernoff, *Protection de nationaux resident à l'étranger, avec introduction sur la souveraineté des Etats en droit international*, Paris, Pedone, 1899; J. Westlake, *International Law, Part I, Peace*, Cambridge, Cambridge University Press, 1904, pp. 314-315, in addition to the works of Hall and Anzilotti cited above. 'Theoretical differences notwithstanding' means that, even those authors who professed the existence of individual (human) rights, such as Bluntschli, Fiore and (to a lesser extent) Thomas and Pradier-Fodéré recognised that the intervention of the state of nationality was the only mean to ensure those rights, thus bowing, in practice, to the more realistic approach epitomised by Anzilotti (see, for instance, the position of Fiore at P. Fiore, *Trattato di diritto internazionale pubblico, seconda edizione interamente rifatta e considerevolmente ampliata*, Torino, Unione tipografico-editrice, 3 vv., 1879-1884, v. 1, p. 493). This is not surprising, in perspective, since these authors had to confront the position that denied at once that international responsibility existed (see, for instance, Th. Funck-Brentano, Sorel A., *Précis de droit des gens*, Paris, Plon, 1877, p. 224). For an appraisal of the positions of some of these authors on the subject, see T.C. Wingfield, J.E. Meyen (eds.), *Lillich on the forcible protection of nationals abroad: in memory of professor Richard B. Lillich*, International Law Studies, v. 77, Newport (RI), Naval War College, 2002.

[6] As regards the issue of state responsibility for damages suffered by aliens during civil wars, see the report of Emilio Brusa and the other members of the special committee established by the Institut de droit international, including Enrico Catellani and Carlo Francesco Gabba, *Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile*, published in *Annuaire de l'Institut de droit international*, XVII, 1899, pp. 96-137; the report prepared by Ludwig Von Bar, *De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile*, published in «Revue de droit international et de législation comparée», XXXI, 1899, pp. 464-481 and, finally, the resolution adopted by the Institut on September, 10, 1900, at the session of Neuchatel, *Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile*, published in *Annuaire de l'Institut de droit international*, XVIII, 1900, pp. 254-256 e pp. 312-315. As regards expulsion, see the report drafted by Gustave Rolin-Jaequemyns and presented at the Institut in 1888, at the session of Lausanne, *Droit d'expulsion des étrangers, Rapport à l'Institut du droit international* (session de Lausanne, 1888), published in «Revue de droit international et de législation comparée», 20, 1888, pp. 498-504 and in *Annuaire de l'Institut de droit international*, X, 1888-

1889, pp. 229-238; the report of the special committee composed, *inter alia*, by Albert Rivier, Ludwig Von Bar, Emilio Brusa e Paul Pradier-Fodéré (published Ivi, pp. 238-244); the discussion of the subject that took place at the subsequent session of Hamburg (in 1891) after the submission of additional observations by Louis-Joseph-Delphin Féraud-Giraud (*Projet de réglementation de l'expulsion des étrangers présenté par M. Féraud-Giraud*), Ludwig Von Bar (*Projet de règlement international et rapport de M. L. de Bar*), and John Westlake (*Observations de M. Westlake sur le projet de M. de Bar (extrait d'une lettre de M. Westlake à M. de Bar en date du 28 août 1891)*, all published in *Annuaire de l'Institut du droit international*, XI, 1889-1891, pp. 316-329, pp. 284-329, as well as the final discussion at the session of Geneva (1892) when the Intitut adopted the resolusion concerning *Règles internationales sur l'admission et l'expulsion des étrangers* (published in *Annuaire de l'Institut de droit international*, XII, 1892-1894, pp. 185-226).

[7] The model is C. Storti, *Empirismo e scienza: il crocevia del diritto internazionale nella prima metà dell'Ottocento*, in Nuzzo, Vec (eds.), *Constructing International Law. The Birth of a Discipline* cit., pp. 51-145 (in particular, p. 55).

[8] The establishment of the *Consiglio* was foreseen in the *Regolamento del servizio interno della segreteria di Stato* of December 22, 1856 (published in R. Moscati, *Il ministero degli affari esteri (1861-1870)*, Milano, Giuffrè, 1961, pp. 52-82, see, in particular Articles 195-199). However, the *Consiglio* was in fact established by royal decree n. 2560 of November 29, 1857 (for references, see Ivi, pp. 18-19). Sources report that the establishment of the *Consiglio* was proposed by Cavour, who, having attended the Paris conferences of 1856, had been impressed by the advice given to his French counterpart by the *Comité du contentieux*, established at the French ministry of foreign affairs by order of April 21, 1835 (see, for instance, L. Pilotti (ed.), *Il fondo archivistico serie Z – contenzioso (1861-1959)*, Roma, Istituto poligrafico e zecca dello Stato, 1987, p. 53, footnote 1). The work of the *Consiglio* is generally overlooked in the literature on the history of international law (for exceptions, see C. Storti, *L'indipendenza dell'Italia nel diritto internazionale della prima metà dell'ottocento*, in M.P. Viviani Schlein (ed.), *Problemi giuridici dell'unità italiana*, Milano, Giuffrè, 2013, pp. 58-59 and Ead., *Ricerche sulla condizione giuridica dello straniero in Italia, dal tardo diritto comune all'età preunitaria, aspetti civilistici*, Milano, Giuffrè, 1989, pp. 209-210 and p. 314). That is striking, considering the importance that international lawyers of the time attached to the opinions delivered by such advisory bodies, and by the *Consiglio del contenzioso diplomatico* in particular (see, for instance, A. Pierantoni, *Trattato di diritto internazionale. Volume I. Prolegomeni – Storia dall'antichità al 1400*, Roma, Forzani e c. Tipografi del Senato, 1881, pp. 40-48). The opinions are part of the collection of the *Archivio Storico Diplomatico del Ministero degli Affari Esteri* (hereinafter, ASDMAE) in Rome. They will be cited with reference to their number in the *Indici del fondo 'Consiglio del contenzioso diplomatico 1857-1937'*, Roma, Istituto poligrafico e zecca dello Stato, 1980, together with the indication of the collection (*Archivio del contenzioso diplomatico. Periodo dal 1857 al 1937. Parte prima: periodo dal 1857 al 1923* hereinafter cons. cont.), package (*pacco*, hereinafter «p.») and file (*fascicolo*, hereinafter «f.») where they are located.

[9] Royal decree n. 2560/1857 is published in Ministero degli affari esteri (hereinafter Mae), *Il Consiglio del contenzioso diplomatico (1857-1897). Cenni storici e statistici*, Roma, Tipografia del ministero degli affari esteri, 1898, pp. 6-7 (see, in particular, Articles 2, 3 and 6). See also the report drafted by Cavour to introduce the decree to the king (*Relazione a S.M. che precede il r. decreto del 29 novembre 1857*, published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 4-5). On that same November 29, 1857, count Sclopis of Salerano (who famously presided the Geneva arbitral tribunal in the *Alabama* case) was elected president of the committee.

[10] The *Regolamento interno* of December 13, 1857 is published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 9-11 (see, in particular, Articles 1, 3 and 6).

[11] In the years immediately following the establishment of the *Consiglio*, several decrees provided minor amendments (see, for example, royal decree of December 4, 1863, of December 23, 1866, of January 27, 1867, of March 9, 1873 and of May 9, 1973, all published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 15, 18, 22, 25, 29). Mancini plans an overall reform shortly after having been appointed minister of foreign affairs in 1881. The reform is enacted by royal decree n. 1236 of February 17, 1883 (published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 28-30, see in particular Articles 2, 4, 10). The reform's main feature are: (*i*) the establishment of a smaller committee for routine legal questions; (*ii*) the provision of a staggered term of appointment for the members of the *Consiglio* (each member will serve for a five year term, but three of the members will be replaced each year, counting from the fifth year after the reform takes effect). According to the report drafted by Mancini to introduce the decree to the King, this set of amendments proved necessary to allow the *Consiglio* to keep its high

office of main international legal adviser to the government, while establishing a quicker mechanism for routine legal questions (*Relazione a S.M. il re che precede il r. decreto del 17 febbraio 1883*, published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., pp. 30-35). Moreover, Mancini insists that the *Consiglio* should preserve its independence from government, thus the staggered term of appointment of its members (*ibidem*). After the reform, some further amendments are provided by royal decree n. 5548 of July 1, 1888 (published in Mae, *Il Consiglio del contenzioso diplomatico (1857-1897)* cit., p. 48), royal decree n. 550 of December 15, 1901, royal decree of December 14, 1905 and royal decree n. 1090 of August 6, 1911 (all located at ASDMAE, cons. cont., p. 1). Finally, the *Consiglio* is abolished by royal decree of December 30, 1915.

[12] As noted, in general terms, by A. Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, in «Harvard International Law Journal», 51, 2, 2010, pp. 475-552.

[13] See Kolb, *The Protection of the Individual in Times of War and Peace* cit., p. 331; Parlett, *The Individual in International Law* cit., pp. 13-16; C. Walters, *Subjects of International Law*, in MPEPIL, par. 15; Weis P., *Nationality and Statelessness in International Law*², Alphen aan den Rijn-Germantown, Sijthooff & Noordhoff, 1979, pp. 32-33. In international law works of the time, that condition is underlined, for instance, by J.K. Bluntschli, *De la qualité de citoyen d'un Etat au point de vue des relations internationales*, in «Revue générale de droit international public», 2, 1870, pp. 107-120, p. 108; P. Esperson, *Condizione giuridica dello straniero secondo le legislazioni e la giurisprudenza italiana ed estera, i trattati fra l'Italia e le altre nazioni, parte seconda*, Torino, Bocca, 1883, p. 3; F.P Contuzzi, *Cittadinanza. Diritto internazionale*, in «Digesto italiano», Torino, Unione tipografico-editrice, 1896-1899, v. VII-2, pp. 305-334, p. 307.

[14] These disputes, concerning the nationality of individuals (normally the claimant or his ancestors), are themselves disputes over sovereignty, being understood that «[e]n principe, la détermination de la nationalité est un acte de la souverainetée interne, en vertu de laquelle chaque législateur concède ou refuse comme il l'entend la qualité de national de son pays» (F. Despagnet, *Cours de droit international public, deuxieme édition completement revue et mise au courant*, Paris, Sirey, 1899, p. 338).

[15] According to Article 4 of the 1865 civil code: «è cittadino il figlio del padre cittadino». Authors of the time note that the principle of *jus sanguinis* is a natural consequence of the French revolution, and of the principle of nationality developed by the Italian school of international law; and that the same principle was adopted in the majority of the civil codes of Italian preunitarian states (see, for example, O. Sechi, *Cittadinanza. Diritto italiano*, in «Digesto italiano», t. VII, parte II, Torino, Unione tipografico-editrice, 1896-1899, pp. 221-305, in particular pp. 230-231). The assertion that it was one of Italy's main foreign policy goal to establish a close link between Italians abroad and the motherland is commonground in Italian historiography (see, for instance, G. Tintori, *Cittadinanza e politiche di emigrazione nell'Italia liberale e fascista*, in D. Zincone (ed.), *Familismo legale. Come non diventare italiani*, Roma-Bari, Laterza, 2006, pp. 52-106; Id., *Italy: the Continuing History of Emigrant Relations*, in M. Collyer (ed.), *Emigration Nations. Policies and Ideologies of Emigrant Engagement*, Houndmills Basingstoke, Palgrave Macmillan, 2013, pp. 126-152).

[16] Article 23 of the *Instructions aux consuls de S.M. le Roi de Sardaigne du 8 avril 1859* (published in Moscati, *Il ministero degli affari esteri (1861-1870)* cit., p. 101) instructed Sardinian (and then Italian) consuls to protect all those individuals «qui sont originaires des Etats et qui quoique nés et domiciliés en pays étrangers ont toujours été considérés et traités comme sujet du Roi; tels sont dans le pays de Levant e dans l'ile de Scio beaucoup des familles d'origine génois».

[17] As correctly pointed out, «gli italiani […] hanno cominciato a spostarsi molto prima che l'Italia diventasse uno Stato nazionale» (M. Vitiello, *Le politiche di emigrazione e la costruzione dello Stato unitario italiano*, in «Percorsi Storici – Rivista di storia contemporanea», 1, 2013, available at <www.percorsistorici.it/docs/articolipdf/numero1/PS1-Vitiello.pdf>, p. 5, november 2017).

[18] The request for an opinion is transmitted to the *Consiglio* on December 5, 1860 (*Memoria del ministero degli affari esteri del 5 dicembre 1860, Posizione degli ebrei livornesi nella Tunisia. Convenzioni toscano-tunisine in proposito (1822-1847)*, in ASDMAE, cons. cont., p. 4, f. 13). References to the history of the *Grana families* can be found in F. Petrucci, *Una comunità nella comunità: gli ebrei italiani a Tunisi*, in «Altreitalie, Rivista internazionale di studi sulle migrazioni italiane nel mondo», n. 36-37, 2008, pp. 173-188; J.-P. Filippini, *La nazione ebrea di Livorno*, in C. Vivianti (ed.), *Storia d'Italia, Annali, n. XI, Gli ebrei in Italia*, vol. II, Torino, Einaudi, 1997, pp. 1047-1066; S. Milella, *Gli italiani all'estero: breve storia della comunità italiana in Tunisia*, in «The Lab's Quarterly/Il Trimestrale del Laboratorio», n. 3 (2006), available at <http://dsslab.sp.unipi.it//trimestrale/Archivio%20-%20Articoli/Milella%20S.%20-%20Gli%20italiani%20all%27estero.pdf>, november 2017; H. De

Montety, *Les Italiens en Tunisie*, in «Politique étrangère», 2, 5, 1937, pp. 409-425.

[19] The *Consiglio* states that: «coloro che erano o potevano essere considerati come sudditi del granducato di Toscana al momento della seguita annessione agli Stati sardi debbono godere di tutti i vantaggi accordati ai sudditi di Sua Maestà»; accordingly, it is for the ministry to «rivendicare quei sudditi che furono ingiustamente rapiti alla sovranità toscana, alla quale subentrò il governo di S.M.» for the purpose of the «riconoscimento agli italiani residenti [in Tunisia] dei loro sacri diritti di nazionalità» (Parere del Consiglio del contenzioso diplomatico del 18 gennaio 1861, Posizione degli ebrei livornesi nella Tunisia. Convenzioni toscano-tunisine in proposito (1822-1847), n. 13, Alfieri, in ASDMAE, cons. cont., p. 4, f. 13, pp. 1-2). On a practical note, the *Consiglio* presses the Sardinian consuls to «provvedere alla pronta iscrizione d'ufficio di tutti gli antichi sudditi riconosciuti dalla Toscana» (*ibidem*).

[20] At the time and up to the unhortodox opinion expressed by Anzilotti (D. Anzilotti, *La formazione del Regno d'Italia nei riguardi del diritto internazionale. Prolusione tenuta nell'università di Roma il 4 dicembre 1911*, Roma: Athenaum, 1912), the process of Italian unification was described as one of subsequent incorporations to the Sardinian states by virtually all international and constitutional lawyers (see, for instance, Gabba G., *Successione di Stato a Stato*, in *Questioni di diritto civile*, Torino, 1882, p. 327, footnote 1; G. Fusinato, *Annessione*, in *Enciclopedia giuridica italiana*, v. I-II, pp. 2055-2143). Recently, it has been argued that, even after the turn of the century, those authors who (like Anzilotti) stressed the «discontinuità» between the Italian kingdom and the ancient kingdom of Sardinia were a minority (L. Lacchè, *L'opinione pubblica nazionale e l'appello al popolo: figure e campi di tensione*, in M. Torres Aguilar, M. Pino Abad (eds.), *Burocracia, poder político y justicia. Libro-homenaje de amigos del profesor José Maria Garcìa Marìn*, Madrid, Dykinson, 2015, pp. 455-473, p. 472, footnote 77, with reference to F. Colao, *L'idea di nazione nei giuristi italiani tra Ottocento e Novecento*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 30, 2001, pp. 255-360; Ead., *Due momenti della storia costituzionale italiana nella cultura giuridica tra Ottocento e Novecento: la "formazione del regno d'Italia" e la "trasformazione dello Stato" dall'età liberale al fascismo*, in A. De Benedictis (ed.), *Costruire lo Stato, costruire la storia. Politica e moderno fra '800 e '900*, Bologna, Clueb, 2003, pp. 183-247). In any event, be it for incorporation to the Sardinian state, be it for the creation of a new state, all nationals of the different states of the peninsula acquired Italian nationality by virtue of a longstanding principle of international law (see, for instance, A. Zimmerman, *State succession*, in MPEPIL, par. 26), which is well established in Italian case-law of the time (see, among may, Parere del consiglio di Stato a sezioni unite del 20 dicembre 1870; parere del consiglio di Stato, sezione di grazia e giustizia dell'8 febbraio 1879; parere del consiglio di Stato, sezione di grazia e giustizia del 21 febbraio 1879; parere del consiglio di Stato, sezione dell'interno del 27 giugno 1884).

[21] This is noted, for instance, by P. Audenino, *Rotta verso sud: dall'Italia al Mediterraneo*, in M. Antonioli, A. Moioli (eds.), *Saggi storici. In onore di Romani H. Rainero*, Milano, Franco Angeli, 2005, pp. 239-267, in particular p. 265.

[22] The tension among the two conceptions of Italian nationality can be traced throughout all the works of the Italian school of international law from P.S. Mancini, *Della nazionalità come fondamento del diritto delle genti. Prelezione al corso di diritto internazionale e marittimo pronunziata nella R. università di Torino nel dì 22 gennaio 1851*, in P.S. Mancini, A. Pierantoni (eds.), *Diritto internazionale. Prelezioni con un saggio sul Machiavelli*, Napoli, G. Marghieri, 1873, pp. 1-64, to P. Esperson, *Il principio di nazionalità applicato alle relazioni civili internazionali e riscontro di esso colle norme di diritto internazionale privato sancite dalla legislazione del regno d'Italia*, Pavia, Tip dei f.lli Fusi, 1868 (in particular p. 63, where the author stresses the voluntaristic side of the acquisition of Italian nationality, arguing from the right to option that was reserved by Article 12 of the treaty of Zurich of 1859 and Article 14 of the treaty of Vienna of 1866) and G. Fusinato, *Le mutazioni territoriali, il loro fondamento giuridico e le loro conseguenze. Parte prima. Fondamento giuridico*, Lanciano, Carabba, 1885 (in particular p. 99, where the author underlines the importance of the plebiscites by means of which the people of the peninsula «voted» the incorporation to the Italian kingdom).

[23] It has been noted that «[I Grana] contribuirono a mantenen[re] l'italiano come idioma ufficiale degli europei presenti [in Tunisia] e come lingua franca del paese» (A. Cortese, *L'emigrazione italiana nell'Africa mediterranea*, Dipartimento di Economia Università degli Studi Roma Tre, Working Paper n. 149, 2012, available at <http://dipeco.uniroma3.it/public/WP%20149%20Cortese%202012(1).pdf>, pp. 4-5, november 2017).

[24] It has been noted that the Grana were «[u]n des éléments essentiels [de la bourgeoisie italienne]» and that they «ont occupé, jusqu'à une époque récente, la première place sans conteste au sein de la colonie italienne» (A. Sayous, *Les Italiens en Tunisie*, Bruxelles, Goemaere, 1927, p. 84). Moreover, it is com-

monground that the Grana played «[un] ruolo di spicco nel commercio mediterraneo» (Petrucci, *Una comunità nella comunità* cit., p. 175).

[25] For Italy, the capitulation regime was regulated by the treaty of July 10, 1861 and by that of March 11, 1873. On the content of these treaties, in comparison with that of those previously in force between the Ottoman empire and some preunitarian Italian States (such as Venice, Genoa and the kingdom of the two Sicilies) see S. Pomodoro, *Le capitolazioni e la giurisdizione consolare negli scali di Levante*, Roma, stab. G. Civelli, 1889, pp. 12-14 and, more recently, E. Augusti, *Storie e storiografie dei Consolati in Oriente tra Otto e Novecento*, in «Historia et ius», 11/2017, available at <http://www.historiaetius.eu/uploads/5/9/4/8/5948821/augusti_11_.pdf>, p. 14, november 2017.

[26] Authors of the time define protection as «un lien juridique qui rattache une personne à un Etat et le fait jouir de certains de droits et avantages dérivés de la qualité de national de cet Etat sans cependant lui conférer cette qualité de national ni le statut personnel qui en dépend» (P. Arminjon, *Etrangers et protégés dans l'empire ottoman*, Paris, A. Chevalier-Maresq & Cie, p. 261).

[27] On the abuses in the protégés system starting in the XVII century and reaching its apex in the second half of the XIX century see, among many, Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., p. 61; Ferrero Gola, *Corso di diritto internazionale pubblico, privato e marittimo* cit., p. 180 and, in more recent times, Laghmani, *Histoire de droit de gens* cit., pp. 206-207; Becker Lorca, *Universal International Law: 19th century histories of imposition and appropriation* cit., pp. 506-509. On the diplomatic correspondence between the Sublime Porte and the Italian government concerning the abuses of the capitulation regime in the last decade of the XIX Century, see Augusti, *Storie e storiografie dei Consolati in Oriente tra Otto e Novecento* cit., p. 8.

[28] The regulation on foreign consular service of 1863 is published (in French translation) in Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., pp. 325-330. Its content is illustrated in a *Mémoire* transmitted by the Sublime Porte to foreign ambassadors in Constantinople on May 21, 1869 (published in «Archive Diplomatiques», 1870, pp. 249-254). For references, see Nuzzo, *Origini di una Scienza. Diritto internazionale e colonialismo nel XIX secolo* cit., pp. 169-170, footnote 1, and Id., *Un mondo senza nemici. La costruzione del diritto internazionale e la negazione delle differenze*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», 39, 2009, pp. 1311-1382 (in particular p. 1365 and footnote 130).

[29] The abuses in the granting of certificates of naturalisation once the regulation of 1863 inhibited that of new certificates of protection are confirmed by Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., pp. 61-62 and p. 68, where the author concludes: «tous les sujets du Sultan auxquels [le règlement du 1863] avait barré la route à la protection s'étaient tournés vers la naturalisation».

[30] The Turkish law on nationality is published (in French) in «Journal de droit international privé», 16, 1889, p. 896. Article 5 provides that: «le sujet ottoman qui a acquis une nationalité étrangère avec l'autorisation du gouvernement impérial est considéré et traité comme sujet étranger; si, au contraire, il s'est naturalisé étranger sans l'autorisation préalable du gouvernement impérial, sa naturalisation sera considérée comme nulle et non avenue, et il continuera à être considéré et traité en tous points comme sujet ottoman. Aucun sujet ottoman ne pourra obtenir un acte d'autorisation délivré en vertu d'un irade impérial». Article 9 provides that: «tout individu habitant le territoire ottoman est réputé sujet ottoman et traité comme tel jusqu'à ce que sa qualité d'étranger ait été régulièrement constatée».

[31] The *Circulaire* is published in G. Cogordan, *La nationalité au point de vue des rapports internationaux*[2], Paris, Larose et Forcel, 1890, pp. 465-466. The relevant passage reads: «la derniere disposition de la loi se rapporte exclusivement aux cas d'individus que l'on aurait des raisons de croire sujets ottomans et qui revendiqueraient une nationalité étrangère sans être en mesure de justifier leur dire. Il est clair que […] la preuve de la nationalité étrangère incombe à celui qui la revendique, et jusqu'à ce qu'il fournisse cette preuve, les autorités impériales doivent, en tant qu'il se trouve sur le territoire ottoman, le considérer et le traiter comme sujet ottoman […] l'article ne porte aucune atteinte aux droits acquis aux étrangers par les traités, et n'autorise point les Autorités impériales à se départir des règles découlant de ces traités dans leurs rapports avec les étrangers […] cette loi, comme toute loi d'ailleurs, n'a pas d'effet rétroactif». Concerning Article 5 it clarifies that «l'article 5 exige du sujet ottoman qui veut acquérir une nationalité étrangère de se munir préalablement d'un acte d'autorisation qui lui sera délivré en vertu d'un iradé impérial, sans quoi sa naturalisation sera toujours considérée comme nulle et non avenue». With a subsequent note of April 21, 1869, (published in «Archive Diplomatiques», 1870, pp. 50-53), the Sublime Porte reiterated that the statute's only aim was to tackle «les abus qui devaient, par la force des choses, découler des capitulations et qui augmentaient de jour en jour».

[32] According to the Italian consul

in Beirut, Article 9 of the Turkish law on nationality poses a threat for all the «individui che vantano antenati italiani [che] si stabilirono in Turchia sotto il governo delle italiane repubbliche, e passarono poi sotto la dominazione turca [poiché] non sono in grado di produrre i titoli […] della loro discendenza dall'antenato che emigrò in Turchia e la fede di nascita in Italia di quell'antenato […] a tanta distanza dall'antenato a cui rimontano» (Questione di nazionalità in Turchia, Rapporto del cavaliere De Gubernatis nobile Enrico, regio console a Beirut, settembre 1892, in ASDMAE, cons. cont., p. 4, f. 12, p. 6). However, the consul stresses that «essi vantarono per secoli la qualità di stranieri [e] ne hanno goduto i benefici» (Ivi, p. 10). The fact that Venetians and Genoans were among the first communities to enjoy extraterritorial privileges in the territories of the then Byzantine empire is confirmed, among others, by M. Soosa Nasim, *Historical Interpretation of the Origin of the Capitulations in the Ottoman Empire*, in «Temple Law Quarterly», 4, 1929-1930, pp. 358-371 (in particular p. 362).

[33] According to the opinion adopted by the *Consiglio* at Esperson's proposal: «non possiamo fare alcun rimprovero alla Turchia per aver emanato la legge del 1863 […] la quale limitò la protezione agli indigeni che sono impiegati come guardie o come dragomanni […] la Turchia avea il diritto di emanarla, per far cessare le protezioni abusive, che erano molto numerose […] è ben giusto che tale protezione sia estesa agli indigeni che sono impiegati come guardie o come dragomanni al servizio dei consolati; ma non vi ha ragione alcuna di estenderla ad altre persone» (Parere del Consiglio del contenzioso diplomatico del 27 maggio 1894, Protetti e cittadini italiani in Turchia, n. 117, Esperson, in ASDMAE, cons. cont., p. 5, f. 1, p. 4).

[34] In the opinion it is stated that: «il comitato del contenzioso presso il ministero degli esteri della Francia, corrispondente al nostro Consiglio del contenzioso diplomatico, fu riunito per esaminare la legge e riconoscere se essa non contenesse nulla di contrario alle regole poste dalle capitolazioni. Il risultato di questo esame fu che: la legge del 1869 nulla ha di contrario al diritto internazionale in generale, e che essa non porta alcuna offesa ai diritti ed ai privilegi riconosciuti dalle capitolazioni e consacrati negli usi» (Parere del 27 maggio 1894 cit., pp. 12-13). Below, Esperson's draft takes note of the opinion expressed by Cogordan, *La nationalité au point de vue des rapports internationaux* cit., p. 150. For an account of the (overall positive) French diplomatic reaction to the approval of the statute, see E.R. Salem, *Des effets en Turquie de la naturalisation obtenue par un sujet ottoman sans autorisation du gouvernement turc. De la compétence des tribunaux ottomans pour juger les étrangers qui commettent en Turquie un acte délictueux envers un sujet ottoman*, in «Journal de droit international privé», 33, 1906, pp. 65-93 (in particular p. 69 and footnote 2) and Arminjon, *Etrangers et protégés dans l'empire ottoman* cit., p. 70.

[35] In dealing with nationality, the opinion states, at the outset, that «ogni Stato [è] libero, in forza del potere legislativo inerente alla sovranità, di regolare, come meglio crede, le condizioni dalle quali dipende la qualità di nazionale» (Parere del Consiglio del contenzioso diplomatico del 27 maggio 1894 cit., p. 13). Applying this principle to the provision contained in Article 5 of the Turkish law, Esperson holds that from the above principle follows that «ciascuno Stato, in virtù della sua sovranità, è libero di regolare la naturalizzazione come meglio crede, subordinandola alle condizioni che giudica più convenienti […] quando si vuol sapere trattandosi di naturalizzato, quale sarà la sua situazione *rispetto al suo paese d'origine*, se, cioè, il governo da cui egli dipende al momento della naturalizzazione lo considererà snazionalizzato, oppure se continuerà, non ostante la naturalizzazione, ad esercitare a di lui riguardo la sua sovranità, la decisione di siffatta questione non può appartenere che al diritto pubblico interno dello Stato dal quale il naturalizzato vuole staccarsi» and concludes: «Non poteva negarsi alla Turchia, ammessa nel concerto delle nazioni civili, il diritto di regolare la snazionalizzazione dei suoi sudditi e di impedire che questa segua coll'unico intendimento di sottrarli alla sua autorità legislativa» (Ivi, pp. 13-14, emphasis in the original). It is interesting to note that Esperson attaches importance to the Sublime Porte's admission «à participer aux avantages du droit public et du concert européens», provided for by Article 7 of the treaty of Paris of March 30, 1856, albeit recognising that «siamo lontanissimi ancora dal caso di rinunciare alle capitolazioni, perché certamente molto rimane da fare alla Turchia per porsi al livello delle nazioni civili» (Ivi, p. 4). On the treaty of Paris of 1856 and its consequenes on the status of Turkey under international law see (in addition to the works cited above) H. McKinnon Wood, *The Treaty of Paris and Turkey's Status in International Law*, in «The American Journal of International Law», 37, 2, 1943, pp. 262-274; A. Tryol y Serra, *L'expansion de la société internationale aux XIXe et XXe siècles*, in «Recueil des Cours», 116, 1965), pp. 89-169 (in particular pp. 129-132); Y. Onuma, *When Was the Law of International Society Born – An Inquiry of the History of International Law from an Intercivilizational Perspective*, in «Journal of the History of International», 2, 1, 2000, pp. 1-66 (in particular pp. 33-36); E. Augusti, *La Sublime*

Porta e il Trattato di Parigi del 1856. Le ragioni di una partecipazione, in «Le Carte e la Storia», n. 1, 2008, pp. 151-159; Ead., *From Capitulations to Unequal Treaties. The matter of an Extraterritorial Jurisdiction in the Ottoman Empire*, in «Journal of Civil Law Studies», v. 4, 2011, pp. 285-307; Ead., *L'intervento europeo in Oriente nel XIX secolo: storia contesa di un istituto controverso*, in *Constructing International Law. The Birth of a Discipline* cit., pp. 277-330. Capitulations will eventually be abolished in 1923 with the treaty of Lausanne.

[36] The opinion reads, in relevant part: «È parimenti unilaterale la questione tendente a conoscere la nazionalità in generale di un individuo […] essendo ogni stato libero di regolare come meglio crede la condizione dalla quale dipende la qualità di nazionale […] in massima generale chi da noi è considerato italiano dev'esserlo anche dalla Sublime Porta, salvo che questa non dimostrasse, a sua volta, che l'italiano divenne ottomano» (Parere del 27 maggio 1894 cit., pp. 13-14). It follows that: «La disposizione dell'art. 9 […] non impone ad alcuno la nazionalità ottomana, ma fa solo sorgere una *presunzione* di siffatta nazionalità riguardo a chi, residente nell'impero, non è in grado di constatare la sua qualità di straniero. Se egli è effettivamente straniero, non gli mancherà certamente la prova per dimostrarlo; ma fino a tanto che non abbia fornito siffatta prova, vale a dire, sino a prova contraria, non essendo stata stabilita che una presunzione soltanto *juris*, è ben giusto che si presuma suddito ottomano, e, come tale, venga reputato e trattato. La disposizione dell'art. 9 sarebbe stata ingiusta unicamente nel caso nel caso in cui avesse stabilito una presunzione *juris et de jure*, la quale non ammette prova contraria» (Ivi, p. 14).

[37] According to the opinion under review: «è ben giusto che per le famiglie di origine italiana […] i cui antenati si stabilirono in Turchia sotto il governo delle italiane repubbliche […] debba bastare la loro iscrizione nei registri consolari ed il possesso della nazionalità, senza che occorra precisare l'epoca in cui i loro antenati vennero a stabilirsi in Turchia. La iscrizione, infatti, ed il possesso della nazionalità italiana sono più che sufficienti ad attribuire la cittadinanza, poco importando se lo stabilimento in Turchia dati più o meno tempo, non essendo tale fatto valevole a distruggere la presunzione di cittadinanza» (Parere del 27 maggio 1894 cit., pp. 14-15). The definition of the proof of nationality *iure sanguinis* as *probatio diabolica* is taken from A.-N. Makarov, *Règles générales du droit de la nationalité*, in «Recueil des Cours», 74, 1949, pp. 269-378 (in particular p. 364).

[38] See E. Pears, *Turkish capitulations and the status of British subjects and other foreign subjects residing in Turkey*, in «Law quarterly review», 21, 1905, pp. 408-425 (in particular p. 413) and Phillimore, *Commentaries upon International Law*, cit., I, p. 341 (quoted in Augusti, *Storie e storiografie dei consolati in oriente tra Otto e Novecento* cit, p. 6 and footnote 25).

[39] See, for instance, Esperson, *Il principio di nazionalità* cit., pp. 62-63, where the author affirms that «se alcuno […] pretendesse di essere considerato come cittadino italiano, la controversia dovrebbe essere risolta consultando le disposizioni del codice civile del regno d'Italia concernenti l'acquisto e la perdita della cittadinanza» and, in the same vein, Contuzzi, *Cittadinanza. Diritto internazionale* cit., pp. 319-324.

[40] With regard to the Ottoman conception of nationality, it has been pointed out that: «I non-musulmani, gli infedeli, erano divisi in tre categorie: i dhimma, i musta'min e gli harbi, a seconda che si trattasse di cristiani sudditi ottomani, individuati singolarmente o a comporre piccole comunità minoritarie, definite millet; di stranieri cristiani che si fossero trattenuti temporaneamente sul territorio ottomano e di nemici dei musulmani tout-court, cioè di tutti quei soggetti che non avessero riconosciuto l'Islam» in accordance with the principle «ignoto all'occidente della personalità del diritto in base alla confessione religiosa» (E. Augusti, *Storie e storiografie dei consolati in Oriente tre Otto e Novecento* cit., p. 13). Below (making reference to C.A. Nallino, *Diritto Musulmano, Diritti Orientali Cristiani*, in M. Nallino (ed.), *Raccolta e scritti editi e inediti*, Roma, Ipocan, 1942, v. 4), the author explains that «Il diritto […] è unico per tutti i musulmani, ovunque risiedano, da qualsiasi sovrano dipendano, a qualsiasi "razza" appartengano» since «il diritto musulmano non ha alcuna relazione con il concetto di territorialità» and, consequently, «quel tipo di rapporto dell'individuo verso lo Stato che si qualifica "cittadinanza" o "nazionalità", è cosa ignota al sistema musulmano» (*Consiglio*, see also Ead., *Protezione, sicurezza, assistenza, solidarietà* cit., pp. 59-60).

[41] The native Moroccan had been registered as a *protégé* by the Italian consulate in Tangier for the service of the Italian firm Lombroso & Co. on June 2, 1897. He was, then, arrested on July 5, 1878 and released on January 20, 1899 (see Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico del 14 marzo 1889, oggetto: domanda di indennità della ditta V.A. Lumbroso verso il governo marocchino in ASDMAE, cons. cont., p. 5, f. 6, with the attached diplomatic correspondance). The ministry of foreign affairs asks the opinion of the *Consiglio* on March 14, 1899, *i.e.* after the release of the protégés. The question is, thus, confined to the matter of damages. For general reference, see H.C.M. Wendel, *The Protégé System in Morocco*, in «Journal of modern

history», 2, 1, 1930, pp. 48-60.

[42] According to the opinion adopted by the *Consiglio* on Fusinato's draft: «è un principio generalmente accolto nella teoria e nella pratica del diritto delle genti che, come regola, la riparazione non debba oltrepassare i limiti del danno direttamente e immediatamente accertato» whereas «i danni indiretti, per i precetti del diritto internazionale (che ebbero la più solenne consacrazione nella sentenza del tribunale arbirtale di Ginevra […]), non possono costituire una base sufficiente per fondare un giudizio per calcolo di indennità nei rapporti fra le nazioni» (Parere del Consiglio del contenzioso diplomatico del 25 marzo 1899, domanda di indennità della ditta V.A. Lumbroso di Livorno verso il governo marocchino, Fusinato, n. 131, ASDMAE, cons. cont., p. 5, f. 13, pp. 1-2). On the indirect claims doctrine contained in the arbitral award see, among many, Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 413-417.

[43] In Fusinato's words, «mancherebbe, in ogni caso, la indispensabile dimostrazione del vincolo di necessaria e inevitabile causalità fra il fatto e il danno. Invero, dopo l'arresto del Ben Giumla ben poteva la ditta nominare un altro suo rappresentante […] e nol fece» (Parere del 25 marzo 1899 cit., p. 2). As a consequence, «le domande della ditta non potrebbero venire accolte se non ammettendo di poter entrare nel terreno degli apprezzamenti delle utilità che l'individuo illegalmente privato della sua libertà personale, avrebbe potuto trarre, in determinate circostanze, dalla propria attività personale, o dal proprio patrimonio» (Ivi, pp. 2-3).

[44] In his separate opinion, Pierantoni agrees «che non vi sia ragione di reclamare danni nel caso, e che la Ditta in nessun modo possa reclamarli» but reaches this conclusion «per ragioni pienamente diverse da quelle della relazione» (Voto separato del consigliere Pierantoni, attached to the Parere del 25 marzo 1899 cit., pp. 7-8).

[45] Pierantoni «non crede che calzi qui l'esempio dei danni indiretti nel caso Alabama» (Voto separato cit., p. 8). He, then, distinguishes the two cases on account of the different facts underlying the two of them: «Innanzi il tribunale arbitrale di Ginevra, l'America presentò la domanda dei danni diretti e indiretti, imputandoli al governo inglese. I primi erano composti del valore della distruzione delle navi e dei loro carichi per opera delle navi degli insorti; gli altri erano formati dalle spese fatte per l'inseguimento delle navi corsare, per le perdite sofferte in seguito al trasferimento sotto bandiera inglese di navi della marina mercantile degli Stati Uniti, per l'elevazione dei prezzi di assicurazione, e per le perdite sofferte per il prolungamento della guerra […] Qui la dedotta mancanza dell'acquisto delle pelli dipese dalla impossibilità in cui si trovò il [protetto] di fare il sensale» (*ibidem*). On the Alabama case, Pierantoni published A. Pierantoni, *La questione anglo-americana dell'Alabama: studio di diritto internazionale pubblico e marittimo*, Firenze, Stabilimento Civelli, 1870 and Id., *Gli arbitrati internazionali e il trattato di Washington*, Napoli, De Angelis, 1872, where the author recalls that a passage from his previous monograph had been quoted in the US case (Ivi, p. 8 and footnote 1).

[46] According to Pierantoni, the case at hand calls for the identification of the «fondamento dell'azione di responsabilità […] in diritto internazionale»; that is to say, «come nel diritto interno, così nello internazionale, la legge, il patto, il delitto e il quasi- delitto», with the precision that «[i] trattati […] equivalgono alla legge tra le parti stipulanti» (Voto separato cit., p. 4). With reference to the case at hand, he, then, points out that the question is «*se sia esistita la violazione del diritto di protezione*», *i.e.* «se il governo del Marocco [abbia] violato la fede dovuta ai trattati», and in particular to the treaty of Madrid of July 3, 1880 (*ibidem*, emphasis in the original). Pierantoni's elaboration on the foundation of the international responsibility naturally echoes that expressed in Pierantoni, *I fatti di nuova Orleans e il diritto internazionale* cit.

[47] In his separate opinion, the author stresses the «carattere speciale, che il *diritto di protezione* assume ne' paesi retti a capitolazioni [ove] per diritto *comune* i consoli debbono proteggere i loro cittadini [mentre] per diritto *speciale* inerente al sistema delle giurisdizioni consolari la protezione […] si estende benanche ad una categoria di individui che, sudditi del paese nel quale si svolgono i privilegi e le immunità consolari, si pongono al servizio degli ambasciatori, de' consoli stranieri e di un determinato commercio straniero» (Voto separato cit., pp. 4-5).

[48] Article 7 of the treaty of July 3, 1880 provides as follows: «foreign representatives shall inform the Sultan's minister of foreign affairs, in writing, of any selections of an employee made by them. – 2. They shall furnish annually to the said minister a list of the names of the persons protected by them or by their agents throughout the states of the Sultan of Morocco. – 3. This list shall be transmitted to the local authorities, who shall consider as persons enjoying protection only those whose names are contained therein». Article 8, in turn, reads: «consular officers shall transmit each year to the authorities of the district in which they reside a list, bearing their seal, of the persons protected by them. These authorities shall transmit it to the minister of foreign affairs, to the end that, if it be not conformable to the reg-

ulations, the Representatives at Tangier may be informed of the fact. – 2. A consular officer shall be required to give immediate information of any changes that may have taken place among the persons protected by his consulate». An English version of the treaty is available at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0071.pdf>. In its separate opinion Pierantoni reports (in Italian translation) the treaty's main provisions (see Voto separato cit., p. 7). For references on the treaty, see Wendel, *The Protégé System in Morocco* cit., pp. 54-55and 56-60, and Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 469-470.

49 In Pierantoni's own words, «la lista doveva essere trasmessa alle autorità locali e al ministero, e il governo marocchino non era obbligato a riconoscere [il] protetto. I servizi che l'anzidetto marocchino doveva rendere alla ditta, dovevano essere indicati nel certificato. Mancando l'osservanza delle condizioni e delle solennità della nomina manca la violazione del trattato; e quindi cade certamente l'azione di danno nascente dalla supposta inosservanza» (Voto separato cit., pp. 7-8). Hence, the separate opinion concludes that: «Ogni altra argomentazione [è] superflua, se non vi fu manifesta violazione del diritto di protezione, l'arresto del sensale fa mancare la ragione a chiedere per lui la indennità […] ed esclude assolutamente l'azione dei Lumbroso» (*ibidem*).

50 See Parere del Consiglio del contenzioso diplomatico del 19 giugno 1898, n. 127, Cappelli, Reclamo di italiani danneggiati nello Stato di Bahia (Brasile) nel 1896, in ASDMAE, cons. cont., p. 5, f. 5, p. 8, where the *Consiglio* makes reference to the norms of «il diritto internazionale universalmente riconosciuto fra popoli civili» as the only applicable law.

51 See M. Koskenniemi, *International Law in the World of Ideas*, in M. Koskenniemi, J. Crawford (eds.), *The Cambridge Companion to International Law*, Cambridge, Cambridge University Press, 2012 pp. 57-60 (in particular p. 59).

52 See Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law* cit., p. 415, and, in the same sense, Chetail, *Migration, droits de l'homme et souveraineté* cit., pp. 40-47, E. Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 105-106. On the principle of equal treatment (so-called Calvo doctrine) see C. Calvo, *Dictionnaire de droit international public et privé*, 2 vv., Berlin-Paris, Puttkammer et Mühlbrecht-Pedone Lauriel, 1885, v. 2, pp. 170-173 (entry "responsabilité internationale"); A.A. Alvarez, *Latin America and International Law*, in «The American Journal of International Law», 3, 1909, pp. 269-353; J.M. Yepes, *Les problèmes fondamentaux du droit des gens en Amérique*, in «Recueil des Cours», 47, 1934, pp. 1-144 and, for an appraisal, J. Irizzarry y Puente, *The concept of "denial of justice" in Latin America*, in «Michigan Law Review», n. 43, 1944-1945, pp. 383-406 (in particular pp. 388-389). The Calvo doctrine is summarized in P. Bordwell, *Calvo and the 'Calvo doctrine'*, in «The Green Bag», 28, 7, 1906, pp. 377-382. On the opposite principle of the international minimum standard, see M. Paparinski, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford, Oxford University Press, 2013, pp. 20-44; H. Dickerson, *Minimum Standards*, in MPEPIL; A. Roth, *The Minimum Standard of International Law Applied to Aliens*, The Hague, Sijthoff, 1949. See also the speech given by the US secretary of State in 1910, published as E. Root, *The Basis of Protection to Citizens Residing Abroad*, in «The American Journal of International Law», 4, 1910, pp. 517-528.

53 In this regard, the *Consiglio* states that «nessuno stato può essere obbligato ad accordare ai cittadini di altro stato maggiori guarentigie di quelle che concede ai propri cittadini, pur essendo strettamente tenuto a fare tutto ciò che gli è possibile per tutelare la sicurezza della vita e delle sostanze dei primi come dei secondi» (Parere del 19 giugno 1898 cit., p. 8).

54 The *Consiglio* attaches importance to the fact that «i fatti dolorosi che si lamentano non avvennero e non avvengono solamente a danno degli italiani, ma hanno luogo abitualmente anche a danno dei brasiliani e sono cagionati dal deplorevole stato delle cose in alcune regioni di quella repubblica» and that «il governo federale ed il governo locale nell'ottobre 1896 hanno fatto ogni sforzo per impedire gli atti di brigantaggio contro gli italiani e per punirli» (Parere del 19 giugno 1898 cit., p. 8).

55 In the words of the *Consiglio*: «conviene che il regio governo vigili per accertare se dal processo stesso non siano per risultare, a carico del predetto individuo […] responsabilità di tale natura da impegnare anche la responsabilità delle autorità governative, così da giustificare, in questa parte, una domanda di rifacimento a vantaggio dei nostri connazionali danneggiati» (Parere del 19 giugno 1898 cit., p. 9). Interestingly, the *Consiglio* shares the conclusion reached by the legal adviser of the Brazilian ministry of foreign affairs, see Parecer: Indenização reclamada pela legação da Itália pelo saque que sofreram vários súditos italianos estabelecidos no sertão da Bahia, em local onde a ação preventiva da autoridade não se podia exercer eficazmente, e onde os mesmos se haviam fixado espontaneamente, Carlos de Carvalho, 22 de julho de 1905, in A.P. Cachapuz de Medeiros (ed.), *Pareceres dos Consultores Jurídicos do Itamaraty*, v. I, 1903-1912, Brasília, FUNAG, 2000, pp. 11-16. The role of *Consultor Jurídico* of the Brazilian ministry

of foreign affairs was established by decree n. 2358 of February, 19, 1859, see, for references, F.M. de O. Castro, *1808-2008: dois séculos de história da organização do Itamaraty*, Brasília, FUNAG, 2009 (in particular p. 111). The role was covered by renown professors of international law, such as Antônio Pimenta Bueno (1803-1878), José Maria da Silva Paranhos (1819-1880), Carlos Augusto de Carvalho (1851-1905), Amaro Cavalcanti (1849-1922), Clovis Bevilaqua (1859-1944). In an opinion of 1911, Bevilaqua provides a useful insight on the work carried out by the office, see Parecer: sobre o apoio a conceder-se as reclamações enquanto não se esgotarem os recursos da via judiciaria, Clovis Bevilaqua, 23 de janeiro 1911 in *Pareceres dos Consultores Jurídicos do Itamaraty* cit., pp. 114-120.

56 The issue is widely treated in international law works of the time; see, for the South American position, C. Calvo, *De la non-responsabilité des Etats à raison des pertes et dommages éprouvés par des étrangers en temps de tourbes intérieurs ou de guerre civile*, in «Revue de droit international et de législation comparée», 1, 1869, pp. 417-427. Calvo's views are accepted, in principle, by European authors, see, for instance, J.K. Bluntschli, *Le droit international codifié* cit., p. 224 (art. 380 *bis*); Pradiere-Fodéré, *Traité de droit international public européen et américain* cit., v. 1, pp. 346-348; F. Despagnet, *Cours de droit international public, II ed. complètement revue et mise au courante*, Paris, Sirey, 1899, pp. 469-471; Hall, *A Treatise on International Law* cit., pp. 218-219 and, among monograps, V. Pennetti, *Responsabilità internazionale in caso di revolte o di guerre civili. Lettura fatta al circolo giuridico di Napoli*, Napoli, stab. tip. G. Cozzolino e c., 1899; A. Rougier, *Les guerres civiles et le droit des gens*, Paris, Larose, 1903. In 1899-1900, the issue was discussed at the Institut de droit international, see supra footnote 7.

57 According to the Peruvian ministry of foreign affairs, the note was conceived «no solamente para justificar la manera como se ha resuelto las demandas […] sino por [exponer] de modo sucinto los principios que acerca de [las reclamaciones diplomáticas] admite [el] gobierno y que son los que ha aplicado en la presente oportunidad» (Il ministro delle relazioni esteriori del Perù al r. ministro in Lima, Lima, 26 ottobre 1897, attached to Relazione del ministero degli affari esteri del 29 gennaio 1899, oggetto: recente dottrina del Perù in ordine ai danni sofferti da regi sudditi in quello Stato durante la guerra civile, Roma, 29 gennaio 1899, in ASDMAE, cons. cont., p. 5, f. 2, pp. 6-7). The note had been transmitted to the Italian, British, French, German and Spanish representatives. For references, see P. Pradier-Fodéré, *Traité de droit international public européen et américain* cit., v. 1, pp. 234-239, and, in more recent times, Irizarry y Puente, *The concept of "denial of justice" in Latin America* cit., p. 390, footnote 30.

58 According to the Peruvian ministry of foreign affairs, «indiscutible es ciertamente el que sirve de fundamento à las reclamaciones diplomáticas: el Estado debe protección à sus miembros, no sólo dentro de su territorio, sino donde quiera que se hallen, siendo ésta una de las principales ventajas de la asociación política à cuya satisfacción tiende la moderna institución de la legaciones permanentes. Objeto de esa protección es reparar las injurias que el extranjero recibiese en el país de su residencia, y que, en ciertos casos, trascienden al Estado à que pertenece, y indemnizarle de los daños que en el mismo pudieran irrogársele […] pero, si es cierto el principio, no es siempre admisible la extensión que se pretende darle al aplicarlo, por lo que, en esta materia, encuentra-se la dificultad en reconocer, para no exagerarlo, hasta dónde se extiende aquel deber de protección y cuando, por consiguiente, pueden los gobiernos entablar legítimamente reclamaciones, en defensa de sus nacionales» (Il ministro delle relazioni esteriori del Perù cit., pp. 6-7). The note appears to be widely based upon C. Wiesse, *Le droit international appliqué aux guerres civiles, édition française revue et mis à jour par* A. De Blonay, Lausanne, B. Benda libraires-éditeurs, 1898.

59 On the issue, the Peruvian note reads as follows: «el ingreso de un individuo al territorio de un Estado à que no pertenece, origina entre ambos reciprocas derechos y obligaciones: aquel contrae la de respetar las leyes del país, obedecer à sus autoridades, someterse à su jurisdicción, y tácitamente se compromete también à sufrir resignado los vicios de su organización ò de su estado social; el Estado, por su parte, se impone respecto de extranjero la obligación de hacerle justicia, de velar por su existencia, de defenderle sus bienes y de no hacer distinción entre el y los nacionales en lo relativo à la garantía de sus derechos; pero […] no se deduce, por cierto, de esta reciprocidad de derechos y obligaciones que los extranjeros hayan de encontrarse en mejor condición que los nacionales, lo que no se puede pretender sin alterar el orden natural de su situación respectiva […]si se la llevase mas allá de sus naturales y justos limites, pretendiéndose colocar à los nacionales en una situación de inferioridad tanto mas irritante cuanto menos fundada […] el elemento extranjero, lejos de ser agente poderoso de bienestar, se convertiría, para los países, en carga pesada y peligrosa, de la que, sobre todo los débiles, procurarían verse libres en previsión de desagradables desavenencias, si no, desdorosas humillaciones» (Il ministro delle

relazioni esteriori del Perù cit., p. 7). It has been noted that «no doctrine is more strongly emphasized by Latin-American publicists than the general principle that aliens coming and settling in a country must normally share its fortunes, and have no claim to better treatment than nationals» (Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 236-237). The same argument is crafted by Wiesse, *Le droit international appliqué aux guerres civiles* cit., 1898, pp. 44-46.

60 The Peruvian note goes on in stating that «no afectan la responsabilidad de la nación, ni pueden, por consiguiente, ser materia de reclamación diplomática, los danos y perjuicios que sufran los extranjeros como consecuencias inevitables del estado de rebelión o de guerra civil, ni los que en tal estado les causen las facciones rebeldes [...] derivar responsabilidad des estado de insurrección, pretender ponerse a cubierto de sus danos inevitables, importa, pues, tanto como querellarse de un terremoto o otro semejante siniestro: la insurrección es una calamita general, extensiva à todos los habitantes del país en que ocurre, y de la cual, por consiguiente, nadie tiene el derecho de pretender sustraerse con absurdas exigencias de responsabilidad, como si fuesen los gobiernos sociedades de seguros contra riesgos y danos que de ellos no dependen ni pueden, en la generalidad de los casos, impedir» (Il ministro delle relazioni esteriori del Perù cit., pp. 7-8). The appeal from the contrary by which the Peruvian note equals government with insurance companies appears, identical, in Von Bar, *De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile* cit., pp. 468-469 (published two years later).

61 The Peuvian note admits international responsibility in cases where there has been «culpable y notoria negligencia» from state agents; however, it maintains that responsibility is not triggered «si el gobierno desaprueba y condena [la] conducta y somete al funcionario culpable al juicio correspondiente para hacer efectiva, conforme à ley, la responsabilidad civil y criminal en que hubiese incurrido» (Il ministro delle relazioni esteriori del Perù cit., pp. 8-9).

62 Actually, the ministry asks the *Consiglio*: «Se e fino a qual punto ritenga l'alto consesso doversi dal governo del Re far luogo all'azione diplomatica a pro dei reclami italiani in confronto della dottrina alla quale il governo peruviano afferma di voler informare la propria condotta» (Relazione del ministero degli affari esteri al Consiglio del contenzioso diplomatico, oggetto: recente dottrina del Perù in ordine ai danni sofferti da regi sudditi in quello Stato durante la guerra civile, Roma, 29 gennaio 1899, in ASDMAE, cons. cont., p. 5, f. 2, p. 1).

63 According to the *Consiglio*, «uno Stato il quale o si sottraesse [...] o fosse impotente ad adempiere [il suo dovere di difesa della vita e dei beni] tanto verso i nazionali quanto verso gli stranieri [...] perderebbe la sua ragione d'essere di Stato civile. I nazionali hanno con l'esercizio dei diritti politici o, quando altro manchi, con la rivoluzione [...] modo di difendersi da un governo incivile. Lo straniero, che non gode dei diritti politici ed è tenuto alla neutralità, deve trovare altra guarentigia che sia capace di salvaguardare in lui i diritti della civiltà umana [...] Questa guarentigia sta nella protezione dello Stato al quale egli appartiene» (Parere del Consiglio del contenzioso diplomatico del 19 febbraio 1899, n. 130, Cappelli, Reclami di italiani verso il Perù per danni sofferti durante la guerra civile 1894-1895, in ASDMAE, cons. cont., p. 5, f. 5, p. 3).

64 Notably, the *Consiglio* considers that an exception to the rule that excludes international responsibility for damages occurred to foreigners during civil commotions had to be provided «quando si trattasse [...] di moti popolari diretti specialmente contro gli stranieri» (Parere del 19 febbraio 1899 cit., p. 4).

65 The opinion makes it clear that the reference to the facts of Aigues Mortes is intended to «escludere l'ingiusta accusa [che] una interpretazione simile del diritto le potenze europee non la applicano fra loro, ma solo quando trattasi delle repubbliche sudamericane» (Parere del 19 febbraio 1899 cit., p. 4). It is true that, after the killing of 7 Italian workers at the salterns of Aigues Mort (and the wounding of 26) by a mob led by French workers, the French government operated swiftly in opening an enquiry and providing redress to the families. At the same time, sources witness that economic redress was provided «dans une pensée d'humanité» (see *Chronique de faits internationaux*, in «Revue générale de droit international public», 1, 1894, pp. 171-181 and Borchard, *The Diplomatic Protection of Citizens Abroad* cit., p. 221).

66 The *Consiglio* labels as «veramente inammissibile la pretesa del governo peruviano, il quale vuole negare [un'indennità] a stranieri non d'altro colpevoli che di essere incorsi nelle persecuzioni delle autorità locali» (Parere del 19 febbraio 1899, p. 5). The arbitral award issued on February 13/25, 1897 is published in G. Regelsperger, *L'affaire du Costa Rica Packet et la sentence arbitrale de M. de Martens*, in «Revue générale de droit international public», t. IV, 1897, pp. 735-745. See, for references, J. Valery, *Sur la sentence arbitrale rendue dans l'affaire du Costa Rica Packet*, in «Revue générale de droit international public», 5, 1898, pp. 57-66 and J. Dietzmann, *Costa Rica Packet Arbitration*, in MPEPIL.

67 Together with the other docu-

ments relating to the case, the *Consiglio* is transmitted the legal opinion given by the British Law Officer of the Crown and by the Spanish government legal adviser, in Italian translation (see Il R. ambasciatore in Londra al ministro degli affari esteri, Londra, 1 marzo 1898, and Nota verbale [traduzione] Madrid 4 luglio 1898, attached to Relazione del ministero degli affari esteri del 29 gennaio 1899 cit., pp. 17 and 19-20). Not surprisingly, these opinions resemble that given by the *Consiglio* in all the relevant passages. Few months after the *Consiglio* gave its opinion, Italy and Peru conclude an agreement to submit the claims originally rejected to the arbitration of the Spanish ambassador in Lima (see Acuerdo diplomático para el arreglo de las reclamaciones italianas, firmado, en Lima, à los 25 dìas del mes de noviembre 1899, published in H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Berne, Imprimerie Stampelli & CIE, 1902, pp. 614-615).

68 J. Paulsson, *Denial of justice in international law*, New York, Cambridge University Press, 2005, p. 22. The author argues that «the duty to provide decent justice to foreigners arises from customary international law. Indeed, it is one of its oldest principles» and recalls the definition of denial of justice elaborated by Grotius and Vattel. The former, «conceived two types of denial of justice: (*i*) where a judgement cannot be obtained against a criminal or a debtor within a reasonable time and (*ii*) where in a very clear case judgemnt has been rendered in a way manifestly contrary to law»; the latter «the true intellectual father of denial of justice [...] proposed a systemic approach to the illegitimate refusal of justice under three heads: (*i*) not admitting foreigners to establish their rights before the ordinary courts; (*ii*) delays which are ruinous or otherwise equivalent to refusal; (*iii*) judgemnts manifestly unjust and onesided» (Ivi, pp. 1, 62 and 65).

69 See, for the South American position, C. Calvo, *Dictionnaire de droit international public et privé* cit., v. 1, p. 237 (entry "déni de justice") and, for an appraisal, Irizzarry y Puente, *The concept of "denial of justice" in Latin America* cit., pp. 383-406.

70 On attribution, see J.R. Crawford, T.D. Grant, *Local Remedies, Exhaustion of*, in MPEPIL, par. 7; C. De Visscher, *Le déni de justice en droit international*, in «Recueil des Cours», 52, 1935, pp. 369-441 (in particular pp. 373-374); Borchard, *The Diplomatic Protection of Citizens Abroad* cit., p. 219.

71 On the relationship between denial of justice and the local remedy rule see Paulsson, *Denial of justice in international law* cit., p. 8; Borchard, *The diplomatic protection of citizens abroad* cit., p. 179; Freeman, *The international responsiblity of States for denial of justice* cit., p. 56; Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law* cit., p. 404 and Id., *Origins and Historical Development of the Local Remedy Rule in International Law*, in «Revue Belge de droit international», 12, 1976, pp. 499-527 (in particular p. 526).

72 See Borchard, *The Diplomatic Protection of Citizens Abroad* cit., p. 180. On the same line, it has been noted that «[le déni de justice] a son fondement dans le droit international commun ou coutumier; les traités, d'ailleurs nombreux, qui contiennent la clause de libre et facile accès aux tribunaux se bornent à confirmer un principe dont l'autorité est indépendante de toute convention» De Visscher, *Le déni de justice en droit international* cit., p. 374. In the same sense, see also Cançado Trindade, *Origins and Historical Development of the Local Remedy Rule in International Law* cit., p. 526.

73 See Spiegel, *Origin and Development of Denial of Justice* cit., p. 79. On the same line, see A.A. Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law*, in «Philippine Law Journal», 53, 1978, pp. 404-416 (in particular p. 404); O.J. Lissitzyn, *The Meaning of the Term Denial of Justice*, in «The American Journal of International Law», 30, 1936, pp. 632-646 (in particular p. 645); Freeman, *The International Responsiblity of States for Denial of Justice* cit., pp. 182-183. In its resolution on denial oj justice, adopted at the 1927 Lausanne session, on report by Leo Strisower, the Institut de droit international defined denial of justice as the international wrongful act which occur, on the one hand (so-called formal denial of justice), «lorsque les tribunaux nécessaires pour assurer la protection des étrangers n'existent ou ne fonctionnent pas – lorsque les tribunaux ne sont pas accessibles aux étrangers – lorsque les tribunaux n'offrent pas les garanties indispensables pour assurer une bonne justice»; on the other hand (so-called substantive denial of justice), «[lorsque] la procédure ou le jugement constituent un manquement manifeste à la justice, notamment s'ils ont été inspirés par la malveillance à l'égard des étrangers, comme tels, ou comme ressortissants d'un Etat déterminé» (see Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers, available at <http://www.justitiaetpace.org/idiF/resolutionsF/1927_lau_05_fr.pdf>, Articles 5 and 6).

74 The facts are resumed in Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico del 25 febbraio 1898, Reclamo di Ermoli Antonietta vedova Felice, in ASDMAE, cons. cont., p. 5, f. 5.

75 Article 23 of the Ley constitutiva

de la Republica de Guatemala decretada por la asemblea nacionale constiuyente en 11 de diciembre de 1879 (available at <https://archivos.juridicas.unam.mx/www/bjv/libros/5/2210/14.pdf>, november 2017) reads as follows: «1. Los habitantes de la Republica tienen asimismo libre acceso, ante los tribunales del País, para ejercitar sus acciones en la forma que prescriben las leyes. – 2. Los extranjeros no podrán ocurrir a la vía diplomática sino en los casos de denegación de justicia. – 3. Para este efecto, no se entiende por denegación de justicia, el que un fallo ejecutoriado no sea favorable al reclamante». It has been noted that that was yet another example of the «established practice of […] Latin American countries to enact legislation strengthening the principle of exhaustion of local remedies […] by the mid-nineteenth century» (Cançado Trindade, *Origins and Historical Development of the Local Remedy Rule in International Law* cit., p. 521). However, as correctly pointed out, «[i]t is hardly to be supposed that any foreign State […] would consider itself bound by a municipal legislative interpretation of the term denial of justice» (Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 334-335).

76 Notably, the *Consiglio* considers that «[è] universalmente riconosciuto il principio di diritto internazionale, che la ingerenza in via diplomatica di uno Stato verso l'altro, per la protezione che è doverosa a tutela dei diritti personali e patrimoniali dei propri cittadini, non è permessa nelle controversie private, se non quando […] pur chiesta giustizia, la sia stata negata, o in odio della nazionalità del reclamante, o per qualsiasi altro motivo. Usata fuori de' detti casi l'azione diplomatica […] sarebbe trasmodante ed inopportuna, perché lesiva dell'uguaglianza degli Stati e dell'indipendenza de' tribunali e comprometterebbe altresì gli interessi legittimi degli stessi cittadini, che esplicando la propria attività, abbiano liberamente preso stanza durevole in estero Stato» (Parere del Consiglio del contenzioso diplomatico del 26 marzo 1898, Reclamo di Ermoli Antonietta vedova Felice verso il governo del Guatemala, Pagano-Guarnaschelli, n. 126, in ASDMAE, cons. cont., p. 5, f. 5, pp. 9-10).

77 According to the *Consiglio*, which blames the obscurity of the complaint transmitted by the claimant: «siano non tre, ma due, e se vuolsi sia pure uno solo il giudizio pendente, non è lecito alla reclamante, dopo avere liberamente, e secondo le leggi, adito la giustizia locale, ritrarsi indietro a mezzo il cammino, e lasciando sospeso il giudizio e facendo dormire la procedura dei gravami prodotti, venir chiedendo lo straordinario ausilio dell'azione diplomatica » (Parere del 26 marzo 1898 cit., pp. 10-11).

78 According to a consisten body of authorities, that is «the most confused and difficult problems in the whole field of international responsibility» (see A.V. Freeman, *The International Responsiblity of States for Denial of Justice* cit., p. 308; in the same sense, see also Borchard, *The Diplomatic Protection of Citizens Abroad* cit., pp. 340-341).

79 The *Consiglio* holds *verbatim* that «non si può negare che in modo formale non fu negata giustizia al Verlangieri [*i.e.* the claimant]. Il difetto di motivazione di una sentenza non può aprire l'adito all'esercizio di un'azione diplomatica, quando le leggi di uno Stato in cui un cittadino italiano si trova porgono un sistema di rimedi giuridici che sono stati, sebbene infruttuosamente, sperimentati» (Parere del Consiglio del contenzioso diplomatico, Reclamo Verlangieri verso il governo del Brasile, 10 febbraio 1907, Inghilleri, n. 170, in ASDMAE, cons. cont., p. 7, f. 7, pp. 4-5).

80 The concession contract of May 29, 1899, is resumed in the Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico, Vertenza fra la ditta Martini e co. e il governo venezuelano, 15 giugno 1906, in ASDMAE, cons. cont., p. 7, f. 12, p. 1. It is also published (in French) in *Le déni de justice en matière civile, en droit international: Tribunal arbitral italovénézuélien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)*, in «Revue du droit public de la science politique en France et à l'étranger», 47, 1930, pp. 542-598 (in particular pp. 544-546).

81 On the Venezuelan revolutions and the subsequent international crisis, see A.S. Hershey, *The Venezuelan affair in the light of international law*, in «The American Law Register», 5, 1903, pp. 249-267; W.L. Penfield, *The Anglo-German Intervention in Venezuela*, in «The North American Review», DLX, 1903, pp. 86-96; J. Basdevant, *L'action coercitive anglo-germano-italienne contre le Venezuela (1902-1903)*, in «Revue générale de droit international public», 11, 1904, pp. 362-458; J.H. Ralston, *Venezuelan Arbitrations of 1903, including protocols, personnels and rules of commissions, opinions, and summary of awards, with appendix containing Venezuelan yellow book of 1903, Bowen pamphlet entitled Venezuelan protocols, and preferential question Hague decision, with history of recent venezuelan revolutions*, Washington, Government Printing Office, 1904. In 1903, mixed commission were established by bilateral protocols between Venezuela and the states of nationality of the claimants (*i.e.* USA, Belgium, France, Germany, Mexico, the Netherlands, and Sweden and Norway). Each commission consist of two delegates appointed, respectively, by Venezuela and the state of nationality of the claimants, and a president (umpire) named by the US president (and, for the American mixed commission, by

the queen of the Netherlands). The Italian commission was regulated by protocols of February 13 and May 7, 1903 (published Ivi, pp. 643-644 and 645-647). With separate agreement, the same countries submitted to an arbitral tribunal to be established within the framework of the Permanent Court of Arbitration, set in The Hague in 1899, the question of preferential treatment; *i.e.* whether subjects of the blockading powers enjoyed preference over bondholders of different nationalities (the *compromis* concluded by Italy in this regard, on May 7, 1903, is published Ivi, pp. 1050-1055).

[82] The Award of the umpire in the Martini case, which acknowledged the wrong, but did not grant the entire sum claimed, is published in Ralston, *Venezuelan Arbitrations of 1903* cit., pp. 837-847.

[83] The judgment is published (in French) in *Le déni de justice en matière civile, en droit international: Tribunal arbitral italo-vénézuélien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)* cit., pp. 547-553. The arguments of the parties are resumed in Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico, Vertenza fra la ditta Martini e co. e il governo venezuelano, 15 giugno 1906 cit., pp. 3-4. The company's main argument relates to the conclusion, on November 25, 1903, of another concession contract between the Venezuelan government and another company allegedly incompatible with that in force between the parties (the second concession contract is published in *Le déni de justice en matière civile, en droit international: Tribunal arbitral italo-vénézuélien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)* cit., pp. 553-555).

[84] Namely, the ministry asks the *Consiglio* whether the Supreme Court's decision «contenga in sé e per sé, gli estremi di un diniego di giustizia»; whether it violated the arbitral award of July 8, 1904, and whether the second concession agreement violated the treaty of friendship, commerce and navigation concluded between Italy and Venezuela on June 19, 1861 and renewed by the protocol of February 13, 1903 (see Memoria del ministero degli affari esteri al Consiglio del contenzioso diplomatico del 15 giugno 1906 cit., p. 6).

[85] The clause provided that any doubt and any dispute that might arise in connection with the interpretation and the execution of the contract shall be decided by the courts of Venezuela, in accordance with municipal law; in no case they shall be the object of an international claim (see Parere del Consiglio del contenzioso diplomatico del 3 marzo 1907, reclamo Martini e C. verso il governo della Repubblica del Venezuela, Puccioni, n. 171, in ASDMAE, cons. cont., p. 7, f. 12, p. 11, where the text of the clause is reported in Italian, and *Le déni de justice en matière civile, en droit international: Tribunal arbitral italo-vénézuélien siégeant à Berne, 3 mai 1930 (affaire de la concession Martini)* cit., p. 546 for the French version). For first references on the Calvo clause, see P. Juillard, *Calvo Doctrine/Calvo Clause*, in MPEPIL.

[86] Parere del 3 marzo 1907 cit., pp. 12-13.

[87] In the opinion under review, the *Consiglio* states that: «la citata disposizione, pertanto, non fa ostacolo a che ci accingiamo ad indagare se la sentenza della Corte federale, a danno della società Martini e Co., possa essere impugnata per la via diplomatica; se, in altri termini, ci troviamo in presenza di uno di quei casi eccezionali in cui anche i responsi dell'autorità giudiziaria straniera possono dare luogo a responsabilità di ordine internazionale e quindi ad intervento diplomatico da parte dello Stato cui la persona condannata appartiene» (Parere del 3 marzo 1907 cit., p. 13).

[88] In the *Consiglio*'s own word: «nel [quesito] con cui si domanda se vi fu diniego di giustizia si è evidentemente inteso d'impiegare questa espressione […] nel senso volgare di *ingiustizia*, non già nel senso tecnico, che sarebbe quella di rifiuto di giudicare, di negata amministrazione della giustizia. Ed invero, è innegabile che nel caso speciale, in cui si tratta di giudicare nel merito di una sentenza regolarmente pronunciata, dopo aver ascoltato e (bene o male) vagliato le ragioni delle due parti, non potrebbe parlarsi sul serio di *denegata giustizia* nel senso proprio […] il quesito va così posto: potrà impugnarsi, nella via diplomatica, la sentenza della Corte suprema venezuelana pel titolo di *evidente ingiustizia?*» (Parere del 3 marzo 1907 cit., pp. 13-14, emphasis in the original).

[89] In the opinion, the argument to rebut the presumption is crafted as follows: in the first place, the *Consiglio* acknowledges that there exists a «presunzione di giustizia che, non solo legalmente, ma anche razionalmente, milita a favore della cosa giudicata», but finds that «nel caso speciale […] il collegio giudiziario da cui emanò il giudicato è quella stessa Corte federale venezuelana di cui nessuna nazione volle sapere, allorché si trattava di giudicare i reclami dei rispettivi cittadini, perché non stimata capace, in affari in cui fosse interessato il governo, di giudicare con imparzialità e indipendenza» (Parere del 3 marzo 1907 cit., p. 14). In the second place, the *Consiglio* accepts that «non è in generale dato di recare sicuro giudizio sulla correttezza di un giudicato straniero [data] la impossibilità di sottoporre a sindacato, nelle questioni di fatto, la sufficienza delle prove su cui la sentenza è fondata», just to hold that the reasoning does not apply to the case at hand, where «come apparisce dal tenore stesso della sentenza, la contestazione, eccet-

tuato qualche punto di non decisiva importanza, non era caduta sulla realtà dei fatti […] bensì su questioni di applicazione di principii certi di diritti ai medesimi fatti» (Ivi, p. 15).

[90] In the words of the *Consiglio*: «la Corte […] ha basato su su due gravi errori di diritto la risoluzione di ciò che era il vero nodo della causa» (Parere del 3 marzo 1907 cit., p. 21).

[91] In detail, the two-fold argument elaborated in the opinion considers, on the one hand, that, for an undisputed principle of contract law, «non [è] lecito al locatore di cambiare, sia nella sostanza, sia nella forma, la cosa costituente l'oggetto della locazione senza il consenso dell'altra parte contraente» and, on the other hand, that a correct understanding of the terms of the dispute would have placed on the plaintiff the burden of proving the contractual breach (see Parere del 3 marzo 1907 cit., pp. 20-21). According to the *Consiglio*, the Supreme Court decision violated both principles, overlooking the fact that the government was the first party to breach the contract and finding against the Martini company albeit evidence was not conclusive: for these reasons, the opinion concludes that «il governo del Re [ha] indubbiamente il diritto di spiegare la sua azione diplomatica per titolo di *evidente ingiustizia* della pronunciata decisione» (Ivi, p. 21, emphasis in the original).

[92] On December 21, 1920, Italy and Venezuela agree to submit the dispute to an arbitral tribunal. On May 3, 1930, the panel composed by an Italian and a Venezuelan delegate, and presided by the Swedish Östen Unden (then professor of civil law at the University of Uppsala, later also ministry of foreign affairs) found in favour of the Martini company, but did not order compensation (with the Italian delegate dissenting on that point). The arbitral award is published in «The American Journal of International Law» v. 25, 1931), pp. 554-585. For references, see W. Weiss, *Martini case*, in MPEPIL and O. Unden, *L'Affaire Martini: une sentence arbitrale internationale*, Upssala: Almqvist & Wiksell, 1930. The decision is commented, among others, by Cançado Trindade, *Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law* cit., p. 406, footnote 15; Freman, *International Responsibility for Denial of Justice* cit., pp. 322-324, 337-338, 354-357.

[93] According to Clovis Bevilaqua, acting as legal adviser to the Itamaraty, in an opinion given on a claim for manifest injustice pressed by Great Britain on behalf of one of its nationals diplomatic protection means to «[c]riar uma instância especial em favor dos estrangeiros, estabelecer para eles um recurso não previsto na lei e contrario a seus intuitos» (Parecer: Tendência revelada por muitas nações de recorrerem às vias diplomáticas em favor de seus súditos ates de serem tentados os médios judiciários, C. Bevilaqua, 22 de fevereiro 1907 in *Pareceres dos Consultores Jurídicos do Itamaraty* cit., pp. 44-47, (in particular p. 46). For some references on the institution of the legal adviser of the Brazialian ministry of foreign affairs, see above footnote 56.

[94] See Il ministro degli affari esteri al R. incaricato di affari in Rio de Janeiro, Roma 17 agosto 1894, istruzioni generali per la trattazione dei reclami, in ASDMAE, cons. cont., p. 5, f. 2, p. 1. It is perhaps of interest to note that these instructions address the international law doctrines on states' responsibility in such an accurate manner to be listed by Anzilotti, some ten years later, among the «documenti diplomatici di questa serie, dove la questione [della responsabilità dello Stato] è meglio posta ne' suoi reali termini» Anzilotti, *Teoria generale* cit., p. 111, n. 47.

[95] For instance, in the above-mentioned opinion concerning damages in the Brazilian state of Bahia, the *Consiglio* holds that: «[o]gni maggior pretesa è irrazionale e pericolosa, specialmente per un paese di larga emigrazione come l'Italia. Noi dobbiamo essere molto fermi nel reclamare i nostri diritti, quando esistono realmente, e molto corretti nel non affacciarne con sottili cavillazioni, quando non esistono. Il mancare alla prima di queste massime rende i nostri connazionali spregiati; il mancare alla seconda le rende odiosi, come odioso è sempre colui che pretende ciò che non ha diritto di avere; nell'uno e nell'altro caso la loro posizione è danneggiata» (Parere del 19 giugno 1898 cit., p. 8).

[96] See P. Fiore, *Diritto internazionale privato o principi per risolvere i conflitti tra le leggi civili commerciali, giudiziarie, penali di Stati diversi*, Firenze, coi tipi dei successori Le Monnier, 1869, p. 81, defining nationality as «un rapporto libero, volontario e permanente» and Esperson, *Il principio di nazionalità* cit., p. 65, stating that «la cittadinanza è inalienabile […] è la natura stessa che lega, con un nodo indissolubile, l'uomo alla terra che l'ha visto nascere».

[97] See Nolte, *From Dioniso Anzilotti to Roberto Ago: the Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations* cit., p. 1087.

[98] See Jouannet, *Le droit international liberal-providence. Une histoire du droit international*, cit., p. 123. It is undisputed that the treatment of aliens raises a conflict between the territorial jurisdiction of the state of residence and the personal jurisdiction of the state of nationality, see, for instance, E. Kaufman, *Regles generales du droit de la paix*, in «Recueil des cours», t. 54, 1939, pp. 309-630, in particular, pp. 381-382, and, more recently, K. Hailbronner, J. Gogolon, *Aliens*, in MPEPIL, par. 3.

Quel che resta della sovranità. Concessioni e governo del territorio a Tianjin*

LUIGI NUZZO

1. *Lo spazio di una concessione*

La storia raccontata nelle pagine che seguono inizia negli anni sessanta dell'Ottocento quando, sulla base della Convenzione di Pechino, furono ceduti a Gran Bretagna, Francia e Stati Uniti tre ampi appezzamenti di terreno non lontano dalla città di Tianjiin, destinati ad ospitare i primi insediamenti occidentali nella Cina settentrionale[1]. A queste tre concessioni, che si aggiungevano alle altre già individuate nei trattati di Tianjin del 1858, seguì poco più di trent'anni dopo, tra il 1895 e il 1896, l'apertura di un insediamento tedesco e di uno giapponese. Tianjin, tuttavia, cambiò volto solo all'inizio del nuovo secolo quando, repressa la rivolta nazionalista e antioccidentale dei Boxers, fu occupata da una coalizione internazionale. Nel cosidetto protocollo dei Boxers firmato nel 1901, le undici potenze alleate (Stati Uniti, Gran Bretagna, Francia, Giappone, Russia, Germania, Austria, Belgio, Spagna, Olanda e Italia) ottennero il riconoscimento formale di occupare «certain points», di cui avevano già preso materialmente possesso durante le operazioni militari, «in order to maintain free communication between the capital and the sea»[2]. In questo modo mentre Francia, Inghilterra, Germania e Giappone ottenevano un allargamento delle proprie concessioni a Tianjin, Russia, Austria, Italia e Belgio riuscivano finalmente a conquistare la loro porzione di Cina lungo l'Hai River e inauguravano le proprie enclavi nazionali sul suolo cinese.

Nasceva così uno spazio metropolitano con più di un milione di abitanti, attraversato da una molteplicità di confini, fisici, giuridici sociali e composto da due entità distinte ma connesse: la città cinese e le concessioni straniere.

Quello spazio o meglio i primi trent'anni del processo di definizione di quello spazio territoriale costituiscono l'oggetto del mio articolo.

Recentemente gli internazionalisti sono tornati ad occuparsi dei trattati ineguali e

hanno offerto interessanti lavori, attraversati anche da una nuova sensibilità storica, sulle rappresentazioni occidentali del diritto cinese, sulla giurisdizione consolare o sulla posizione della Cina nell'ordine giuridico internazionale[3]. Le concessioni straniere di Tianjin non hanno ricevuto però particolare attenzione e sono rimaste un campo di ricerca affidato alle cure esclusive dei sinologi. Ciò, a mio avviso, ha impedito di cogliere appieno la centralità della dimensione giuridica sia nell'acquisizione e amministrazione dei territori in concessione, sia nella strutturazione delle relazioni con le popolazioni locali. Allo stesso tempo il ritardo con cui internazionalisti e storici del diritto hanno rivolto il loro sguardo alle concessioni occidentali in Cina ha contribuito ad occultare la rilevanza della dimensione coloniale nel processo di costruzione e definizione del moderno diritto internazionale[4].

Tianjin costituisce quindi, un ottimo punto di osservazione per comprendere come sia stato possibile trasformare una sperduta località dell'impero cinese in un nuovo spazio sociale al cui interno definire inedite relazioni tra diritti e discorsività giuridiche differenti. Allo stesso tempo Tianjin può essere assunta anche come un modello per leggere le discussioni giuridiche sull'eccezionalità degli spazi non occidentali e le loro popolazioni e per seguire le proiezioni extraeuropee del diritto internazionale occidentale. Tianjin è infatti uno spazio complesso, ibrido in cui Occidente e Oriente si sovrappongono e che non può essere ricondotto all'interno di categorie politico giuridiche nette come stato, nazione, città. Tianjin, dunque, è insieme oggetto della mia storia e piattaforma decentrata per cogliere la dimensione spaziale del discorso giuridico occidentale. Ciò significa, in altri termini, non solo 'spazializzare' il discorso giuridico analizzando il processo di formazione dei primi tre insediamenti occidentali e il complesso tessuto di relazioni giuridiche economiche e sociali che si definisce al loro interno, ma anche assumere il concetto stesso di spazio come oggetto di analisi.

Come Emil Durkheim e Marcel Mauss sottolinearono all'inizio del secolo scorso, lo spazio non è omogeneo, universale o costante, né può essere considerato kantianamente come intuizione pura e forma a priori dell'esperienza[5]. Al contrario ha una sua dimensione sociale, politica, economica e giuridica. Non è questa la sede, ovviamente, dove riprendere o anche solo riassumere il profondo dibattito teorico sul concetto di spazio che dall'articolo degli autori prima citati conduce, attraverso le riflessioni di Lefebvre e Foucault[6], ai recenti lavori di geografi come Harvey, Soya o Farinelli[7].

Mi sembra però opportuno ricordare che proprio le critiche alla concezione newtoniana di spazio abbiano reso possibile ripensare l'immagine dello stato come spazio omogeneo offerto dalla giuspubblicistica occidentale tra diciannovesimo e ventesimo secolo e allo stesso tempo mettere in discussione l'esistenza di un concetto unitario di sovranità. In questo modo cercare di capire come lo spazio urbano di Tianjin sia stato immaginato e poi realizzato, analizzando sia le strategie coinvolte nella sua costruzione sia le forme di resistenza o negoziazione messe in atto dalla diplomazia cinese o dalle élite locali, significa 'provincializzare' il concetto di sovranità. Le concessioni subite dalla Cina a Tianjin dimostrano cioè che il rapporto tra potere governamentale, territorio e sudditi fuori dai confini dell'Occi-

dente funzionava in modo diverso o come scriveva con straordinaria lucidità Georg Jellinek già alla fine dell'Ottocento, che la sovranità non era più una caratteristica essenziale dello Stato, ma solo «una categoria storica necessaria per la comprensione del sistema statale contemporaneo, ma non dello Stato in sé»[8]. Lo strano contratto di affitto perpetuo con cui le nove potenze straniere dettero forma giuridica all'occupazione di ampie porzioni di territorio cinese ci interroga, quindi, sui limiti del concetto di sovranità fuori dall'Occidente e sui limiti della statualità come requisito della soggettività internazionale.

2. *Il contratto scomparso*

Tianjin comparve nel discorso coloniale dell'Occidente solo nel 1858 come sede in cui furono firmati i trattati tra Cina, Gran Bretagna e Francia che chiusero la seconda guerra dell'oppio. Tuttavia, per la sua inclusione nell'elenco degli *open ports* si dovette aspettare ancora due anni. Solo con la Convenzione di Pechino, cioè con l'accordo che seguì all'ingresso delle truppe anglo francesi in città e alla distruzione del Palazzo d'estate, il trattato di Tianjin entrò in vigore, l'indennità dovuta dal governo cinese a Francia e Gran Bretagna fu portata a sedici milioni di *taels* e il porto di Tianjin si aprì al commercio occidentale alle stesse condizioni osservate negli altri *treaty ports* dell'impero[9]. Pochi mesi dopo, tra la fine del 1860 e l'inizio del 1861, le autorità cinesi concessero a inglesi, francesi e, in virtù della clausola della nazione più favorità, agli americani, tre zone da destinare alla costruzione dei rispettivi settlement. Gli inglesi si stabilirono poche miglia a sud di Tianjin, occupando un territorio ricompreso tra le mura meridionali della città e il fiume.

Nel volume dei *Treaties series* dedicato ai trattati stipulati tra Gran Bretagna e Cina l'accordo relativo a Tianjin risulta, però, ufficialmente stipulato solo il tre settembre 1861 ed è l'ultimo di una serie di *leases* che permisero alla potenza europea di avere proprie concessioni a Zhenjiang (23.2.1861), Hankou (21.3.1861), Jiujiang (25.3.1861) e di ampliare quella già esistente di Guanzhou[10]. Di questo contratto, però, non c'è traccia. Come scrisse il console inglese Byron Brennan a Thomas G. Grosvenor, incaricato d'affari a Pechino «no formal lease for the British concession at Tientsin has been issued by the Chinese Government»[11]. L'unica prova dell'esistenza dell'accordo risulta così una ricevuta rilasciata nel 1865 dall'ufficiale distrettuale cinese al console inglese Mongan per il pagamento annuale dell'affitto del terreno e diligentemente citata nella raccolta ufficiale dei trattati stipulati dal governo inglese nel modo seguente: «To annual rent for the year ending, paid to the Chinese - Government for the British concession at Tien-tsin, known by the name of Tan Chu Lin, viz., 412 *mou*, 6t. 5m. Se. at 1,500 *copper cash* per *mou*=618,987 *copper cash*»[12].

In realtà le potenze alleate non avevano avuto bisogno di un contratto per occupare Tianjin e il suo territorio. Nell'agosto del 1860 se le autorità cinesi continuavano ad amministrare la città, operavano ormai sotto lo stretto controllo britannico ed erano tenute ad offrire un'adeguata assistenza all'esercito inglese che muoveva alla conquista di Pechino. A questo scopo l'ammiraglio James Hope aveva lasciato a Tianjin il suo interprete, Harry Parkes, con il compi-

to di individuare l'alloggio più adatto per il ministro plenipotenziario inglese, Lord Elgin di ritorno in Cina dopo una missione in Giappone, e di requisire gli edifici da destinare al futuro consolato[13]. Lo stesso Parkes il 25 novembre 1860, circa un mese dopo che la Convenzione di Pechino avesse trasformato Tianjin in un porto aperto, scrisse un *Memorandum* con il quale provvedette ad indicare i confini della concessione. Il suo *Land Memorandum* è probabilmente il primo ed unico documento inglese che riconosce il diritto della Gran Bretagna ad avere un proprio settlement e fissa le linee guida del suo sviluppo[14].

Il testo tuttavia presenta non pochi problemi. La copia che sono riuscito a trovare negli archivi inglesi è così disordinata e piena di correzioni da sembrare poco più di un semplice progetto. Tredici anni dopo, tuttavia, una versione molto più leggibile dello stesso documento è allegata ad una lettera scritta dal console inglese a Tianjin, James Mongan, ed indirizzata a Edmund Hornby, Chief Justice a Shanghai[15].

Se ciò conferma l'importanza del *Memorandum* di Parkes, rafforzando l'impressione che ci si trovi di fronte all'atto costitutivo della presenza inglese a Tianjin, la strana sensazione di incertezza e di ambiguità che esso trasmette non scompare mai del tutto. Da un lato infatti il documento sembra essere destinato a cinesi e a britannici: un ufficiale cinese e un membro del *Committee of supplies* del principe Sengerinchen assistono Parkes nelle complesse operazioni di definizione dei confini; il nome del villaggio ricompreso nella concessione è riportato in caratteri cinesi; e anche l'unità di misurazione del suolo adottata, il *zhang*, è cinese.

Dall'altro però il documento è firmato dal solo Parkes, l'affitto annuale da pagare al governo cinese così come l'estensione dell'area non sono ancora calcolate esattamente ed infine gli stessi confini, pur individuati con qualche chiarezza, assumono come punti di riferimento alberi, capanne, banchine, muretti.

Il confine settentrionale infatti seguiva il percorso del fiume per circa un chilometro ed era chiuso a nord da «a large tree, at the foot of which are two wells and a small boat dock», e a sud da un «large single tree on the East bank of the river in line with a small single tree on the West side a short distance from the bank».

A pochi metri da quel punto una capanna aveva il compito di rendere ancor più chiaro il punto terminale della linea. A questo scopo Parkes intagliò su una delle travi del tetto della capanna la seguente iscrizione: «255 chang Nov. 23. 1860», e riportò la stessa informazione su un foglio apposto sulla parete della capanna stessa.

Sul lato opposto Taku road, la strada principale, segnava il confine occidentale: «at the Northern End it is a 120 chang from the river's bank to the road. At the Southern end it is 91 chang from the River to the road»[16].

Situato a due miglia a sud della città cinese di Tianjin, il sito che era stato selezionato, non era tuttavia uno spazio vuoto. E probabilmente questo era il problema principale. Al suo interno vi era un villaggio cinese e un villaggio significava capanne, tombe e edifici da demolire e soprattutto persone da evacuare. La loro presenza all'interno della concessione, cioè all'interno di uno spazio che si voleva sottoposto alla sovranità inglese, non poteva essere accettata per motivi diversi che riguardavano, come vedremo, il piano simbolico, quello economico e quello legale. Il *Memorandum*, quindi, doveva fissare chiaramente i termi-

ni dell'esproprio, della compensazione e dell'espulsione della gente del villaggio di Zizhulin dalla propria terra.

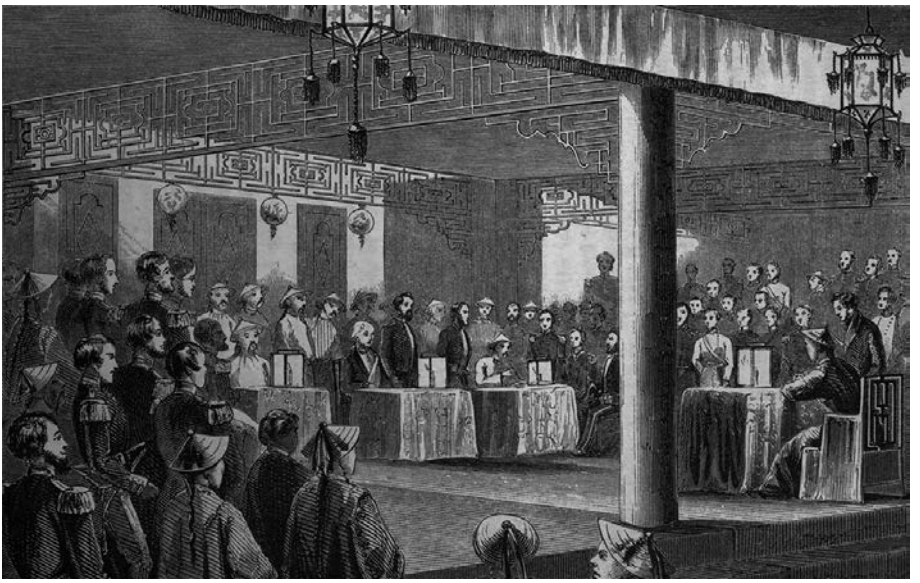
Ogni proprietario di terreni aveva diritto a ricevere 30 *taels* per ogni singolo *mou* di terreno, ad ottenere il corrispettivo del valore delle capanne e degli edifici di sua proprietà che erano stati espropriati e altri 10 *taels* per essere stato costretto ad abbandonare la concessione. Tuttavia, fintanto che i cinesi continuavano a risiedere all'interno della concessione, rifiutandosi di abbandonare le proprie abitazioni, gli inglesi non si consideravano obbligati a pagare il canone dovuto al governo cinese.

Il *Memorandum* non aggiunge altro e se sostanzialmente rende più saldo il diritto di occupazione riconosciuto dall'articolo IV della Convenzione di Pechino, dando forma giuridica agli accordi raggiunti da Parkes e dal capitano Gordon con le autorità cinesi, ci spinge a guardare agli altri *lease agreements* stipulati dalla corona britannica per gli insediamenti di Guangzhou, Zhenjiang, Hankou e Jiujiang, al fine di identificare il quadro teorico giuridico entro il quale ricondurre anche l'accordo di Tianjin. In tutti questi casi si trattava infatti di uno strano contratto di locazione privo di scadenza temporale che aveva ad oggetto un appezzamento variabile di terreno e il cui canone di affitto doveva essere pagato annualmente. Con la firma del contratto e il contestuale pagamento della prima annualità di affitto il terreno poteva essere considerato proprietà della Corona inglese e sottoposto alla piena giurisdizione della magistratura consolare. Essa avrebbe dovuto provvedere all'individuazione e al subaffitto dei lotti, così come, d'intesa con i funzionari imperiali, all'espropriazione delle proprietà cinesi ricomprese nella concessione. Secondo quanto previsto nel *lease agreement* relativo ad Hankou (21.3.1861), una popolosa città fluviale che a partire dalla fine del XIX divenne sede anche di settlement tedeschi, francesi, russi e giapponesi, il console inglese, il prefetto e il magistrato distrettuale cinesi avrebbero dovuto convocare i proprietari dei terreni e degli immobili presenti all'interno della concessione invitandoli a presentare i loro titoli e poi avrebbero provveduto al pagamento delle indennità di espropriazione. Gli eventuali conflitti sarebbero stati risolti facendo ricorso a criteri equitativi[17].

Ma torniamo a Tianjin.

Solo pochi giorni dopo che Parkes aveva scritto il *Memorandum*, James Bruce, Lord of Elgin, chiese chiedeva al principe Gong di affittare in perpetuità un'area di 440 miglia a sud di Tianjin, con l'accordo che gli abitanti cinesi avrebbero dovuto essere espropriati delle loro abitazioni ed evacuati. La richiesta confermava anche l'ammontare dell'indennità fissata da Parkes. Gong rispose prontamente, informando Bruce che avrebbe invitato il vicerè del Zhili a collaborare con gli inglesi nella gestione del contratto di locazione e nella costruzione del consolato[18].

Seguendo le istruzioni di Parkes e del principe Gong, alla fine del dicembre 1860, Mongan, nominato nello stesso mese console di Tianjin, aveva segnato i confini dell'insediamento e posto quattro pietre liminari agli angoli della concessione. Nei primi mesi dell'anno successivo, lo stesso Mongan aveva poi inviato all'ambasciatore britannico a Pechino, Bruce, due mappe del settlement eseguite dal capitano Gordon. La prima illustrava il progetto di divisione del terreno in lotti, la rete urbana che si voleva realizzare, la zona destinata alle attività in-



Signing the Treaty of Tientsin, 1858, coeval print

dustriali e infine le proprietà cinesi all'interno dell'insediamento. La seconda mappa aveva come oggetto la città cinese, i suoi sobborghi, e con essi i quartieri occupati dalle truppe alleate. Mongan chiese che i piani fossero entrambi litografati e pubblicati sul *North Chinese Herald* di Shanghai[19].

Per assicurare un futuro al settlement era necessario, infatti, vendere velocemente i lotti. Bisogna quindi attrarre investitori, definendo un chiaro piano di sviluppo che lasciasse intravedere agli imprenditori inglesi delle reali possibilità di arricchimento. Tianjin non aveva una buona reputazione. Solo due anni prima, Laurent Oliphant, entrando in città con James Bruce, aveva scritto «to contain half a million of inhabitants, Tientsin was the most squalid, impoverished-looking place we had ever been in. […] In no part of the world – scrisse – have I ever witnessed a more squalid, diseased population than that which seemed rather to infest than inhabit the suburbs of the city. Filth, nakedness and itch, were their prevailing characteristics»[20].

Anni dopo Alexander Michie, in un articolo pubblicato nel Tienstin Express, e William Mc Leish, in una conferenza tenuta presso la *China Society* di Londra, resero ancora più fosco il quadro sottolineando la «well known aptitude» al crimine e alla violenza dei «bullies» di Tianjin, «the most wicked and predatory turbulent race in the Empire»[21].

Tuttavia a Tianjin non era solo la popolazione ad essere ostile, ma anche la natura. Gli inverni erano gelidi e le estati umide e calde. E l'Hai, il grande fiume che attraverso Tianjin metteva in comunicazione Pechino e il mare, correva impetuosamente «in the shape of corncrew»[22], portando con sé una grande quantità di fango e rendendo difficile la navigazione[23]. Non solo, come risulta dai resoconti redatti dal con-

solato inglese l'inadeguatezza degli argini e la sottoposizione dei terreni rivieraschi rispetto al livello del fiume rendevano ancora più gravi gli effetti delle frequenti inondazioni dell'Hai River[24].

Allo stesso tempo il fiume era anche una grande risorsa per Tianjin e ne determinava l'importanza strategica a livello economico, politico e militare. Situata al centro di un grande bacino, la città poteva divenire un straordinario mercato per l'oppio indiano e per le merci britanniche (in particolare il cotone e i prodotti in lana) nel nord della Cina, nonché un buon porto da cui il cotone e il tabacco cinesi avrebbero potuto essere importati nel Regno Unito. Non a caso il settlement inglese e poi tutti gli altri insediamenti stranieri trovarono collocazione lungo i due lati del fiume e tutti i consoli rivolsero una grande attenzione ad esso, progettando e realizzando interventi importanti per facilitarne la navigazione, il suo attraversamento e per proteggere i terreni circostanti. Ciò condusse nel 1897, per esempio, subito dopo la grande inondazione dell'anno precedente, alla fondazione *Hai River Conservancy Commission*. Si tratta, come ha ricordato recentemente Shirley Ye[25], di un'interessante commissione mista nominata da Li Hongzang, il governatore generale del Zhili, i consoli di Gran Bretagna e Francia e il presidente della camera commerciale generale di Tianjin, in cui cinesi ed occidentali cercavano di trovare un modo di cooperazione al fine di superare i problemi comuni che rendevano difficile la navigazione del fiume.

Anche il primo console britannico a Tianjin, James Mongan, era consapevole che il futuro della città e dello stesso settlement inglese dipendessero dal fiume. Da un lato, era necessario controllare militarmente il traffico fluviale imponendo limiti alla navigazione dei giunchi cinesi e colpendo duramente il contrabbando e la pirateria. Dall'altro, sarebbe stato fondamentale, una volta aperto il fiume alla navigazione, fissare regole doganali certe. Il sistema doganale (*Custom House System*) reintrodotto nel 1854 a Shanghai con la partecipazione di cittadini occidentali come ispettori, si sarebbe dovuto estendere anche a Tianjin, ma sette anni dopo la situazione dell'intero comparto commerciale e doganale era ancora piuttosto confusa[26].

Nell'aprile del 1861, infatti, l'ispettore generale delle dogane marittime Horatio Lay era in partenza per la Gran Bretagna, formalmente «on sick leave», e fece ritorno in Cina solo due anni più tardi. Già nel maggio successivo, comunque, il Principe Gong aveva attribuito a George Henry Fitzroy e Robert Hart le funzioni di ispettori generali, ma come scrisse il console Mongan a Bruce, ambasciatore inglese di stanza a Shanghai, «the arrival of foreign shipping may be daily expected»[27]. Non c'era tempo da perdere quindi e in effetti Mongan si era mosso in anticipo.

Consapevole che fosse necessario introdurre immediatamente sia il sistema di controllo doganale cinese, sia un chiaro regime fiscale e che l'introduzione di entrambi fosse possibile solo attraverso una stretta collaborazione con i funzionari cinesi, Mongan, in accordo con Ch'ung-hou, sovrintendente del commercio dei tre porti settentrionali, aveva elaborato un breve regolamento doganale e il 12 marzo aveva provveduto ad inviarlo a Bruce[28].

Ovviamente il console sapeva che si sarebbe trattato solo di poche regole temporanee modificabili non appena Tianjin fosse stata inclusa nella rete delle *Custom Houses*.

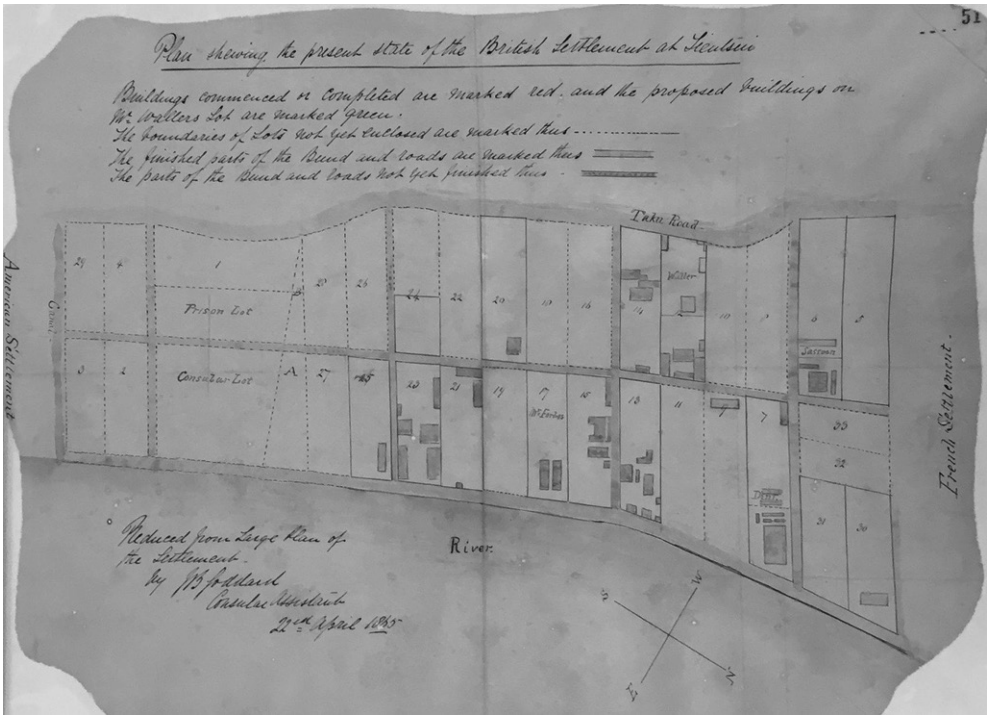
Il suo regolamento consisteva di soli sei articoli e prevedeva l'apertura all'estremità settentrionale dell'insediamento di un ufficio doganale per le merci trasportate da navi straniere e a Dagu, verso il mare, di un *Office of General Inspection.* In questo modo qualsiasi imbarcazione mercantile britannica che avesse risalito il fiume avrebbe potuto essere facilmente ispezionata da un ufficiale delle dogane che poi sarebbe rimasto a bordo fino a raggiungere il punto di attracco all'interno della concessione inglese a Tientsin. Il giorno dopo l'ancoraggio, secondo quanto prescritto dall'art. 37 del Trattato di Tianjin, i documenti della nave dovevano essere presentati al console che, nelle 24 ore successive, era tenuto a comunicare il nome, il tonnellaggio e la natura del carico della nave al soprintendente delle dogane al fine di determinare l'ammontare dei dazi doganali e delle tasse dovute[29].

Il 19 aprile Ch'ung-hou inaugurò ufficialmente il nuovo ufficio doganale. L'ufficio si trovava nel villaggio cinese di Zizhulin, cioè all'interno della concessione inglese ed era destinato esclusivamente a raccogliere i dazi su tutte le merci importate ed esportate da navi straniere. Nel caso di prodotti cinesi o di merci trasportate da vettori cinesi la competenza in materia doganale sarebbe rimasta alla cosidetta *Old Custom House*[30].

Paradossalmente, però, mentre Ch'ung-hou continuava ad utilizzare il villaggio cinese per individuare il sito dell'ufficio della dogana, il villaggio stesso stava ormai scomparendo. Tra marzo e aprile 1861, Mongan, aveva infatti già iniziato a ripartire il terreno della concessione in trenta lotti e, dopo averne riservati 4 per le esigenze del consolato, progettava la vendita degli altri ventisei[31].

Il console era sicuro che il fiume, il suo enorme bacino e l'ampia rete di canali avrebbero permesso di trasformare rapidamente Tianjin nell'hub dell'impero britannico nella Cina settentrionale. L'interesse degli investitori non sarebbe quindi potuto mancare e presto sarebbero arrivate numerose richieste per l'acquisto dei terreni della concessione, e in modo particolare per quelli lungo il fiume. Mongan ne era così convinto da richiedere ai loro acquirenti non solo di contribuire al processo di urbanizzazione degli insediamenti, ma anche di provvedere alla costruzione della banchina a proprie spese. Allo stesso tempo, oltre alla necessaria collaborazione degli investitori inglesi, Mongan era altrettanto convinto che il coinvolgimento del governo cinese fosse fondamentale per un rapido miglioramento del settlement e paradossalmente per liberare l'insediamento dai cinesi che vi vivevano ancora al suo interno.

Seguendo le prescrizioni contenute nel *Memorandum* di Parkes secondo le quali i cinesi avrebbero dovuto lasciare la concessione, Mongan, procedette, prima, al censimento di tutti i cinesi proprietari e alla determinazione del valore di ogni edificio, poi confrontò i dati ottenuti con quelli in possesso del governo cinese e cercò di bilanciare l'importo del rimborso proposto con le richieste economiche avanzate dallo stesso governo cinese. Infine presentò a Bruce la sua idea di sviluppo del settlement, suggerendo alcune interessanti soluzioni in merito alla vendita dei lotti. Con l'obiettivo di impedire speculazioni o concentrazioni di proprietà immobiliari nelle mani di pochi investitori, Mongan avrebbe preferito vendere la terra ai residenti inglesi a Tianjin ed escludere la possibilità di presentare domanda per più di un lotto. Nel caso in cui ci fossero state altre richieste per lo stesso



Mappa del settlement inglese di Tianjin 1865, TNA, FO, MPKK 1/50/9

lotto, si sarebbe proceduto alla vendita al più alto offerente per asta pubblica. In assenza di offerte, invece, il limite di un lotto per ogni acquirente sarebbe stato rimosso.

Con riferimento al tempo entro il quale presentare le domande, esse sarebbero dovute arrivare negli uffici del consolato entro il 31 maggio del 1861 e la vendita si sarebbe svolta il giorno successivo. Entro la fine di aprile il consolato avrebbe fornito i piani topografici del luogo, le condizioni di vendita e una scheda dettagliata di ciascun lotto con l'indicazione del valore degli edifici di proprietà cinese eventualmente ricompresi nel lotto stesso[32].

Intanto, sempre verso la fine di maggio, Robert Hart, facente funzioni di ispettore generale delle dogane cinesi dopo il ritorno di Lay in Inghilterra, e il segretario francese di legazione nonché commissario delle dogane a Tianjin, Michael Kleczkowski, erano giunti in città per dare attuazione alle prescrizioni in materia doganale contenute nel Trattato del 1858. Negli stessi giorni Ch'ung-hou inviò a Mongan i regolamenti finali della *Tientsin Custom House*, invitandolo a trasmetterli ai commercianti inglesi che risiedevano nella concessione[33].

Il 29 agosto 1861, il sostituto di Mongan, l'*acting consul* Gibson, dette inizio alla vendita dei terreni. Un mese dopo Bruce autorizzò l'acquisizione di un altro tratto di terra sul versante meridionale dell'insediamento che avrebbe dovuto compensare i quattro

lotti messi a disposizione del governo cinese. Poi, all'inizio del 1862, lo stesso ambasciatore inglese dispose «the purchase of a new strip of land on the South side for the excavation of a canal from the Peiho River on the East to the Taku road on the West», fissando definitivamente il confine meridionale della concessione.

L'interesse degli imprenditori e commercianti britannici verso i terreni della concessione fu enorme e alla fine di settembre 1863 tutti i lotti erano stati venduti.

Tra il 1863 e il 1865, tuttavia, vi erano ancora delle divergenze tra Gibson e le autorità di Tianjin in merito all'estensione della concessione e conseguentemente all'affitto da pagare. Secondo le informazioni fornite da Mongan il settlement inglese si estendeva per 425 5.5.6 *mou* e l'affitto ammontava 638.732 *copper cash*. Nel 1865 Mongan, ritornato a ricoprire la carica di console, confrontò il registro delle proprietà inglesi con i contratti di affitto, accertando che «the total area of all the lots was *mou* 412 6.5.8 and that the total of the ground rent payable on these at 1500 *copper cash* per *mou*, if computed in the aggregate, was 618.987 and 618.985 if computed *seriatim*». Così, con l'autorizzazione di sir Alcock, ministro plenipotenziario britannico e *Chief Superintendant of the Trade*, propose alle autorità cinesi locali una riduzione del canone dovuto. I cinesi accettarono, fissando a 618.985 *copper cash* l'affitto annuo che la Corona era tenuta a pagare all'impero cinese, e rilasciarono una ricevuta in cui dichiaravano che «the Tse-Chu Lin is in consideration of the above yearly payment rented in perpetuity by the British Government»[34]. Questa ricevuta, in assenza di un contratto formale, costituisce l'unica prova della legittimità giuridica della presenza inglese a Tianjin e per questo fu inserita, come si è detto, nella raccolta ufficiale dei trattati stipulati tra la Gran Bretagna e la Cina[35].

All'interno del settlement ogni contratto di subaffitto aveva una durata di 99 anni e prevedeva il pagamento di un canone di affitto annnuale di 1500 *copper cash* per *mou* e l'impegno degli affittuari di contribuire alle spese per gli edifici, la manutenzione e l'illuminazione delle strade, la sicurezza e il miglioramento della concessione.

Nel 1862 gli affittuari elessero il consiglio comunale e tra la fine dell'ottobre 1863 (27 ottobre) e il 1 giugno 1864 vennero pubblicati i primi regolamenti della concessione. Ma nel novembre del 1866 Alcock procedette alla loro abrogazione e alla contestuale emanazione di due nuovi regolamenti: uno relativo all'amministrazione dei terreni che si trovavano all'interno della concessione e l'altro all'amministrazione del distretto consolare di Tianjin[36]. Rilasciati entrambi in virtù di un *Order in Council* per la Cina e il Giappone, grazie al quale nell'anno precedente la Corona si era riservata il diritto di emanare tutti regolamenti necessari per la buona amministrazione dei suoi distretti consolari e per il buon governo dei sudditi all'interno degli *open ports*, essi erano vincolanti per ogni cittadino britannico che si trovasse nella concessione.

Quattro pietre agli angoli del settlement, come abbiamo visto, ne segnavano il confine e ne differenziavano lo spazio da quello della concessione francese e della concessione americana. Le operazioni di delimitazione, tuttavia, non apparivano sufficienti per garantire la sua trasformazione in un nuovo spazio sociale. Per questo obiettivo, era necessario infatti che il territorio prima militarmente occupato e poi misurato, ripartito in lotti e venduto

fosse effettivamente abitato. In altre parole parlasse inglese. Ciò significava tracce che mostrassero indelebilmente l'autorità della Corona britannica e nuove pratiche, politiche, economiche, giuridiche e architettoniche, in grado di segnare il territorio della concessione assicurando una profonda trasformazione sociale[37].

Non si trattava di un'operazione semplice.

L'insediamento inglese, come quello francese e tutti gli altri che ad essi seguirono tra la fine del XIX secolo e l'inizio del Novecento, era uno spazio giuridicamente ambiguo su cui sembravano incombere le intramontabili categorie medievali del *dominium directum* e del *dominium utile*. Da un lato il ricorso alla figura giuridica della concessione e il pagamento di una tassa annuale alle autorità locali permetteva di riconoscere ancora, almeno formalmente, la sovranità cinese. Dall'altro la perpetuità della concessione, l'esproprio forzato della proprietà cinese, l'espulsione degli abitanti e il riconoscimento della piena giurisdizione della magistratura consolare sembravano rompere irreparabilmente il rapporto tra lo stato cinese e il suo territorio, perfezionando la cessione e creando veri e propri diritti territoriali in favore delle potenze occupanti.

Le *Local Land Regulations* e le *General Regulations* possono essere considerate, quindi, il primo tentativo di fissare un nuovo ordine giuridico e rappresentarono un modello per tutti gli altri stati concessionari. Ad essi era affidato il compito di disciplinare in modo preciso la vita dell'insediamento, definendo lo spazio interno ed esterno della concessione. Dopo averne fissato i confini, individuato i lotti da subaffittare e determinato il costo di ciascuna unità di misura (*mou*), bisognava rendere omogeneo il territorio della concessione. Ciò significava in primo luogo stabilire chi (e a quali condizioni) potesse essere riconosciuto come un legittimo subaffittuario. Nelle intenzioni del governo britannico, ovviamente, gli affittuari sarebbero dovuti essere in primo luogo i cittadini inglesi o naturalizzati inglesi. In linea di principio, però, gli stranieri non erano esclusi.

Anch'essi, infatti, avrebbero potuto acquistare a condizione di osservare rispettosamente le norme e i regolamenti amministrativi della concessione e di avere preventivamente ottenuto un'autorizzazione ufficiale dalla propria autorità consolare. Ma chi era uno straniero? O meglio chi erano i cinesi? potevano essere considerati stranieri in patria e come tali, dunque, essere legittimati ad acquistare i terreni della concessione? O il dato formale che il territorio all'interno del villaggio britannico appartenesse alla Cina e che essa fosse ancora il titolare di una *ultimate sovereignty* impediva di attribuire loro lo status di stranieri? Le *Land* e le *General Regulations* non rispondono in modo chiaro e diretto a questa domanda, ma offrono indicazioni significative. La normativa inglese attribuiva, infatti, all'autorità consolare il diritto di revocare i contratti di subaffitto stipulati con cittadini stranieri in presenza di una qualsiasi violazione regolamentare. Tuttavia, indipendentemente dalla nazionalità del concessionario, era sempre possibile sciogliere il contratto di locazione e riprendere il possesso della terra se quest'ultimo avesse permesso a cittadini cinesi di costruire o di occupare una casa all'interno della concessione. L'omogeneizzazione architettonica, culturale, economica, sociale e giuridica del territorio poteva sopportare la presenza di altri cittadini occidentali, se si fossero mo-

strati rispettosi dell'ordinamento giuridico britannico, ma non la presenza di cittadini cinesi. Da un lato, quindi, era necessario procedere all'esproprio dei loro beni e all'espulsione di coloro che non avevano ancora lasciato la concessione, proprio come Lord Elgin aveva chiesto al principe Gong di fare sin dal 1860. Dall'altro invece, doveva essere evitato (o almeno bisognava provarci) che i cinesi tornassero a vivere all'interno della concessione[38].

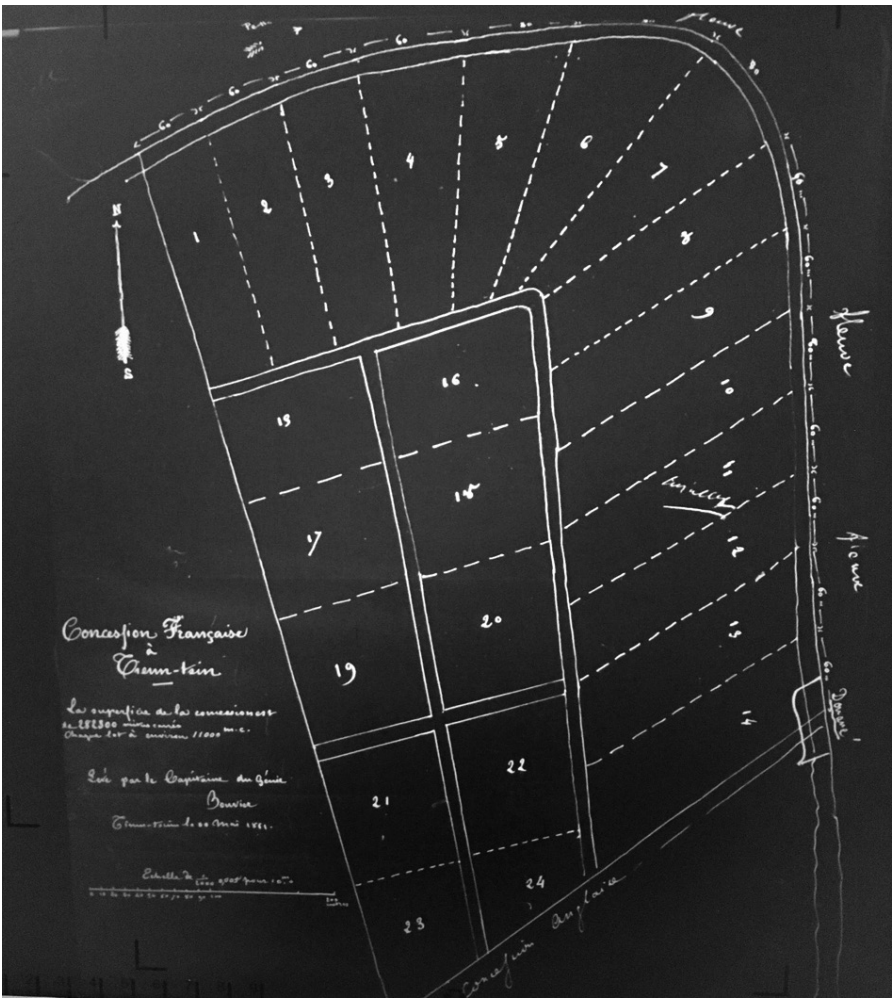
Raggiungere questi obiettivi significava definire un efficiente sistema amministrativo capace di mettere in comunicazione governo e imprenditori. Come si è detto, nelle intenzioni della Corona la concessione sarebbe dovuta divenire un avamposto commerciale britannico nella Cina settentrionale, ma affiché ciò accadesse era necessario anche l'impegno degli stessi imprenditori inglesi. Ad essi, dunque, si chiedeva di collaborare e provvedere al pagamento della *land tax* annuale fissata dalla Cina, rifondendo sostanzialmente la Corona delle somme anticipate per affittare la terra e per lo sviluppo e il controllo della concessione.

Così ogni anno l'assemblea generale degli affittuari, convocata annualmente dal console, stabiliva quanto ciascun locatario avrebbe dovuto pagare in proporzione al terreno posseduto e definiva i diritti di banchina e le imposte di ormeggio. L'assemblea generale era chiamata, poi, ad eleggere un comitato esecutivo, composto da tre a cinque membri, e il suo presidente. Il comitato aveva il potere di imporre e riscuotere le tasse, amministrare i fondi municipali e emanare i regolamenti (*Bye-Laws*) necessari per raggiungere gli obiettivi fissati dall'assemblea. Una volta adottate dall'assemblea e approvate dal console, i regolamenti presi dal comitato avevano la stessa efficacia delle *Land* e *General Regulations*.

Era compito del console convocare l'assemblea tutte le volte gli fosse apparso necessario e quando il presidente del comitato o almeno cinque proprietari lo avessero chiesto. All'approvazione del presidente era anche subordinata la validità delle decisioni assunte dall'assemblea generale su questioni che riguardassero la municipalità e avessero interesse generale. Contro la decisione del console era sempre possibile presentare appello all'ambasciatore entro sette giorni dalla decisione stessa.

Il mantenimento dell'ordine pubblico all'interno della concessione era affidato alla polizia consolare e a corpi di polizia privata scelti dai proprietari terrieri. Dotata di ampi poteri, la polizia aveva il diritto di arrestare chiunque fosse colto in flagranza di reato all'interno della concessione anche nel caso di ipotesi criminose non particolarmente gravi come disturbo della quiete pubblica, furto, ubriachezza o altri comportamenti 'disordinati'. In tali casi il console doveva verificare le accuse e decidere secondo il diritto inglese se l'accusato fosse di nazionalità britannica, altrimenti era tenuto ad informare l'autorità consolare dell'imputato. Quest'ultima ne avrebbe assunto la custodia e avrebbe proceduto all'istruzione del processo. Infine, se l'accusato era cittadino di uno stato che non aveva una propria rappresentanza consolare a Tianjin, per lui si sarebbero aperte le porte del temutissimo sistema correzionale cinese e l'unica 'garanzia' che gli veniva riconosciuta era la presenza di un funzionario consolare inglese nel processo.

Il sistema amministrativo scelto dalla Corona inglese produsse i frutti sperati e il settlement divenne presto un modello per le altre potenze europee. Come veniva sot-



Mappa della concessione francese di Tientsin, 1861, AMAE, Paris, NS Chine, vol. 286, Concession française de Tientsin 1861-1897, 148 CPCOM P/19231

tolineato nell'agosto del 1896 dal console tedesco a Tianjin, Ludwig Loeper, in una memoria indirizzata al suo ambasciatore a Pechino, Gustav Adolf Freiherr Schenck zu Schweinsberg, la capacità della Corona e poi dell'autorità municipale nel definire quali terreni fossero da subaffittare al miglior offerente e quali da destinarsi a scopi pubblici, e soprattutto l'individuazione di regole chiare per evitare le speculazioni immobiliari, avevano assicurato lo sviluppo della concessione. Grazie ai surplus derivanti dalla vendita dei terreni, agli introiti ottenuti con le tasse sul traffico fluviale e alla scelta di imporre agli investitori le spese di urbanizzazione delle zone limitrofe ai singoli lotti acquistati, la Corona aveva potuto anticipare le somme necessarie per

l'espropriazione e l'espulsione dei cinesi. Allo stesso tempo era riuscita ad effettuare gli interventi necessari per il rimpascimento dei terreni rivieraschi e per dotare il settlement di banchine e di un'adeguata rete viaria. Senza cinesi e ben organizzato, esso aveva cominciato ad attrarre investitori inglesi ed occidentali e solo pochi terreni erano ormai rimasti in proprietà della Corona. Ciò aveva condotto ad un rapidissimo aumento dei prezzi all'interno del settlement e ad un nuovo interesse anche verso terreni di proprietà cinese che si trovavano al suo esterno o nella città cinese di Tianjin. Senza nascondere il proprio stupore il console tedesco ricordava infatti che, nel primo caso, per un lotto di limitata estensione (11 *mou*), non particolarmente interessante perché lontano dal fiume e privo di edifici utilizzabili, erano stati offerti, nel 1893, 24000 *taels* e 27000 tre anni dopo, a fronte di una richiesta di 36000. Nel secondo invece i prezzi richiesti dai proprietari cinesi erano arrivati a 300 *taels* per *mou* per terreni ricompresi tra il settlement e la città cinese mentre, oscillavano, a secondo dei rimpascimenti necessari, tra 100 e 140 *taels* per *mou* per i terreni che si trovano all'interno delle mura cinesi[39].

Alla fine del secolo la speculazione edilizia aveva oltrepassato i confini del settlement e investiva ormai anche la zona cinese. La municipalità inglese, approfittando della debolezza politica della Cina e temendo la concorrenza del Giappone, della Germania e delle altre potenze occidentali già arrivate o pronte a sbarcare a Tianjin e a rivendicare la propria parte del bottino, cominciò ad acquistare terreni al suo esterno e a preparare l'estensione del settlement. All'estensione si accompagnò anche l'introduzione di un nuovo sistema contrattuale secondo il quale l'acquirente non conferiva più l'intero prezzo dovuto per i 99 anni di affitto al momento della stipulazione del contratto, ma un canone annuale. Il locatario continuava a disporre del suo titolo come un vero proprietario, sempre senza essere formalmente autorizzato a vendere a cinesi, ma il locatore poteva agevolmente adeguare il canone all'aumento dei prezzi o a fronte dell'incremento delle domande.

3. *L'invenzione della perpetuità*

Dal punto di vista formale gli inglesi non erano stati i primi ad ottenere una concessione sulla riva destra del fiume Hai. Il 29 maggio 1861, infatti, il sovrintendente dei tre porti settentrionali, Ch'ung-hou, aveva proclamato ufficialmente l'esistenza di una concessione francese e ne aveva stabilito i confini[40].

La proclamazione recepiva una richiesta avanzata da Auguste Trève, sottotenente di vascello e console a Tientsin, che il funzionario cinese aveva trovato fondata «in diritto e giustizia». Negli archivi del Ministero degli Affari Esteri, la richiesta sembra purtroppo scomparsa. Tuttavia, la Proclamazione di Ch'ung-hou ci offre indicazioni importanti sull'inizio della presenza francese nella città di Tianjin. Sebbene essa costituisca, infatti, il primo documento firmato da un funzionario cinese che riconosceva l'esistenza della concessione, quest'ultima non nasceva da un atto di grazia di Ch'ung-hou, ma si fondava sull'autorità formale dell'articolo 10 del trattato franco cinese di Tianjin del 1858, espressamente citato nel testo. Per la diplomazia francese, dal punto di vista giuridico e simbolico, appariva

molto più efficace fondare la legittimità dell'occupazione su un articolo di un trattato internazionale piuttosto che su un atto amministrativo che esprimeva la volontà di un oscuro sovrintendente cinese.

Solo pochi giorni dopo la Proclamazione di Ch'ung-hou, la centralità dell'articolo 10 venne confermata dal *Réglement relatif à l'affermage à perpetuité des terrains dans les limites de la concession Française à Tientsin* (2.6.1861). Si tratta di un regolamento emesso sulla base del provvedimento precedente, firmato dal segretario di legazione francese Michael Kleczkowski e dallo stesso soprintendente cinese, in cui si riconduceva sempre all'articolo 10 il diritto della Francia ad ottenere una concessione in perpetuità sul suolo cinese[41].

L'articolo 10, tuttavia, prevedeva soltanto che tutti i cittadini francesi che si fossero stabiliti in uno dei porti aperti cinesi, indipendentemente dalla durata del loro soggiorno, avrebbero potuto «*louer des maisons des magazins ou bien affermer terrains et y bâtir lui-même des maisons et des magasins*», al fine di incentivare gli investimenti francesi in Cina[42].

La perpetuità, dunque, era solo un elemento temporale che qualificava il contratto di affitto della concessione, ma nell'articolo o nell'intero trattato non vi era alcun elemento che imponesse una simile soluzione. La concessione nasceva dalla violenza di un'occupazione territoriale che nessuna interpretazione estensiva del trattato avrebbe mai potuto giustificare e che l'impero cinese era stato costretto a subire in virtù del principio della nazione più favorita sebbene nessuna potenza ne avesse esplicitamente chiesto l'applicazione.

Pochi mesi dopo, i vincoli reali e immaginari alla sovranità cinese contenuti nel trattato di Tianjin spinsero Ch'ung-hou a concedere alla Francia anche un altro ampio appezzamento di terra lungo l'Hai River, 60 miglia ad est di Tianjin, in un'area compresa tra i Dagu Forts[43].

La nuova concessione si trovava in una posizione strategica dal punto di vista militare e avrebbe dovuto rafforzare la presenza francese nell'area. I forti erano stati al centro della seconda guerra dell'Oppio e la loro conquista aveva determinato la vittoria delle truppe anglo francesi. Controllare i porti significava controllare l'Hai River e l'accesso alla città di Tianjin, garantendo quindi la sicurezza delle concessioni straniere.

Nella lettera che accompagnava la traduzione della proclamazione di Ch'ung-hou il console francese a Tianjin, Henri-Victor Fontanier, informava il segretario di legazione dell'ubicazione della concessione, allegando alcuni suoi schizzi, ne sottolineava l'importanza e dava notizia della richiesta di affitto di un forte all'interno della concessione che gli era stata inoltrata da un protetto francese[44]. Non sappiamo se la richiesta venne accettata, né se il «soggetto italiano» Sandri sia stato il primo affittuario di una delle fortificazioni ma, in verità, non ci interessa scoprirlo. Essa, era la prima richiesta di affitto che arrivava al consolato. Si trattava di una richiesta particolarmente attesa, perché un anno e mezzo dopo la prima dichiarazione di Ch'ung-hou pochissimi francesi si erano stabiliti nella concessione e di loro c'era necessariamente bisogno per affermarne l'identità francese. Un nuovo spazio sociale non poteva infatti essere semplicemente il prodotto di nuove definizioni territoriali. Al contrario richiedeva segni che marcassero in maniera indelebile il territorio, rendendolo omogeneo e indicando chiaramente il potere

che la Francia esercitava su di esso. Ma vi era anche un ulteriore motivo che potrebbe spiegare l'insistenza cortese di Fontanier affinché Kleczkowski accettasse la richiesta di Sandri: essa avrebbe permesso al console di «faire valoir immediatement nos traités»[45]. Sarebbe stato, cioè, lo strumento per rafforzare un accordo la cui base giuridica non era facile da identificare. Anche la Francia doveva avere una concessione a Tianjin e anche la Francia doveva avere un diritto perpetuo sulle proprietà all'interno della concessione, ma il suo prerequisito di validità non poteva essere la dichiarazione unilaterale di un funzionario cinese.

Da un lato i privilegi francesi rinviavano formalmente alla forza normativa di un trattato internazionale che aveva codificato il diverso valore delle parti contraenti e che, in questo caso, svuotava il provvedimento di Ch'ung-hou, trasformandolo in atto dovuto privo di qualsiasi discrezione. D'altra parte era necessario che questi privilegi fossero effettivamente goduti. La loro stessa esistenza era impensabile se proiettata solo su un piano teorico. L'occupazione del suolo cinese costituiva, quindi, il titolo originario da cui traevano legittimità trattati e proclamazioni e al contempo la condizione necessaria affinché gli stessi accordi esercitassero la loro efficacia costitutiva. Tuttavia, la dimensione fattuale cui rinviava la concessione poneva non pochi problemi. Circa venti anni dopo la sua apertura formale, Charles Dillon, console a Tianjin dal 1870 al 1883, confessò in una lettera scritta nel luglio 1881 ed indirizzata all'ambasciatore francese a Pechino, Fréderic Albert Bourée, che nove anni dopo il suo arrivo era a malapena riuscito a trovare l'accordo del 29 maggio e una mappa della concessione.

Dal tenore della lettera, comunque, si ha l'impressione che questa scoperta non avesse aiutato i funzionari francesi a determinare esattamente la sua estensione e quali regole seguire sia nella formazione e nell'assegnazione dei lotti, sia nella determinazione delle indennità dovute ai cittadini cinesi che avevano subito l'espropriazione. Eppure il regolamento del 2 giugno 1861 indica chiaramente la procedura attraverso la quale i cittadini e i protetti francesi avrebbero potuto avere accesso alla distribuzione dei terreni della concessione. Il ricorso al filtro di un procedimento amministrativo sembrava essere la soluzione migliore, in grado di garantire la certezza delle aspettative. Avrebbe permesso di misurare la terra concessa, trasformarla in lotti da assegnare agli imprenditori e ai commercianti francesi, controllare la sua ripartizione e il suo utilizzo. Al console era affidato il compito di sovrintendere l'intero processo, mettendo in comunicazione due mondi lontani. Ricevuta la richiesta, d'intesa con le autorità locali, egli, prima, doveva verificarne la conformità ispezionando il luogo e, poi, doveva seguire la delicatissima procedura di espropriazione.

Nella speranza di stimolare l'interesse per i terreni della concessione il consolato aveva addirittura approntato dei moduli precompilati attraverso i quali gli acquirenti, inserendo pochi dati e qualche dichiarazione di supporto, avrebbero potuto agevolmente presentare le loro richieste[46].

Ai moduli però era affidato anche il compito di integrare e chiarire lo stesso regolamento. Se, infatti, i suoi dodici articoli erano rivolti esclusivamente a cittadini o protetti francesi, nei moduli di domanda si riconosceva il diritto di tutti gli occidentali di investire nella concessione previa auto-

rizzazione del proprio console e a condizione che ciascun acquirente riconoscesse la giurisdizione del console francese. Ai cinesi, al contrario, veniva espressamente fatto divieto di acquistare immobili e terreni nella concessione. A causa del numero limititatissimo di francesi residenti o interessati a stabilirsi nella concessione, tuttavia, il consolato ritenne che l'espropiazione immediata di tutti terreni occupati dai cinesi sarebbe stata «contraria ad equità e giustizia» e preferì riservarsi il diritto di decidere caso per caso.

Il console avrebbe dovuto raccogliere dall'acquirente la metà della somma fissata (60 *taels* per *arpent*) e consegnarla al proprietario che subiva l'espropriazione. L'altra metà sarebbe stata invece destinata alle spese di trascrizione dell'atto, a quelle di costruzione e manutenzione di strade, ponti, banchine e infine all'istituzione e al mantenimento di una forza di polizia. Per tutti gli altri terreni l'indennità dovuta ai cinesi avrebbe esaurito gli oneri finanziari degli investitori francesi.

Essa tuttavia non si limitava al terreno espropriato, ma si estendeva anche agli immobili presenti sul terreno e comprendeva anche una piccola somma pensata per compensare il disagio subito dalle famiglie cinesi per il *déplacement*[47]. Immobili e cinesi, erano stati meticolosamenti censiti dal magistrato di Tianjin e inseriti in una lista poi consegnata al primo segretario di legazione francese. Firmata e munita del sigillo delle due autorità, essa diveniva un atto autentico che certificava la presenza cinese all'interno della concessione, evitando, nelle intenzioni francesi, il lievitare del numero dei residenti cinesi ed escludendo qualunque forma di indennizzo per gli immobili costruiti dopo la promulgazione del regolamento.

Il quindici dicembre di ogni anno l'acquirente avrebbe dovuto versare il canone di affitto perpetuo conferendone una metà nelle casse del governo cinese e l'altra in quelle del consolato affinché fossero utilizzate per il miglioramento e la messa in sicurezza della concessione. Contestualmente egli avrebbe ricevuto dal console un atto autentico «de bail a perpetuité» che paradossalmente avrebbe costituito un titolo di proprietà a perpetua garanzia del suo diritto (art. XI).

Qualche anno più tardi, nel 1865, una copia del regolamento venne inviata, in traduzione, al console inglese[48]. Nella nota di accompagnamento Gabriel Deveria, interprete del consolato e in quel momento facente funzioni consolari, ricordava al console inglese che il governo francese avrebbe dovuto integrare il regolamento amministrativo, offrendo la possibilità di investire nella concessione anche ai suoi connazionali. Sebbene infatti i dodici articoli del regolamento si rivolgessero esclusivamente a cittadini e protetti francesi, la grave penuria di investitori e più in generale la limitatezza delle attività economiche spingeva le autorità consolari a ritenere sempre meno rilevante la nazionalità dei concessionari occidentali e la eventuale presenza di cinesi. Formalmente, ad essi continuava ad essere impedito l'acquisto di terreni, ma gli si riconosceva la possibilità di vivere all'interno della concessione.

Gli unici due limiti espressamente ricordati da Deveria riguardavano, da un lato, il carattere francese che l'insediamento doveva conservare e che non poteva essere messo in discussione; dall'altro la specialità del suo regime giuridico al quale tutti i residenti dovevano sottostare.

Investitori stranieri e residenti cinesi non sembravano costituire un pericolo per

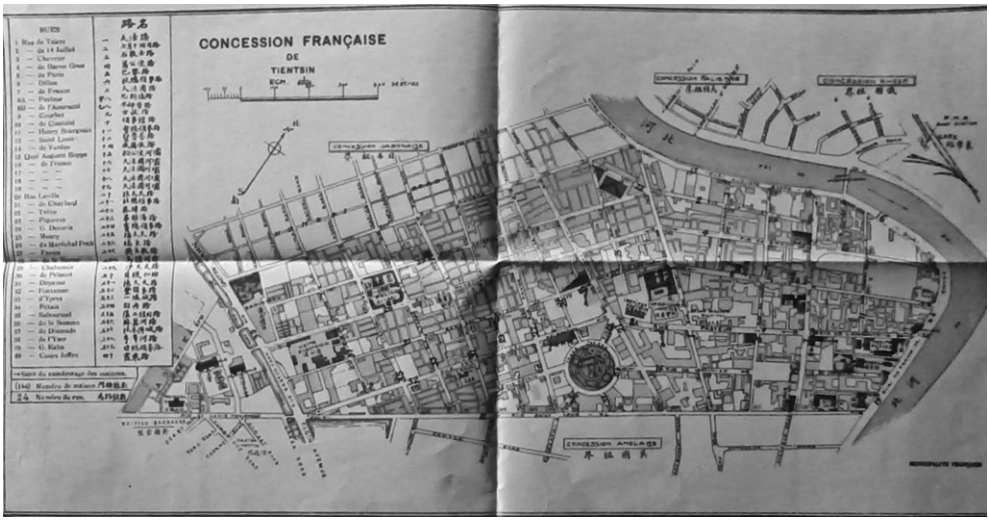
lo sviluppo e l'identità della concessione, confermando le indicazioni contenute tre anni prima nei moduli per la presentazione della domanda. Nove anni più tardi, tuttavia, il regolamento non era ancora stato integrato e non era ancora chiaro se anche altri occidentali potessero investire nella concessione. Ricevuta la domanda di un portoghese interessato ad aprire una sala da gioco lungo il fiume, il console francese Dillon, infatti, chiedeva istruzioni al suo ambasciatore a Pechino. Il regolamento escludeva con il suo silenzio questa possibilità, ma era tempo di prendere un'altra direzione. «Nous sommes si peu de Français en Chine que si l'on ne permet pas aux étrangers d'acheter un lot de terrain, jamais la concession français d'ici ne perviendra à l'être habitée»[49].

I terreni della concessione non suscitavano ancora sufficiente interesse e, nella speranza di dare avvio al suo sviluppo economico, bisognava aprire agli investitori stranieri. L'assenza degli acquirenti era, infatti, il più grave pericolo per la produzione di nuovo spazio sociale e per la stessa costruzione dell'identità francese della concessione.

Nello stesso tempo quei pochi investitori che avevano manifestato interesse si erano scontrati con l'incertezza delle pratiche amministrative e la fluidità dei confini della concessione. Se infatti il regolamento amministrativo del 1861 conteneva indicazioni molto precise, ogni console nella sua traduzione pratica aveva introdotto un proprio sistema per la distribuzione dei lotti e un proprio schema per la redazione delle domande. Ma vi è di più. Le inondazioni del Hai River avevano determinato la scomparsa della pietra che segnava il confine occidentale della concessione, permettendo ai proprietari cinesi di ridefinire a proprio vantaggio il limite della concessione e di costruire nuovi edifici con la convinzione che non sarebbero mai stati espropriati.

Una convinzione che sembra confermata nel 1872 dalle parole dell'ambasciatore francese a Pechino Geofroy secondo il quale il sostanziale disinteresse manifestato dalla Francia verso la concessione impediva di chiedere un rigoroso rispetto dei confini e una seria applicazione del diritto «pure indiscutibile in principio» che essa vantava sul territorio. Nove anni più tardi la situazione appariva ancora più grave ed imponeva, secondo il console Dillon, di agire fuori dalle logiche giuridiche assumendo equità, convenienza e interesse come criteri guida dell'azione politica[50].

Nel lungo dispaccio inviato al nuovo ambasciatore francese Bourée nel luglio del 1881, egli ricordava di aver sempre agito nel rispetto delle istruzioni ricevute dall'ambasciata e rivendicava il merito di avere migliorato la procedura amministrativa per la richiesta di terreni, introducendo sin dal suo insediamento un nuovo e più razionale modello di domanda. La sua lettera, tuttavia, lascia trasparire la preoccupazione di poter essere considerato responsabile del mancato intervento del consolato per impedire la rioccupazione di fatto del versante occidentale da parte dei cinesi. Certo, quest'ultimi avevano maliziosamente approfittato della scomparsa della pietra liminare e gli investitori continuavano ad essere pochi, ma il fatto che il console non si fosse accorto della variazione di un confine della concessione, né delle costruzioni che gli stessi cinesi provvedevano a realizzare al suo interno se non dopo nove anni dal suo arrivo, poteva apparire una disattenzione piuttosto grave[51].



Mappa della concessione francese di Tientsin, Règlements municipaux, 1894, Pékin 1900

Il regolamento del 1861 gli forniva una via d'uscita, attribuendogli la possibilità di procedere alla distruzione senza alcuna indennità delle costruzioni edificate dopo la sua promulgazione. Dillon, tuttavia, preferì non seguire questa strategia, anzi si mosse in direzione completamente opposta. Riprendendo Geofroy, da un lato evocò sia l'assenza di prove che individuassero con certezza i responsabili dello spostamento delle pietre di confine, sia il carattere solo teorico del diritto francese alla demolizione, dall'altro insistette sulla sua profonda ingiustizia materiale. Il confine della concessione tagliava in due un nucleo di abitazioni affittate dai capi villaggio a famiglie cinesi particolarmente povere che prima erano state espulse dalla concessione inglese e poi da quella francese. Costoro probabilmente non erano esenti da colpa, ma la demolizione delle loro case sembrava una punizione eccessiva e avrebbe presentato il rischio di essere «mal compris du public et de surreter contre nous, dans la localité, le sentiment national des indigènes». Bisognava quindi prendere atto che i terreni occupati avevano un'estensione estremamente limitata e che nessuno dopo tanti anni vi aveva fatto richiesta. Nello stesso tempo era altrettanto necessario mostrarsi fermi di fronte alle eccessive richieste cinesi. Il taotai di Tianjin chiedeva infatti la rinuncia per iscritto non solo del diritto di espropriazione senza indennità, contenuto dal regolamento del 1861, ma anche del diritto di acquisto di immobili e proprietà cinesi al di fuori della concessione che la Francia si arrogava secondo un'interpretazione più che estensiva del articolo 10 del trattato di Tianjin.

Consapevole della difficoltà in cui si dibatteva la concessione e dei rischi cui poteva condurre l'ostilità della popolazione locale, Dillon preferì cambiare interlocutore e si rivolse direttamente al viceré, la cui decisione sembrò offrire ad entrambe le parti un onorevole compromesso. Ai francesi ven-

ne riconosciuto il diritto di proseguire nel censimento e misurazione dei (nuovi) immobili presenti lungo il confine all'interno della concessione, permettendo a Dillon di affermare che in questo modo il viceré riconosceva implicitamente la concessione ed accettava definitivamente il (nuovo) confine occidentale. Al contempo il viceré considerava come un fatto compiuto la presenza dei nuovi immobili e altrettatanto implicitamente affermava il diritto dei proprietari cinesi all'indennità in caso di espropriazione.

Il taotai, nella ricostruzione di Denby, non apparve felice di questa decisione e continuò ad ostacolare le operazioni di *mesurage*, sobillando i residenti cinesi e dichiarando apertamente che la «force resterait à la loi». Ancora una volta l'intervento del viceré risolse una situazione che stava divenendo difficile. Convocò il taotai e alla presenza del console lo redarguì al punto che lo stesso funzionario dichiarò a Dillon di essere pronto ad aiutarli «sottomano» ad acquistare dai proprietari cinesi anche le case che si trovano al di là del confine della concessione[52].

Tuttavia, la vita del settlement non era facile, gli investitori ancora pochi e lenta l'opera di urbanizzazione. La scelta di non procedere all'immediata espropriazione delle proprietà cinesi e alla conseguente espulsione dei residenti attraverso l'anticipazione delle somme necessarie, si era dimostrata fallimentare. Come abbiamo visto il sistema francese, imperniato sul console e sulla sua attività di mediazione, prevedeva che per i terreni lungo il fiume, cioè i terreni certamente più redditizi ma anche quelli che avevano bisogno di maggiori lavori, le somme necessarie per le attività di rimpascimento, la costruzione di banchine, ponti e rete viaria provenissero dalla metà del prezzo pattuito (l'altra metà sarebbe stata consegnata dal console all'espropriato come indennizzo).

Subordinare gli interventi urbanistici alla vendita dei lotti di terreno si era rivelata, però, una mossa azzardata, le cui conseguenze si ripercuotevano sulle prospettive di sviluppo della concessione e rendevano il confronto con il settlement inglese imbarazzante.

Gli investitori francesi non erano arrivati o erano arrivati in numero molto ridotto e senza di loro, da un lato, si era potuto fare ben poco, dall'altro non solo non si era potuto procedere all'espulsione dei residenti cinesi, ma anche non si era riusciti ad impedire che la concessione divenisse il luogo di residenza di funzionari e benestanti cinesi.

Se poi incrociamo le informazioni che ci restituisce la mappa della concessione allegata ai regolamenti municipali del 1894 con quelle offerte dalla memoria del console tedesco Ludwig Loeper, prima citata, le ragioni del suo mancato sviluppo sono ancora più chiare.

Nella concessione due terreni erano occupati dal consolato e dalla municipalità, tre erano di proprietà del governo cinese e su di essi sorgevano gli edifici delle dogane, dell'ufficio telegrafico, e dell'ammiragliato. Un cittadino francese possedeva tre piccoli appezzamenti e un cittadino russo era il proprietario di due lotti più grandi posizionati lungo il fiume. Tutto il resto apparteneva a Gesuiti e Lazzaretti. I due ordini religiosi, infatti, approfittando della protezione accordata dalla Francia ai missionari cristiani, della mancanza di concorrenza, dell'assenza di aste pubbliche e di un prezzo per *mou* che oscillava tra i 30 e i 60 *taels* (negli stessi anni nella concessione inglese era arrivato a 2000) si erano mossi come abili speculatori, accaparrandosi la maggior

parte dei terreni, e aspettavano il momento migliore per vendere.

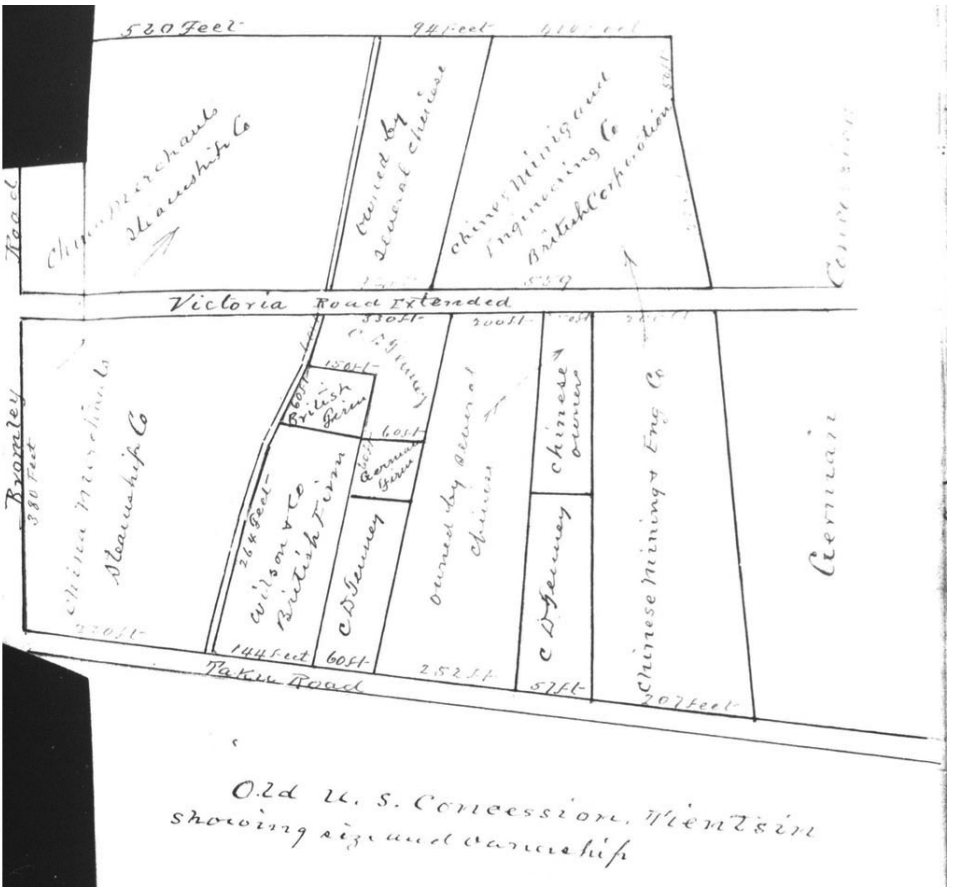
Nel 1894 quel momento non era ancora arrivato, perché appunto erano mancate le opere di urbanizzazione e la concessione continuava ad essere abitata da cinesi, ma anche perché essa era in una sua posizione oggettivamente meno favorevole rispetto quella inglese. In primo luogo il terreno era in gran parte paludoso e richiedeva ingenti interventi di bonifica per adeguarlo agli standard europei, in secondo luogo le possibilità di attracco lungo quel tratto del fiume che lambiva la concessione non erano per nulla agevoli.

Due anni più tardi tuttavia, per un attento e interessato osservatore come il console tedesco a Tianjin, cominciavano ad apparire le condizioni per il suo rilancio. Il vertiginoso aumento dei prezzi dei terreni del settlement inglese dovuto alla diminuzione dell'offerta e alla crescita delle attività commerciali ed imprenditoriali stavano spingendo un numero sempre crescente di europei e di ditte europee verso la concessione francese. Gesuiti e Lazzaretti cominciarono, così, finalmente a vendere[53].

4. *La concessione inesistente*

Ancor più incerte sono le origini della concessione americana. Gli Stati Uniti non avevano preso parte alla seconda guerra dell'oppio e si erano mantenuti neutrali anche nei due anni che separarono il trattato di Tianjin dalla convenzione di Pechino. Tuttavia, attraverso il ricorso alla clausola della nazione più favorita, avevano ottenuto gli stessi privilegi territoriali delle altre *treaty powers*. Un «tract of land» lungo l'Hai river fu così concesso anche a loro, ma come apprendiamo dal carteggio tra Charles Denby, ambasciatore americano a Pechino, e Richard Olney, segretario di Stato, già nel 1895, gli archivi del consolato statunitense di Tianjin non conservavano alcun documento ufficiale relativo ad una eventuale acquisizione territoriale, neanche una semplice ricevuta di pagamento come nel caso inglese, e non offrivano alcuna informazione circa le modalità attraverso cui si era provveduto alla distribuzione dei lotti di terreno tra i cittadini americani ivi residenti[54].

La ragione di questo silenzio, per il diplomatico americano, era dovuta all'assenza, fino all'arrivo di Burlingame nel luglio del 1862, di un ambasciatore e alla nomina di James Meadow come rappresentante consolare nella stessa Tianjin solo nel 1866. Tuttavia, a suo dire, le prove di una legittima presenza americana non mancavano. A metà degli anni novanta dell'Ottocento, di fronte all'aggressività della Germania, interessata ad aprire un proprio settlement a Tianjin e pronta ad avanzare pretese verso aeree pericolosamente attigue a quelle concesse agli Stati Uniti, Charles Denby cercò di ri-orientare la politica del Dipartimento di Stato verso Tianjin nella speranza che il governo degli Stati Uniti svolgesse un ruolo più attivo nella promozione delle attività imprenditoriali e commerciali americane. Le carte d'archivio provavano, secondo lui, che gli Stati Uniti avevano ottenuto nell'ottobre del 1860, insieme con Inghilterra e Francia, un appezzamento di terreno di 23 acri dal solito Ch'ung-hou, il sovrintendente cinese dei tre porti del nord, di cui era possibile individuare i confini e sul quale per un ventennio i consoli degli Stati Uniti



Mappa della concessione americana a Tientsin 1902[55]

avevano esercitato piena giurisdizione[56]. Nessuno di questi documenti però è giunto sino a noi e nello stesso racconto di Denby una prova importante era data dalla presunzione che se degli imprenditori americani erano giunti sin lì pur essendoci altri luoghi interessanti dove andare, allora doveva esserci un «understanding, peraphs a definitive agreement»[57] che aveva determinato la loro presenza a Tianjin. Ulteriore conferma, forse quella definitiva, era data infine dai ricordi del primo rappresentante ufficiale degli Stati Uniti in città, John Meadow, raccolti da William Pethick, un altro viceconsole americano e da quest'ultimo trasmessi in una lettera del 8 settembre 1883, al console James C. Zuck[58].

Pethick raggiunse il consolato americano di Tianjin nel 1872 come interprete, ricoprendo poi la carica di viceconsole una prima volta dal 1873 al 1875 e una seconda dal 1885 al 1893. Conosceva a fondo, quindi, i problemi della concessione e ricordava bene il caos in cui si trovava l'archivio consolare.

Meadow aveva trasmesso tutti i documenti in suo possesso al suo successore

Sheppard, e lo stesso Pethick aveva provveduto alla loro catalogazione, senza però riuscire a trovare sia un titolo fondativo, sia indicazioni utili per comprendere come fosse avvenuta la distribuzione della terra e chi fossero i legittimi proprietari. Le interviste che aveva avuto con l'ormai anziano Meadow non erano servite a molto. Il funzionario era stato presente quando furono individuati da Ch'ung-hou i terreni da destinare alle concessioni inglesi, francesi e statunitensi ed era ancora in grado di indicare con chiarezza i confini della concessione. Ma a quel tempo, fine anni settanta inizio anni ottanta, non c'era alcun motivo per continuare le ricerche o più in generale per preoccuparsi dell'assenza di una prova certa. Il diritto americano ad avere una concessione non era in questione e una volta ottenuta, sia pure nei modi poco documentati che abbiamo visto, erano giunti anche non pochi investitori nordamericani i quali avevano comprato terra all'interno concessione confidando proprio sul fatto che sarebbero stati sottoposti al governo e al controllo degli Stati Uniti d'America. «There were plenty of equally desirable lots with water frontage still obtainable at that early time in the English and French Concession but our Pilgrim fathers did not choose to locate elsewhere»[59].

Anche gli inglesi ed in particolare il console Mongan, con il quale lo stesso Pethick aveva visionato il fosso che si assumeva come confine tra i due insediamenti, consideravano la concessione americana un dato di fatto e riconoscevano l'autorità del console inglese. Ciò sembrava confermato dall'invito che avevano rivolto ad un loro concittadino, unico residente nella concessione, a interpellare il consolato americano quando aveva avuto delle difficoltà con i cinesi.

Allo stesso modo vi erano prove evidenti che anche da parte cinese si riconosceva ufficialmente l'esistenza di una concessione americana. Pethick ricordava infatti il caso di Mr Chu, un grosso imprenditore cinese, che, dopo aver eredito dal fratello un lotto di terreno lungo l'Hai River nella zona americana e avervi aperto dei magazzini e diversi locali commerciali, aveva proposto al consolato di costruire, a proprie spese, una banchina, di mantenere una forza di polizia e di garantire la copertura di tutte le spese sanitarie. Come corrispettivo chiedeva il pagamento dei diritti di banchina e delle imposte di attracco. La richiesta di Chu fu respinta, ma permise di guardare alla concessione con occhi diversi. Il console Denny si rese conto delle potenzialità della concessione e cominciò ad introdurre dei miglioramenti. In primo luogo istituì una forza di polizia locale, fece sistemare e pulire le strade e introdurre un lieve sistema di tassazione su case e negozi che riscosse il plauso dei residenti. Il terreno compreso nella concessione cominciava dunque a mostrare chiaramente i segni del potere governamentale americano. La sovranità americana era ora evidente e occidentali e Cinesi dovevano prenderne atto. Pethick insisteva infatti nel sottolineare che nelle ripetute conversazioni che aveva avuto con il sovrintendente delle dogane non era mai stato messo in dubbio il diritto americano ad avere una concessione né che gli Stati Uniti non avessero esercitato con continuità il loro diritto sovrano.

Cosa aveva condotto dunque alla grave situazione di abbandono in cui la concessione era caduta dopo il 1880 quando cioè il console Mangum aveva addirittura proposto la retrocessione della concessione al Governo cinese riservandosi solo il diritto delle autorità consolari di emettere dei regolamenti

municipali qualora fosse sembrato opportuno ? Perché i fondi a disposizione erano stati destinati alla costruzione di un imponente muro a protezione del consolato invece di essere impiegati per il miglioramento delle strade e della banchine? Perché era stata dismessa l'efficiente forza di polizia locale ? E perché infine era stato sufficiente l'arrivo di «cinque laceri soldati cinesi» per giustificare l'evacuazione di un settlement che, dopo due anni di vera occupazione, era diventato «very sleek and well dressed»?

Nella sua lettera Pethick non ci aiuta a comprendere le ragioni di un simile abbandono e non offre risposte. Egli riteneva valesse ancora la pena riassumere il controllo della concessione anche se ormai non vi erano nazionali residenti o evidenti interessi economici. Per il diplomatico statunitense, infatti, un'azione in difesa dei propri diritti avrebbe giovato a tutti i settlement stranieri. «Passing across the boundary of any foreign settlement into Chinese quarters is like stepping from a garden into a sty; the further off we can keep the sty, the better it will be for us – if not for our bacon»[60].

Dodici anni però erano trascorsi senza che nulla di rilevante fosse successo. La concessione americana non era uscita dalla situazione di incertezza e abbandono in cui era piombata apparentemente senza motivo. Comprensibilmente le autorità cinesi avevano preso sul serio l'offerta di Mangum e avevano provato ad approfittarne. Da un lato infatti avevano annunciato l'adozione di tutte quelle misure in grado di garantire gli interessi americani, dall'altro si erano riservate il diritto, qualora i consoli americani avessero voluto riassumere il controllo sulla concessione, di verificare la presenza di condizioni ostative e di ridefinire le modalità della sua amministrazione.

Per Denby si era trattato, però, solo di una proposta che nonostante l'impossibilità di ritrovare il contratto originario, il mancato esercizio di funzioni municipali e più in generale uno sviluppo non paragonabile a quello del *settlement* inglese e francese non lasciava presupporre l'assenza di un legittimo titolo né poteva essere intesa come una completa rinuncia dei propri diritti da parte del governo degli Stati Uniti[61].

A differenza di Francia e Inghilterra quest'ultimi non si erano curati della ripartizione in lotti del territorio ricompreso nella concessione né avevano provveduto alla loro vendita, costringendo invece gli acquirenti americani a comprare direttamente dal governo cinese. Ma senza dubbio, a suo dire, avevano ottenuto la propria concessione negli stessi termini e tempi delle due potenze europee e, nonostante tutto, formalmente continuavano ad essere i legittimi titolari. Non solo, insisteva l'ambasciatore, le due potenze europee avevano ampliato le prerogative giurisdizionali originariamente previste, ma anche nessuna concessione era fondata su un trattato, risultando al contrario il prodotto imprevedibile di pratiche, consuetudini, usi. Non è chiaro se Denby si riferisse alle tre concessioni di Tianjin o più in generale ai *settlements* aperti nei *treaty ports* cinesi. In ogni caso si tratta di un'affermazione molto forte che svela impietosamente le ambiguità del discorso giuridico all'interno di contesti coloniali o semicoloniali. Oltre i confini dell'Occidente, regole ed eccezioni, diritti e privilegi si sovrapponevano fino al punto di non essere distinguibili gli uni dagli altri. Ciò conferì legittimità a pratiche e poteri che non avevano nulla a che fare con lo stato di diritto, il diritto internazionale e perfino il diritto consolare.

Allo stesso tempo le parole di Denby tradivano la debolezza delle pretese americane. Fuori dal diritto i diritti potevano farsi valere solo attraverso una trasformazione dello spazio sociale, la trasformazione cioè di un pezzo di Cina in qualcosa che rassomigliasse agli Stati Uniti e sul quale fosse visibile l'autorità dei consoli americani. I ritardi nell'urbanizzazione della concessione, il mancato esercizio dei poteri giurisdizionali ed infine la lettera di Mangum al governatore cinese indebolivano le argomentazioni di Denby. Nel 1895 però il problema non concerneva la riespansione della sovranità cinese sul territorio assegnato venticinque anni prima agli Stati Uniti. «I do not propose at this time – scriveva infatti l'ambasciatore il 31 luglio del 1895 al *Zongli Yamen* – to present a full argument on the question of the right of my Government to retake jurisdiction over the ceded territory. It will be time to do this when the right is disputed»[62]. Gli Stati Uniti non avevano mai manifestato un'attenzione particolare verso quella striscia di terra lungo l'Hai River, ma seguivano con preoccupazione la politica coloniale delle altre potenze interessate ad aprire un proprio *settlement* a Tianjin o a rafforzare la propria presenza in zona. Non si trattava di un problema teorico. Il Reich tedesco trattava per ottenere una concessione e la nuova potenza orientale, il Giappone, assunto il controllo della Corea con la vittoria nella guerra con la Cina, non avrebbe tardato a dare avvio ad una politica espansionistica anche all'interno dei porti cinesi[63]. «I have understood – scriveva Denby sia al *Zongli Yamen* sia al viceré – that proceeding are pending having for their object to cede the territory mentioned to one or more other powers. Against such cession or attempt at cession I enter my solemn protest» (*Ibidem*). Il suo obiettivo era semplice e in linea con la strategia diplomatica da lui seguita nei dieci anni di direzione dell'ambasciata americana di Pechino: proteggere ed incentivare gli investimenti e le attività commerciali degli imprenditori statunitensi nel nord della Cina. Ciò imponeva di evitare in qualunque modo la formale cessione anche di una piccola porzione della concessione americana[64].

Pochi giorni dopo le due lettere, il memoriale sulla concessione americana e un breve testo introduttivo furono inviati a Washington. Nella risposta il segretario di Stato Richard Olney condivideva l'analisi di Denby, ma non le sue conclusioni. Sebbene, alla metà degli anni novanta, il prolungato disinteresse del Dipartimento di Stato verso ciò che accadeva nella lontanissima Cina cominciasse ad essere sostituito da una sempre maggiore consapevolezza della rilevanza economica del mercato cinese e dalla volontà di giocare un ruolo più importante nello scacchiere orientale, la politica di non interferenza non era stata ancora completamente abbandonata. Olney invitava infatti Denby a non assumere alcuna iniziativa ulteriore. La tutela degli interessi economici e le proprietà americane erano garantite dagli *unequal treaties*. Essi erano la cornice giuridica all'interno del quale si articolava tutta la politica occidentale in Cina, si consumavano le rivalità tra le diverse potenze e si definiva l'attività imprenditoriale di mercanti e società commerciali. Allo stesso tempo gli Stati Uniti non avevano mai avuto alcuna giurisdizione sulla cosiddetta concessione. Le loro pretese su quel territorio non discendevano infatti né da un *lease agreement*, di cui non esisteva prova documentale, né dal materiale esercizio di una normale attività amministrativa, ormai

abbandonata da tempo, ma semplicemente dalla cortesia diplomatica del governo cinese. La Cina, nella rappresentazione di Olney, aveva infatti riconosciuto in favore degli Stati Uniti solo «a right of comity» e ad esso andavano fatte risalire le legittime pretese statunitensi. In altri termini la strana *comitas* in versione orientale immaginata da Olney non solo aveva obbligato la Cina ad accettare una limitazione della propria giurisdizione, pur in assenza di alcuna reciprocità, ma era arrivata a produrre anche una ulteriore compressione della sovranità cinese, garantendo agli Stati Uniti il diritto di ottenere, al pari di Inghilterra e Francia, un pezzo di terra e di chiamarlo *American Concession*. A quel diritto, tuttavia, non era seguito un vero interessamento: il governo degli Stati Uniti non aveva effettuato alcun acquisto territoriale né tantomento preso accordi formali. Al contrario aveva abbandonato anche quei poteri di controllo che pure gli erano stati concessi molti anni prima. Alla luce di queste considerazioni quindi egli non riteneva il suo paese nella posizione «to mantain that we are entitled to resume jurisdiction over the tract, even if it is considered desiderable to do so»[65].

La risposta di Olney non dovette costituire una sorpresa per Denby. Vista da Washington una piccola concessione americana all'interno dell'impero cinese non poteva infatti risultare attraente o apparire strategicamente rilevante né sul piano economico né sul piano politico. Osservata dall'interno, invece, la situazione era differente e Tianjin appariva un avamposto dell'imperialismo commerciale americano nella misura in cui acquisiva importanza sempre maggiore per la Germania e il Giappone.

La storia delle concessioni occidentali di Tianjin non è infatti una storia che può essere raccontata assumendo esclusivamente una prospettiva nazionale. Tianjin era uno spazio complesso, conteso e condiviso da diverse potenze straniere allo stesso tempo in competizione e cooperazione tra loro, e attraversato da diverse strategie di controllo così come da diverse forme di resistenza cinesi. Questa continua incertezza e la molteplicità degli interessi in gioco si riflette nel carteggio tra Olney e Denby, emerge dalle lettere dei consoli a Tianjin e trova conferma nelle richieste del taotai cinese, proiettando sul piccolo spazio di terra lungo l'Hai River conosciuto come *the so called american concession* le incertezze della strategia diplomatica statunitense in Cina.

Pochi giorni dopo che Olney avesse inviato la sua missiva e prima che Denby ne accusasse ricezione il quadro politico di Tianjin era già definitivamente cambiato: il 30 ottobre 1895 la Germania aveva ottenuto il proprio settlement e ora chiedeva agli Stati Uniti di non frapporre obiezioni ai lavori necessari per il prolungamento di due strade che avrebbero collegato il nuovo insediamento tedesco alla concessione inglese[66]. Le due strade avrebbero dovuto necessariamente attraversare un territorio che formalmente apparteneva ancora agli Stati Uniti e che dunque il Reich era interessato ad acquistare. Ottenuta l'assicurazione che i suoi concittadini avrebbero potuto risiedere e comprare terra nella concessione tedesca alle medesime condizione previste per settlement inglese, Denby invitò il console statunitense a Tianjin, Sheridan P. Read, a fornire le autorizzazioni necessarie e provvedette ad informare il segretario di Stato[67]. «The ultimate question» riguardava però sempre la «so called american concession». Ancora non era chiaro cosa fare. Le indicazioni ricevute da

Washington e soprattutto ciò che stava avvenendo a Tianjin inducevano ora Denby a ritenere improbabile una riassunzione della giurisdizione americana, tuttavia il punto continuava a rivestire un'importanza tale che «may well be kept under advisement»[68]. Solo trenta giorni più tardi il quadro si fece più chiaro. Anche il console americano a Tianjin, in una lettera indirizzata a Denby in cui chiedeva ulteriori istruzioni, ribadì infatti l'inopportunità di riassumere la giurisdizione sulla (cosiddetta) concessione americana. A suo dire grazie al lavoro dei funzionari americani, il governo cinese avrebbe ancora preferito che gli Stati Uniti mantenessero il controllo della concessione, ma troppe cose erano cambiate: il Dipartimento di Stato non vedeva più alcuna utilità nel rimanere a Tianjin, i tedeschi pressavano per ottenere una risposta definitiva ed infine nella concessione americana era ormai rimasta ben poca terra disponibile per investitori americani[69]. La concessione sembrava indifendibile ed anche Denby si era ormai convinto che «it was inadvisable to make any claim whatever. We have not a single american merchant at Tientsin. The American missionaries already own valuable tracts of land. There seems to be no reason why we should be embarassed with a useless jurisdiction». L'ambasciatore tuttavia ribadiva la sua richiesta al Dipartimento di Stato per avere istruzioni semplici e chiare su come gestire le richieste tedesche e soprattutto se notificare al taotai la rinuncia ad ogni diritto sulla terra in questione[70].

Mentre Denby attendeva ulteriori istruzioni, tuttavia, la comunità occidentale che viveva nel nord della Cina era minacciata da problemi molto più gravi. La sconfitta del Celeste Impero nella prima guerra sino-giapponese e l'apertura di una concessione tedesca e di una giapponese avevano modificato irrimediabilmente il fragile equilibrio politico di Tianjin. Nello stesso tempo il risentimento e la rabbia dei cinesi per la presenza invasiva delle potenze occidentali e dei missionari cristiani si erano coagulate nel movimento nazionalista dei Boxer.

Il 20 giugno 1900, quando i primi contingenti occidentali erano già arrivati in città, l'ambasciatore tedesco von Ketteler era stato ucciso, provocando lo sdegno della comunità internazionale e la violenta reazione della Germania. Un mese dopo il suo assassinio, il contingente tedesco era pronto per imbarcarsi dal porto di Brema. «I cinesi hanno rovesciato il diritto internazionale», aveva detto loro in un acceso discorso Guglielmo II, e «mai più avrebbero dovuto osare incrociare lo sguardo di un tedesco»[71].

Una nuova storia di Tianjin stava per iniziare.

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[1] La trasformazione di Tianjin in un *open port* fu prevista dall'art. IV della Convenzione di Pechino siglata con la Gran Bretagna il 24.10.1860 e dall'art. VII dell'omologa convezione franco cinese siglata il giorno successivo. Entrambe sono edite on line in <http://www.chinaforeignrelations.net/> ottobre, 2017. Gli Stati Uniti, attraverso la clausola della nazione più favorita, avevano ottenuto il diritto dei propri cittadini

a risiedere in qualunque porto o luogo che sarebbe stato aperto ad una potenza occidentale (*Treaty of Tianjin* 18.6.1858 art. XIV, sempre in <http://www.chinaforeignrelations.net/>).

[2] *Boxer Protocoll*, Peking, 7.9.1901, art. IX, in <http://www.chinaforeignrelations.net/>.

[3] Cfr M. Craven, *What Happened to the Unequal Treaties? The Continuation of Informal Empire*, in «Nordic Journal of International Law», 74, 2005, pp. 335-382. R. Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1847-1911*, Leiden, Brill, 2007; T. Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Cambridge, Harvard University Press, 2013; Li Chen, *Chinese Law in Imperial Eyes. Sovereignty, Justice and Transcultural Politics*, New York, Columbia University Press, 2016.

[4] Sul rapporto tra colonialismo e diritto internazionale v. M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge, University Press, 2001, pp. 98-178; A. Anghie nel suo, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, University Press, 2005; L. Nuzzo, *Origini di una scienza. Diritto internazionale e colonialismo nel XIX secolo*, Frankfurt am main, Klostermann, 2012.

[5] E. Durkheim, M. Mauss *De quelques forme primitive de classification: Contribution à l'ètude des représentations collective*, in «L'Anné sociologique», n. 6, 1903, pp. 1-72; diffusamente P. Costa, *Uno* spatial turn *per la storia del diritto? Una rassegna tematica*, in «Max Plank Institut for European Legal History Research Paper Series», n. 7, 2013, pp. 1-30.

[6] H. Lefebvre, *La production de l'espace*, Paris, Anthropos, 1974; M. Foucault, *Des espaces autres* (1967), in M. Foucault, *Dits et écrits*, (eds.) D. Defert, F. Ewald, vol. 6, Paris, Gallimard, 1994, pp. 752-762.

[7] D. Harvey, *The Urban Experience*, Baltimore, Johns Hopkins University Press, 1989; E. Soya, *Postmodern Geographies: the Reassertion of Space in Critical Social theory*, London, Verso, 1989; F. Farinelli, *La crisi della ragione cartografica*, Torino, Einaudi, 2009.

[8] G. Jellinek, *Ueber Staatsfragmente*, Heidelberg, Koester, 1896 p. 11; cfr. L. Nuzzo, *Autonomia e diritto internazionale. Una lettura storico giuridica*, in «Quaderni Fiorentini», 43, 2014, pp. 651-686; L. Nuzzo, *Territory, Sovereignty and the Construction of Colonial Space*, in M. Koskenniemi, W. Rech, M. Jiménez Fonseca (eds.), *International Law and Empire. Historical Explorations*, Oxford, University Press, 2017, pp. 263-292.

[9] Convention of Peking, 24.10.1860, artt. 1-10, in <http://www.chinaforeignrelations.net/>.

[10] Annex 7, *Tien-Tsin, British Concession*, in *Lease Treaty Series*, n. 34, London, printed and published by His Majesty's Office, 1925, p. 26.

[11] Tientsin 15.2.1883, in National Archives (da ora TNA), FO 228/731.

[12] Annex 7, Tien-Tsin, *British Concession*, cit., p. 26.

[13] Harry S. Parkes a James Bruce, Lord of Elgin, Tientsin 26.8.1860, in *Correspondence respecting Affairs in China*, 1859-1860, Harrison and Sons, 1861, p. 127.

[14] H.S. Parkes, *Land Memorandum*, Tientsin, 25.11.1860, in TNA, FO 674/1.

[15] La lettera è del 26.8.1873, in TNA, FO 656/44.

[16] Parkes, *Land Memorandum*, cit.

[17] Annex 2, *Hankow Lease*, in *Lease Treaty Series*, n. 34, cit., p. 19.

[18] James Bruce al principe Gong, 4.12.1860, in TNA, FO 682/1993/93; Gong a Bruce, 8.12.1860 in TNA, FO 682/1993/97.

[19] James Mongan a James Bruce, Tientisn 4.4.1861, in TNA, FO 674/1.

[20] L. Oliphant, *Narrative of the Earl of Elgin's Mission to China and Japan in the years 1857, 1858, 1859*, vol. 1, Edinburgh and London, Blackwood and Sons, 1859, p. 385; p. 399.

[21] L'articolo di Michie è citato in O.D. Rasmussen, *Tientsin. An Illustrated Outline History*, Tientsin, Tientsin Press, 1901, p. 37; W. Mc Leish, *Life in China Outport*, Tientsin, Tientsin Press, 1917, p. 24.

[22] *Guide to Tientsin*, Tienstin, Tientsin Press 1904.

[23] «The Chinese authorities – si legge in una relazione del console inglese J. Mongan, *Report on the Trade of Consular District of Tientsin for the year 1866*, Tientsin, 17.4.1867, in *Accounts and papers of the House of Commons*, vol. 68, London, Harrison and Sons, 1867, p. 144 – have endeavored to mitigate the evils arising from the sinuosity of the stream, and the number of the grain junks, by fixing the strong wooden posts at eight of the sharpest bends in the river to aid vessels in hauling round these bends, and by framing regulations for the junks to prevent collisions between them and foreign vessels».

[24] Mongan, *Report*, cit., p. 1459, cfr. anche J.T. Dickman, Pekin, 5, November 1900, in *Report on Military Operations in South Africa and China*, Washington, Government printing Office, 1901, pp. 493-498.

[25] Shirley Ye, *River Conservancy and State Building in Treaty Port China*, in R. Bickers, I. Jackson (eds.), *Treaty Port in Modern China: Law, Land and Power*, London, Routledge, 2016, pp. 121-138.

[26] cfr. H. Van de Ven, *Breaking with the Past. The Maritime Customs Service and the Global Origins of Modernity in China*, Columbia, Columbia University Press, 2014, p. 3; R. Bickers, *'Good Work for China in Every Possible Direction'. The Foreign Inspectorate of Chinese Maritime Customs 1854-1950*, in B. Goodman, D.S.G. Goodmann, (eds.), *Twentieth-Century Colonialism and China: Localities, the Everyday and the World*, London, Routledge, 2012, pp. 25-37.

[27] Mongan a Bruce, Tientsin, 12.3.1861, in TNA, FO 674/3. Lay ritornò in China solo nel maggio del 1863 e fu sostituito da Hart nel novembre dello stesso anno a seguito dello scontro con il principe

Gong sul controllo, l'uso e il finanziamento della flotta britannica di navi da guerra conosciuta con il nome di Lay-Osborne Flotilla. Cfr. Van de Ven, *Breaking with the Past*, cit.; J.J. Gerson, *Horatio Nelson Lay and Sino-British Relations, 1854-1864*, Cambridge, Harvard University Press, 1972.

[28] Mongan a Bruce, Tientsin, 12.3.1861, in TNA, FO 674/3.

[29] Mongan a Bruce, Tientsin, 12.3.1861, in TNA, FO 674/3.

[30] Ch'ung-hou a Mongan, Tienstin, 19.4.1861, in TNA, FO 673/1.

[31] James Mongan a Edmund Hornby, Tientsin 26.8.1873, in TNA, FO 656/44. «The four lots – si legge sempre in Mongan a Hornby, Tientsin 26.8.1873, in TNA, FO 656/44, situated on the Northern side of the settlement, adjoining the French concession, were afterwards given up by Mr. Gibson to Ch'ung-hou, the Chinese Minister superintendent who had applied for some land in that position as a site for the Foreign Custom House».

[32] Mongan a Bruce, Tientsin 4.4.1861, in TNA, FO 674/1.

[33] Ch'ung-hou a Mongan, 22.5.1861 in TNA, FO 673/1.

[34] Mongan a Hornby, Tientsin, 26.8.1873, in TNA, FO 656/44.

[35] Annex 7, *Tien-Tsin, British Concession*, cit., p. 26.

[36] *Tientsin Local Land Regulations and General Regulations*, 26.11.1866, Hong Kong, Noronha, 1866. Trentatrè anni dopo, in occasione dell'ampliamento della concessione, il governo britannico promulgò delle nuove *Land Regulation*.

[37] Cfr. con riferimento agli aspetti urbanistici D. Arnold, *Construire la modernité urbaine: la concession britannique à Tianjin 1860-2014*, in «Outre-mers: revue d'histoire», 382-383, 2014, pp. 89-102.

[38] Il 26.8.1873 il console inglese a Tianjin, Mongan, scriveva a Hornby, in TNA, FO 656/44, sottolinenando l'importanza di una «relaxed application» del divieto di vendere i lotti della concessione inglese ai cinesi: «the progress of events within the last six years (which period has been commercially characterized, first by the substitution of shipping agencies for the more purely mercantile agencies at this port, and secondly, by the establishment of a Chinese steamer company, which now competes with our steamer in the carrying trade), has rendered it still further expedient to relax the provision made in Rule IV against a Chinese subject being allowed to become a Land-Renter». Secondo Mongan sarebbe stato sufficiente, da un lato, che i cinesi ottenessero un permesso speciale dall'ambasciatore inglese; dall'altro che accettassero «to conform to the same conditions of tenure as those under which land is now held in the settlement by other non-British subjects».

[39] L. Loeper, *Promemoria betreffend die Gründung einer deutschen Niederlassung in Tientsin*, 7.8.1895, Auswärtiges Amt, Politisches Archiv, (da ora PA AA), RZ 9208 R 1040, B. 2 August 1895-Oktober 1895, pp. 55*r*-55*v*.

[40] *Proclamation du Surintendant des trois ports du Nord à Tien-Tsin*, 29.5.1861, in Archives du Ministère des Affaires Étrangères, (da ora AMAE), Paris, NS Chine, vol. 286, Concession française de Tientsin 1861-1897, 148 CPCOM P/19231. Sulla presenza francese a Tianjin Pierre Singaravélou, *Dix empires dans un mouchoir de poche, le territoire de Tienstin à l'épreuve du phénomène concessionaire (années 1860-1920)*, in Hélèle Blais, Florence Deprest, Pierre Singaravélou (eds.), *Territoires impériaux: Une histoire spatiale du fait colonial*, Paris, ed. de la Sorbonne, 2011, pp. 271-295; e ora Pierre Singaravelou, *Tianjin Cosmopolis. Une autre histoire de la mondialisation*, Paris, Seuil, 2017. Cfr., anche il blog di Fleur Chabaille, *Tianjin Spatial History*, <http://tsh.hypotheses.org/author/tsh>, novembre 2017.

[41] Il regolamento è allegato alla lettera inviata dal console francese a Tianjin, Charles Dillon al suo ambasciatore a Pechino, Frédéric Albert Bourée, Tientsin, luglio, 1881, AMAE, Nantes, Ambassade de France en Pekin 513po/1/262, Concession de Tientsin, dossier 36.

[42] Traité d'amitié, de commerce et de navigation conclu à Tien-Tsin, 27.6.1858, in L. de Reinach (ed.), *Recueil des Traités conclus par la France en Extréme Orient (1684-1902)*, Paris, Ernest Leroux, 1902, 52-53, art. 10: «Tout Français qui, conformément aux stipulations de l'art. 6 du présent Traité, arrivera dans l'un des ports ouverts au commerce étranger, pourra, quelle que soit la durée de son séjour, y louer des maisons et des magasins pour déposer ses marchandises, ou bien affermer des terrains, et y bâtir lui-même des maisons et des magasins. Les Français pourront, de la même manière, établir des églises, des hôpitaux, des hospices, des écoles et des cimetières. Dans ce but, l'autorité locale, après s'être concertée avec le consul, désignera les quartiers les plus convenables pour la résidence des Français, et les endroits dans lesquels pourront avoir lieu les constructions précitées. Le prix des loyers et des fermages sera librement débattu entre les parties intéressées, et réglé, autant que faire se pourra, conformément à la moyenne des prix locaux. Les autorités chinoises empêcheront leurs nationaux de surfaire ou d'exiger des prix exorbitants, et le consul veillera, de son côté, à ce que les Français n'usent pas de violence ou de contrainte pour forcer le consentement des propriétaires. Il est bien entendu, d'ailleurs, que le nombre des maisons et l'étendue des terrains à affecter aux Français, dans les ports ouverts au commerce étranger, ne seront point limités, et qu'ils seront déterminés d'après les besoins et les convenances des ayants droit. Si des Chinois violaient ou détruisaient des églises ou des cimetières français, les coupables seraient punis suivant toute la rigueur des lois du pays».

[43] *Proclamation*, 16.12.1862, in AMAE,

Nantes, Ambassade de France en Pekin 513po/1/262, Concession de Tientsin, dossier 42/1862,

44 Henri-Viktor Fontanier a Michael Kleczkowski, dicembre 1862, in AMAE, Nantes, Ambassade de France en Pekin 513po/1/262, Concession de Tientsin, dossier 42/1862.

45 *Ibidem*.

46 Charles Dillon a Fréderic a Albert Bourée, luglio 1881, in AMAE, Nantes, Ambassade de France en Pekin 513po/A/262, Concession de Tientsin, dossier 42/1862.

47 Cfr. anche l'art VI per cui una volta presentata la domanda era concesso ai proprietari cinesi un mese di tempo per trovare un nuovo alloggio. Decorso tale termine l'acquirente francese sarebbe stato immesso nel posssesso.

48 Gabriel Deveria a James Mongan, Tientsin, 7.1.1865, in AMAE, Nantes, Consulate de Tientsin, 691/po/1/180.

49 Charles Dillon a Luis de Geofroy, Tientsin, 18.2.1874, in AMAE, Nantes, Consulate de Tientsin, 691/po/1/173.

50 La lettera di Geofroy del 13 luglio 1872, era indirizzata a Dillon ed è riportata da Dillon stesso, *Ibidem*.

51 Charles Dillon a Fréderic Albert Bourée, luglio 1881, in AMAE, Nantes, Ambassade de France en Pekin 513po/A/262, Concession de Tientsin, dossier 42/1862.

52 Charles Dillon a Luis de Geofroy, Tientsin, 18.2.1874, in AMAE, Nantes, Consulate de Tientsin, 691/po/1/173.

53 Loeper, *Promemoria betreffend die Gründung einer deutschen Niederlassung in Tientsin*, cit., pp. 49*r*-49*v*.

54 C. Denby, *The American Concession at Tientsin*, p. 4, allegato n. 1 alla lettera di Charles Denby a Richard Olney, 3.8.1895, in National Archives and Records Administration at College Park MD (da ora NARA), Microfilm Publications, Despatches from U.S. Minister to China, (1843-1906), M92, R99. Sulla concessione americana v. N. Vaicbourdt, *De la "me too policy" aux ambitions contradictoires: la brève histoire de la concession américaine de Tianjin, 1860-1902*, in «Outre-Mers. Revue d'histoire», 382/383, 2014, pp. 27-46, e sempre L. Bernstein, *A History of Tianjin in the early modern times, 1800-1910*, Ann Arbor, 1988.

55 La mappa è allegata alla lettera scritta dall'ambasciatore statunitense a Pechino, Edwin H. Conger al segretario di stato John Hay, il 21 gennaio 1902, in NARA, Microfilm Publications, Despatches from U.S. Minister to China, (1843-1906), M92, R116. Recentemente è stata pubblicata anche da Vaicbourdt, *De la «me too policy» aux ambitions contradictoires*, cit., p. 33.

56 Cfr. Bernstein, *A History of Tianjin*, cit. pp. 35 ss.; Vincbourdt, *De la "me too policy" aux ambitions contradictoires*, cit., p. 32, n. 8, ha individuato però una lettera del 15.2.1901 del console Ragsdale al comandante delle forze americane a Tianjin, Foote, in cui il diplomatico indica il 1869 come anno di fondazione della concessione.

57 Denby, *The American Concession at Tientsin*, cit., p. 8.

58 William N. Pethick a James Zuck, 8.9.1883, in NARA, Microfilm Publications, Despatches from U.S. Consuls in Tientsin, China, (1868-1906), M114, R5.

59 Pethick a Zuck, 8.9.1883, cit., p. 8.

60 *Ibidem*.

61 Denby, *The American Concession at Tientsin*, cit., p. 29 «Their [of United States] title exists today unweakened by the failure of the United States Government to take the same advantage therehof as was taken of similar grants by other powers but on the contrary that the extensive exercise of jurisdiction by such powers [England and France] was entirely unforeseen in the original grants».

62 Denby al *Zongli Yamen*, 31.7.1895, p. 3, allegato 3 alla lettera di Denby a Olney, 3.8.1895, in Nara, Microfilm Publications, Despatches from U.S. Minister to China, (1843-1906), M92, R99.

63 S. Paine, *The Sino-Japanese War of 1894-1895: Power, Perceptions, and Primacy*, Cambridge, Cambridge University Press, 2003.

64 Denby al viceré, s.d., allegato 2 alla lettera di Denby a Olney, 3.8.1895; cfr. sulle linee della politica diplomatica di Denby v. D. Anderson, *Imperialism and Idealism. American Diplomats in China 1861-1898*, Bloomington, Indiana University Press, 1986, pp. 144 ss.

65 Richard Olney a Charles Denby, Washington 18.10.1895, in NARA, Microfilm Publications, Diplomatic Instructions of the Department of State, (1801-1899), M77, R42, pp. 265-268.

66 Denby ricevette la lettera di Olney agli inizi di dicembre del 1895. La sua risposta è datata 25 gennaio 1896, in NARA, Microfilm Publications, Despatches from U.S. Minister to China (1843-1906), M92 R100, pp. 1-4.

67 La risposta ufficiale del console tedesco a Tianjin alla richiesta di Denby è allegata alla lettera indirizzata a Olney del 25.1.1896, sempre in NARA, Microfilm Publications, Despatches from U.S. Minister to China (1843-1906), M92, R100.

68 Denby a Olney, 25.1.1896, cit.

69 Sheridan Read a Charles Denby, 30.3.1896, in NARA, Microfilm Publications, Despatches from U.S. Minister to China, (1843-1906), M92, R100.

70 Denby a Olney, Peking, 2.4.1896, in NARA, Microfilm Publications, Despatches from U.S. Minister to China, (1843-1906), M92, R100.

71 J. Prenzler (ed.), *Die Reden Kaiser Wilhelms in den Jahren 1896-1900*, B. II, Leipzig, P. Reclam jun., 1904, pp. 209-212.

Sovranità, autonomia, democrazia: *El Estado integral* spagnolo del 1931 come laboratorio del regionalismo contemporaneo*

GIACOMO DEMARCHI

1. *Le ragioni di una comparazione*

Nel 1932 Carlos García Oviedo, conservatore professore di diritto amministrativo dell'università di Siviglia, pubblicava nella *Rivista di Diritto Pubblico* un lungo articolo dedicato alla fiammante Costituzione della seconda repubblica spagnola del 1931[1]. Membro, per quanto poi fuoriuscitone, dell'*Asamblea Nacional consultiva* primoriverista, l'amministrativista sivigliano e futuro rettore dell'ateneo *hispalense* sotto il franchismo ben riassumeva in quest'articolo molti degli stereotipi con cui veniva criticata la Carta repubblicana[2]. Costituzione d'importazione, che non avrebbe rappresentato la volontà di un popolo spagnolo poco vicino al radicalismo riformista della Costituente, sarebbe stata il frutto di un forzoso processo di adattamento culturale di modelli imposti da un'élite. Posizioni riassunte in chiusura d'articolo, in cui l'autore sosteneva come:

> Gli autori della Costituzione spagnola del 1931 non possono invero menar vanto di aver apportato al diritto pubblico spagnolo innovazioni diverse da quelle già apportate nelle Carte costituzionali, che furono approvate fuori della Spagna precedentemente. Eccezione fatta dei precetti costituzionali riguardanti il nostro problema regionale e della maniera abbastanza singolare con cui l'art. 26 tratta il problema degli Ordini religiosi, in quasi tutto il resto la Costituzione spagnola è una costituzione d'importazione[3].

Molti, fra i coevi e dopo, furono coloro che fecero propria questa posizione critica nei confronti di quello che, in realtà, era un carattere ormai costitutivo del costituzionalismo democratico, ovvero la sua interrelazione con il diritto comparato e la dimensione internazionale. Chi proprio già fra i costituenti spagnoli del 1931 forse meglio stigmatizzò la sterilità di questa critica fu Ortega y Gasset, che in un suo celebre discorso in Costituente ricordava come:

> Este artículo o el otro, es decir, las piezas del aparato gubernamental, podrán haber sido incluso transcritas de Cartas forasteras. ¡No faltaba más! El abecedario jurídico, las piezas del edificio ci-

> vil, son hoy comunes a todos los pueblos, y usar otros sonidos elementales no fuera sino arcaismo o extravagancia. La originalidad, pues, sólo puede consistir en la combinación[4].

Tornando all'articolo di Garcia Oviedo, ciò che fa più specie nel discorso del cattedratico è il riconoscimento dato all'originalità del modello regionale repubblicano, il cosiddetto *Estado integral*. Un tema su cui, senza troppi problemi, si sarebbe invece potuta tranquillamente cavalcare la retorica della costituzione d'importazione. Come si vedrà più avanti, fu lo stesso Jiménez de Asúa, presidente della commissione che elaborò il progetto discusso dalle Cortes nel 1931, a riconoscere sul tema territoriale in più occasioni il debito verso la cultura e la pratica costituzionale weimariana.

In realtà, la posizione assunta da Garcia Oviedo diviene maggiormente comprensibile se si colloca l'organizzazione territoriale come momento centrale della ridefinizione del concetto di sovranità, in relazione con quelli di autonomia e democrazia.

L'uso strumentale che nel saggio viene fatto del dato storico, utilizzando un'allora classica teleologica visione del processo di centralizzazione amministrativa, è funzionale a costruire un'interpretazione della situazione politico-istituzionale spagnola come eccezionale e differente, sganciando così il cambiamento del modello territoriale dalla complessiva democratizzazione della vita pubblica che il costituzionalismo fra le due guerre mondiali cercò di mettere in campo.

Che, d'altronde, il modello dell'*Estado integral* fosse ben di più di una semplice e contingente risposta all'autonomismo catalano lo mise in evidenza, e sempre nel contesto dell'accademia italiana, Gaspare Ambrosini, protagonista poi nella Costituente italiana della costruzione teorica e pratica del regionalismo[5]. In particolare, l'interrogarsi sulla natura giuridica dello statuto come norma costituzionale portò Ambrosini a giudicare in una prospettiva diversa l'autonomia regionale:

> Le Cortes costituenti hanno così concretato un sistema che, pur salvaguardando il diritto dello Stato di procedere anche per sua sola volontà alla modifica dello Statuto della Generalidad, ha dato sufficienti garanzie alla regione. La riforma dello Statuto non può avvenire in tal caso che attraverso ad un procedimento quasi simile a quello richiesto per la riforma della costituzione. Nel che trova conferma il carattere costituzionale dello Statuto e la differenza che intercorre tra la regione autonoma e le provincie od enti simili degli stati unitari anche fortemente decentrati[6].

Ragionamenti quelli del grande giurista siciliano che, significativamente, videro la luce non come risposta alle esigenze della costituente del 1946, ma già nella prima metà degli anni Trenta, come riflessioni d'attualità su Costituenti in azione, entrando in collisione con giovani giuristi decisamente più allineati con il regime fascista, come ad esempio Annibale Carena[7]. Il giovane comparatista pavese, particolarmente sensibile ai problemi del costituzionalismo postbellico, pubblicava nel 1932 un articolo che, da presupposti simili a quelli di Ambrosini, giungeva ad una valutazione completamente antitetica del valore e della portata del regionalismo spagnolo:

> Ogni indagine, dunque, induce a ritenere che per lo Stato spagnolo non possa parlarsi che di un largo decentramento, sia pure di natura anche politica; con il quale concetto sono infatti compatibili tutte le ricordate disposizioni della Costituzione spagnola[8].

Lungi dall'essere un paradosso, la scienza giuridica italiana più ideologicamente

allineata con il fascismo si confrontò con il regionalismo e la sua messa in pratica, sia per cercare di ricondurlo nei tranquilli canali del folklore, sia per dimostrare come, in realtà, il costituzionalismo democratico-liberale non fosse la migliore opzione per l'inserimento delle masse all'interno dello Stato di Diritto[9].

Da lì una delle ragioni per cui, crollato il fascismo, i giuristi che collaborarono e parteciparono alla Costituente prestassero una particolare attenzione al recupero di una differente nozione del concetto di autonomia, cercando nell'incontro fra il dibattito fra le due guerre e le tradizioni regionalistiche italiane gli strumenti necessari al superamento del centralismo autarchico[10].

Dopo vent'anni di fascismo vi era l'oggettiva esigenza, forse elitista, forse anche utopica, ma non per questo meno necessaria, di dare alla cittadinanza i rudimenti necessari per una consapevole partecipazione alla nuova stagione costituzionale. Con questo scopo vennero pubblicate fra il 1945 ed il 1946, come supplemento al *Bollettino di informazione e documentazione del Ministero per la Costituente*, una serie di sintetiche *Guide alla Costituente*, votate a chiarire gli snodi fondamentali dell'incipiente processo di redazione della Carta fondamentale[11].

Significativamente, uno di questi compendi venne dedicato al problema delle autonomie locali, considerato dagli stessi estensori della guida come il più meritevole di chiarimenti:

> in nessuna questione, come in quella cosidetta «delle autonomie locali» vi è tanta confusione di termini. Poiché da questa confusione possono derivare pericolosi equivoci concettuali, sembra opportuno premettere a questo panorama alcune definizioni, onde chiarire con quale significato vengono usate nel testo determinate espressioni[12].

Queste poche, ma significative, parole di avvertenza non solo ponevano l'accento sull'importanza assunta dal problema territoriale negli anni che intercorsero fra l'armistizio del 1943 e la sanzione della nostra carta fondamentale, ma anche di quanto fosse necessaria una rilettura di queste categorie dopo il Ventennio fascista.

Autonomia e sovranità popolare sono due elementi imprescindibili per comprendere l'edificazione del costituzionalismo democratico del Ventesimo secolo: attraverso il concetto di autonomia passano i mille fili della ridefinizione dell'individuo-cittadino nella società industrializzata, della sua partecipazione al processo politico ed istituzionale e della costituzionalizzazione di diritti che già superano il semplice orizzonte delle libertà civili ottocentesche, per affacciarsi su quello dei diritti sociali. Ma autonomia rappresenta anche, e forse soprattutto, l'architrave che avrebbe dovuto sorreggere il modello territoriale ed amministrativo di buona parte del costituzionalismo democratico europeo che, formatosi fra le due guerre mondiali, arrivò ad una sua compiutezza con i processi costituenti dell'Europa del secondo dopoguerra[13].

L'autonomia territoriale rappresentò dunque uno dei punti nodali nel processo di costruzione del costituzionalismo democratico, specie in quei contesti che, fuoriusciti da autoritarismi votati al centralismo, avevano nella riscoperta di una visione plurale dell'articolazione del territorio un elemento determinante nel superamento della monoliticità dello stato totalitario. E se per la Germania post-nazista la riscoperta e ri-declinazione in chiave democratica della propria tradizione federalista significò legare denazificazione con decentralizzazione, nel caso italiano la costruzione di un

modello di autonomie territoriali ed amministrative avrebbe dovuto rappresentare un elemento di pluralismo rappresentativo, capace di riportare al centro della cittadinanza la rappresentanza politica[14].

Le grandi costituzioni democratiche dell'Europa occidentale del secondo dopoguerra divennero, in buona misura, il punto di approdo di un processo di razionalizzazione del costituzionalismo, iniziato con il concludersi della Grande Guerra, letto alla luce delle categorie dello Stato Totale all'interno della dinamica pluralistica e democratica, da declinarsi nei limiti dello Stato di Diritto. In questo processo il momento della ri-edificazione del territorio come funzionale alle nascenti democrazie divenne uno dei tasselli fondamentali per cercare di superare le aporie che la sempre presente monoliticità del concetto di sovranità poneva alla politica ed al diritto. Evidente è dunque come nessuna Costituente democratica del primo e del secondo dopoguerra fosse un processo isolato e nazionale, anzi: la ricerca di modelli e meccanismi, attraverso le ormai codificate metodologie del costituzionalismo comparato, diveniva la strada maestra per poter costruire una carta coerente con la propria storia, ma capace di inserirsi nel dibattito politico e giuridico internazionale.

La costituzione di Weimar del 1919 e quella austriaca del 1920 erano assurte, già negli anni fra le due guerre, a simbolo della "razionalizzazione del federalismo", per usare una fortunata espressione di Mirkine Guetzévich, divenendo i punti di partenza della democratizzazione della relazione cittadino-amministrazione attraverso il raggiungimento di una piena e reale decentralizzazione territoriale, improntata all'autonomia politico-amministrativa[15]. D'altro canto, fu lo stesso Mirkine, aggiornando la sua opera nel corso del tempo, a porre l'esperienza spagnola fra i tasselli fondamentali di questo processo: la seconda repubblica rappresentava non solo il primo vero banco di prova dell'istituto regionale in una realtà digiuna di solide esperienze federali, ma anche il tentativo di riedificazione dello Stato e del territorio spagnolo secondo i valori democratico-repubblicani, dopo l'esperienza autoritaria primoriverista, nell'alveo del costituzionalismo più avanzato. Come l'autore franco-russo mise in evidenza nell'edizione spagnola del 1934 di *Modernas tendencias del derecho constitucional*:

> La Asamblea Constituyente española ha vencido las dificultades que provenían del peligro separatista, presentando la Constitución española una fórmula de regionalismo limitado, que da satisfacción plena a las aspiraciones regionalistas sin comprometer la unidad nacional y el poder económico y social del Estado. A este efecto, los constituyentes españoles se han inspirado en los principios que se manifiestan en la estructura federal de Alemania y Austria, que he calificado como «federalismo racionalizado», el cual se basa en las necesidades técnicas del Estado y no en los principios dinásticos, nacionales, etnográficos, etc. […]
> El regionalismo tiene como fundamento, de un lado, el principio democrático; de otro, la racionalización del Estado; el regionalismo español no se funda solamente en las tradiciones españolas, los fueros – conjunto de recuerdos históricos bastante discutibles y sin ningún valor práctico en la vida moderna –, sino en las necesidades técnicas actuales del Estado[16].

Lungi dunque dall'essere *sic et simpliciter* una risposta contingente al problema territoriale, il modello dell'*Estado integral* era il contributo spagnolo, nella scienza del diritto pubblico fra le due guerre mondiali, al superamento della sovranità fondata

sull'individuo-cittadino nell'ambito della partecipazione territoriale al processo di pluralizzazione dei soggetti politici. Per dunque comprendere appieno il fondamento e le implicazioni di uno dei momenti determinanti nella ridefinizione concettuale e normativa del concetto di autonomia politico-amministrativa, occorre indagare, più in là della mera comparazione testuale e delle influenze semantiche, la complessa relazione con, parafrasando il giurista e letterato Francisco Ayala, la mecca di qualsiasi giovane giurista fra le due guerre, ovvero la repubblica di Weimar[17].

2. *Le radici weimariane del modello regionale spagnolo*

Quando il 27 agosto del 1931 il presidente della Commissione costituzionale delle *Cortes*, Luis Jiménez de Asúa, presentò alla Costituente spagnola, con una articolata prolusione, il fiammante progetto di costituzione, non era passato un mese dalla prima riunione in cui i commissari iniziarono la stesura[18]. Come l'illustre penalista volle sottolineare, la ventina di giorni che si aveva avuto a disposizione per elaborare il testo furono un tempo esiguo, molto più breve di quello che le altre costituzioni coeve avevano richiesto:

> Se tardó tres meses y medio en Alemania, porque desde el 4 de Marzo de 1919 al 18 de Junio de ese año estuvo trabajando la Comisión, y eso que trabajaba sobre el gran proyecto de Hugo Preuss; en Letonia tardó once meses; en Polonia, dos meses; en Yugoeslavia, otros dos; en Austria, no tenemos datos muy exactos, pero pasan cerca de tres meses antes que pueda aprobarse la Constitución desde el comienzo de los trabajos de la Comisión, y también aquí fue un gran hombre el que avaloraba el proyecto: Hans Kelsen[19].

Fu in questo lungo discorso, tanto commentato quanto citato dalla storiografia sul tema, in cui fece capolino la controversa formula dell'*Estado integral*[20].

Centro difatti del problema dell'organizzazione nazionale fu il passaggio in cui si cercò di porre in evidenza come ormai si fossero superate le categorie di stato federale e stato centralizzato, ricorrendo ad una modellistica che, in quegli anni, un divulgatore come Mirkine-Guetevich aveva contribuito a diffondere nel contesto spagnolo[21]. Un modello che trovava il suo fondamento nei presupposti teorici e nelle concretizzazioni pratiche che condussero alle diverse costituzioni nate dalla fine della Grande Guerra, fra le quali indubbiamente quelle austriaca e tedesca svolsero il ruolo di grandi referenti. In particolare però Jiménez de Asúa pose, com'è noto, l'accento sul ruolo di Hugo Preuss nella ricerca e definizione di questo nuovo modo di concepire l'organizzazione territoriale:

> No aceptamos, por tanto, esos términos que están en franca y definitiva crisis: El ensayo de Hugo Preuss, ese gran talento que vió cerradas todas las vías oficiales por la incomprensión de Gierke y Jellinek, representantes del oficialismo de Alemania, ha fijado, con su gran mente poderosa y elegante, las doctrinas del Estado integral y ha intentado llevarlas a la Constitución, obra suya, de 1919, aun cuando no lo ha logrado por entero, tratando, de una parte, que los residuos de la soberanía de los Estados queden reducidos a una autonomía que no es más que políticoadministrativa, y por otra, dando a las provincias de Prusia una gran descentralización.
> Esto es lo que hoy viene haciéndose y esto es lo que ha querido hacer la Comisión: un Estado integral. Después del férreo, del inútil Estado unitarista español, queremos establecer un gran Estado integral en el que son compatibles, junto a la

> gran España, las regiones, y haciendo posible, en ese sistema integral, que cada una de las regiones reciba la autonomía que merece por su grado de cultura y de progreso[22].

Tre sono i punti che meritano a mio avviso di essere posti in evidenza. In primo luogo una conoscenza di Hugo Preuss ed un'ammirazione per il suo lavoro che andava più in là del semplice rispetto per un grande giurista, architetto di un testo fondamentale quale quello weimariano. Conosciuta è l'opera di Jiménez de Asúa come traduttore ed introduttore in Spagna del grande penalista von Liszt, di cui fu allievo diretto proprio durante la sua permanenza di alcuni mesi in Berlino nel 1914. Un rapporto, quello con il cattedratico tedesco che non si limitò solo al diritto penale, come testimonia la traduzione di un piccolo opuscolo inerente ad un progetto di confederazione centro-europea[23]. Von Liszt era uno dei membri più in vista e fondatore del *Fortschrittliche Volkspartei*, formazione nata nel 1910 che riuniva le diverse anime del *Linksliberalismus*. Fra i membri più attivi e controversi di questa formazione vi era proprio Hugo Preuss, che partecipò come membro del consiglio comunale di Berlino, ruolo in cui il giurista pose al servizio della democratizzazione del liberalismo prussiano e dell'apertura verso la SPD le sue doti di giurista esperto della gestione comunale[24].

Secondo punto la chiara attribuzione della paternità preussiana delle prime significative innovazioni al modello territoriale weimariano, sia a livello teorico, sia nel campo pratico, con la decentralizzazione a favore delle provincie prussiane[25].

Ritengo però che determinante sia una terza questione, lasciata spesso in secondo piano, ovvero il carattere di incompiutezza del progetto preussiano. Questo punto, che Jiménez de Asúa già evidenziò nel suo discorso in *Cortes*, venne ancor meglio delineato nel celebre commentario che lui stesso scrisse alla costituzione repubblicana nel 1932: un testo in cui, senza stravolgere lo schema espositivo già utilizzato nell'esposizione del progetto, rimarcò ancor più chiaramente il carattere progressivo ed *in fieri* del modello territoriale tedesco:

> La superación de la antítesis por una síntesis integralista del Estado, fué el intento sagaz de Preuss, que no pudo realizarse plenamente, pero que está en marcha de realización en Alemania desde que fué aprobada su Constitución[26].

Ponendo nuovamente in evidenza il doppio processo di limitazione del federalismo classico e di contemporaneo potenziamento della decentralizzazione politico-amministrativa delle provincie prussiane, che l'originario progetto preussiano aveva ipotizzato, pose ancora in evidenza come

> No se logró completamente el intento, pero se avanzó y se avanza en él lo bastante para que se plantee hoy con rigurosa legitimidad el problema de si es o no un Estado federal el que rige en Alemania, y para que, bajo el prestigio de lo alemán, sea lícito afirmar la crisis de aquél junto a la del Estado unitario y la necesidad de superarlo, por el camino que señaló Preuss – ese gran talento que murió sin llegar a la meta del Profesorado por la oposición incomprensiva del oficialismo tudesco representada por Gierke y Jellinek – mediante el Estado integral, ora se parta para ello de un Estado anteriormente unitario o bien de un régimen federal[27].

In *Proceso histórico* risultano dunque ancora più chiari due elementi: l'ammirazione per il modello elaborato dal giurista berlinese e la contemporanea consapevolezza di come la sua mancata realizzazione avesse solo rallentato l'elaborazione di una compiuta soluzione, che permettesse superare le anomalie del federalismo tede-

14 aprile 1931, festeggiamenti a Madrid per la proclamazione della Seconda Repubblica

sco. In altri termini risulta chiaro come il modello racchiuso nella formula del *Estado integral* non si ispirasse principalmente né nel progetto weimariano né in quello originale di Preuss, quanto piuttosto avesse i suoi modelli di riferimento in un processo di ristrutturazione territoriale che, iniziato nel 1919, cercò di prendere forma nel decennio di travagliata esistenza della prima democrazia tedesca.

Che la costituzione avesse lasciato gravi questioni irrisolte era chiaro a tutta la classe politica tedesca. Ma il modello territoriale era l'elemento che più minava alle fondamenta le possibilità di consolidazione di un potere effettivo della federazione. Una situazione che venne aggravata dalla instabilità del governo del *Reich*, specie se si confrontava quest'ultimo con la granitica resistenza della coalizione costituzionale governativa, che continuava a guidare il *Freistaat* Prussia sotto la guida di Otto Braun[28]. Il male da curare era divenuto, nella schizofrenica politica weimariana, la stampella che sosteneva la repubblica. Anche così, la situazione rimaneva patologica, dal momento che un eventuale cambio di maggioranza in Prussia avrebbe significato il collasso dell'intero sistema. E per quanto la costituzione di Weimar prevedesse meccanismi di riforma territoriale, il conosciuto articolo 18, la farraginosità del procedimento previsto spinse il mondo accademico tedesco a cercare nuove e differenti soluzioni, che permettessero superare la patente contraddizione, stigmatizzata già dallo stesso Preuss, insita nella presenza di una Prussia di quaranta milioni di abitanti in un *Reich* di sessanta[29].

Già dal 1923 vi furono alcuni progetti di riforma che presero le mosse dal generale dibattito che la evidente provvisorietà della soluzione costruita nella Costituzione del 1919 animò fra i giuspubblicisti[30]. In ogni caso si trattò sempre di proposte teoriche, senza un particolare seguito in ambito istituzionale, date anche le molte urgenze che la repubblica weimariana dovette affrontare. Solo a partire dal 1925, sotto la spinta dello "spirito di Locarno", iniziò una stagione di relativa normalità e stabilità nel Reich, che rese possibile mettere nuovamente in agenda la riforma territoriale. In questo clima di normalizzazione nacque nel 1927 la *Lega per il rinnovamento del Reich*: associazione promossa dall'ex-cancelliere Luther, fu capace di riunire le élite economiche, politiche e giuridiche del paese, con l'obiettivo di superare con soluzioni concrete i disequilibri territoriali del *Reich*[31].

A queste prime iniziative fece seguito la mobilitazione istituzionale, culminata nel 1928 nella convocazione di una commissione permanente composta da rappresentanti del governo del *Reich* e dei *Länder* (la *Länderkonferenz*) che, nel giro di due anni di intensi e tutt'altro che lineari lavori, riuscì a presentare al *Reichstag* nel 1930 una bozza di progetto molto avanzata, in cui si proponeva una «soluzione unitaria differenziata» (*differenzierte Gesamtslösung*) al problema territoriale tedesco. Se per un verso la Prussia veniva spogliata delle sue attribuzioni politiche, trasferendo i suoi poteri al governo del *Reich*, dall'altro si proponeva la creazione di un modello territoriale multilivello[32]. L'antico desiderio di Hugo Preuss, la divisione della Prussia in tanti *Länder* quante provincie, prendeva forma articolando la struttura del *Reich* attraverso due categorie di Territori: quelli di nuova creazione (*Länder neuer art*), dotati di un'ampia autonomia amministrativa e quelli già esistenti in precedenza, che mantenevano intatte le antiche prerogative (*Länder älter art*)[33].

Dette riforme, rimaste senza applicazione come conseguenza della crisi del '29 (conobbero nel 1931 un parziale tentativo di applicazione da parte del governo presidenziale Brüning, anch'esso senza successo) divengono il simbolo della debolezza strutturale della politica weimariana, ma anche il segno della forte volontà di miglioramento e sopravvivenza che la prima democrazia tedesca mostrò, non essendo per forza condannata *ab origine* all'abisso nazista[34].

Similmente la seconda repubblica spagnola, tacciata da molteplici parti, come quella weimariana, di costituzione artificiale e d'importazione, divenne il tentativo di superare i limiti del costituzionalismo monarchico ottocentesco e vincere la sfida degli autoritarismi del ventesimo secolo.

Per meglio comprendere come i legami fra queste due realtà andassero ben oltre una contingente fascinazione o la semplice erudizione ritengo necessario superare l'esame del dibattito costituente *strictu sensu*. Per quanto imprescindibile e fondamentale punto di partenza, l'esame dei resoconti d'aula rischia di offrirci una visione ipostatizzata e parziale, limitando il campo di visione alla vita della Costituente o, al massimo, a quell'arco temporale di immediata preparazione del processo costituente che va dal *Pacto de San Sebastián* dell'agosto del 1930 all'approvazione della Costituzione nel dicembre del 1931[35]. Un reale approfondimento sulla genesi del modello regionale della seconda repubblica spagnola è dunque possibile solo inserendo il lavo-

ro delle *Cortes Constituyentes* del 1931 in un percorso meta-costituente che faccia proprio il progetto autoritario primoriverista, ricorrendo a un ventaglio di fonti alternativo a quello esclusivamente interno al processo costituzionale.

3. *Dall'*Estado politicamente unitario *all'*Estado integral

La necessità in Spagna di una riforma costituzionale, in grado al contempo di superare il modello della costituzione del 1876 e risolvere i problemi del liberalismo spagnolo tramite la nozione di autonomia, aprì anche nella penisola, negli anni a cavallo del primo conflitto mondiale, un cantiere costituzionale che di fatto non si chiuse sino alla Repubblica[36]. Partendo dai progetti di *Mancomunidad* elaborati durante il maurismo e portato a compimento da Canalejas, passando per le soluzioni autonomistiche del 1919 sino alla rimodulazione dell'amministrazione e del territorio che avrebbe supposto l'introduzione degli statuti municipali e provinciali per parte del Direttorio, si trattò di fatto di raggiungere in modi diversi e con finalità diverse il superamento della costituzione canovista del 1876, senza elaborare una nuova carta fondamentale, per quanto il piano di riforme locali posto in marcia da Calvo Sotelo fosse già un cambio di paradigma politico-istituzionale, divenendo la pietra angolare di una nozione puramente amministrativa di autonomia, costruita su di un apparente forte riconoscimento dell'autonomia locale, specialmente di quella municipale. Tanto lo Statuto municipale come quello provinciale si sorreggevano su di una concezione di autonomia che, aggirando la dicotomia deconcentrazione-decentralizzazione, impediva anche qualsiasi progetto volto a dare valore politico al mondo locale, sfidando sul campo della gestione locale i progetti di autonomia politica, in primis quello catalano[37].

Lo stesso riconoscimento dell'esistenza di una sfera privativa di compiti del municipio come ente naturale permise di affermarne la naturalezza sovrana, ma diversa da quella dello Stato, riconosciuto come unico vero detentore della sovranità politica.

In altri termini, calcare la mano sull'autonomia municipale non era in contraddizione con la creazione di uno stato fortemente centralista, anzi nel contesto ispanico aveva una precisa funzione.

Lungi dall'essere infatti solo un artificio retorico, creare una bipolarità municipio-Stato intesi come l'alfa e l'omega della dimensione politica, permise di raggiungere contemporaneamente due obbiettivi determinanti. In primis si svuotarono di contenuto le forze politiche e le élite di potere ad esse legate, per ricostruirne delle nuove direttamente vincolate al regime primoriverista; in secondo luogo si cercò di dimostrare una presunta, per quanto strumentale, sensibilità del Direttorio nei confronti della dimensione locale. Una strumentalità ancora più evidente nello Statuto provinciale, vero e proprio coronamento del modello territoriale primoriverista.

Ciò detto, l'apertura dell'*Asamblea nacional consultiva* rappresentò un salto di qualità, il raggiungimento della stabilizzazione di una certa nozione di autonomia funzionale al principio della Nazione indissolubile e politicamente unitaria. Un percorso in cui il Direttorio cercò di coinvolgere quelle risorse intellettuali che erano state in precedenza marginalizzate, quando

non represse, dando così vita ad un ampio, anche se non desiderato, dibattito sulle tematiche del diritto pubblico[38].

Obbligato divenne il confronto con la fucina costituzionale che seguì la grande guerra, ove il mondo germanico era un fondamentale referente, venendo ad essere per tutti necessario punto di partenza, indipendentemente dalle distinte posizioni ideologiche.

In questo senso rivelatrice è un'opera del 1925, dal titolo *La crisis del moderno constitucionalismo en las naciones europeas*[39]. Si trattava della raccolta di un ciclo di conferenze che si tenne a partire dal 30 ottobre del 1923 presso la *Real Academia de Ciencias morales y políticas* ed a cui presero parte alcuni dei più rilevanti protagonisti del mondo giuridico di quegli anni: maestri affermati, quali Adolfo Posada o Rafael de Ureña, giuristi di una generazione successiva, ma già di chiara fama, quali Alcalà Zamora, futuro presidente della seconda repubblica, giovani allievi, quali Goicoechea e Gascón y Marín. Ad un mese circa dall'arrivo al potere di Primo de Rivera quella che era una delle più importanti istituzioni della cultura ufficiale ritenne necessario occuparsi, in prospettiva comparata, delle difficoltà e dei cambiamenti che, nel mondo occidentale, stavano caratterizzando il costituzionalismo. Un interesse non dovuto ad una semplice volontà erudita di conoscenza. Come si è già avuto modo di porre in evidenza, il periodo che va dal *maurismo* alla Repubblica fu attraversato da questa costante del problema della riforma costituzionale, in cui la stagione primoriverista si inserì non tanto come parentesi, quanto piuttosto come risposta autoritaria al rinnovamento. In questo clima si viene a sviluppare dunque il dibattito fra personaggi che, direttamente o indirettamente, sarebbero stati poi protagonisti della stagione costituente repubblicana.

La grande stella di questi interventi sul costituzionalismo europeo fu proprio la Costituzione di Weimar: Posada la pose al centro del suo esame comparato, mentre Gascón y Marín ne fece addirittura il filo rosso attraverso cui ripercorrere tutte le novità e le criticità a cui stava andando incontro il concetto di costituzionalismo. Il rispetto di questi autori per il mondo germanico, complice soprattutto per molti una comune formazione krausista, li portò naturalmente a guardare con interesse una realtà come quella tedesca, culla dell'organicismo nelle sue differenti declinazioni[40]. In gioco vi sarebbe dunque stata la capacità o meno del costituzionalismo novecentesco di superare l'individualismo atomistico, per riconoscere una pluralità di corpi sociali: una missione questa in cui il costituzionalismo storico anglosassone avrebbe mostrato una maggiore capacità di metamorfosi ed a cui quello continentale aveva avuto modo di dare risposta con la rifondazione costituzionale weimariana.

La percezione generale fu dunque quella che la fine degli anni 20, prima del tracollo finanziario dell'ottobre del 1929, potesse essere davvero il momento per raggiungere quella necessaria stabilizzazione che le convulsioni seguite alla pace di Versailles non avevano permesso di raggiungere. Un processo in cui il primoriverismo, giunto ad una prima stabilizzazione con l'instaurazione alla fine del 1925 del *Directorio Civil*, cercò di costruire una risposta di taglio conservatore ed autoritario, ma non per questo poco attenta al ruolo delle masse e della loro organizzazione.

Il percorso che portò all'*Asamblea nacional consultiva*, prima camera a composizione corporativa eletta fra le due guerre mondiali, ed alla sua progettazione di un *Estado politicamente unitario* trovò le sue radici in una lenta marcia che ebbe inizio con i due Statuti. In questo percorso centrale fu la definizione in senso restrittivo e funzionale del concetto di autonomia, con cui dare forza all'autoritarismo e al superamento dei *patrones* del liberalismo tradizionale[41].

Per il regime primoriverista fulcro di questa stabilizzazione era l'affermazione della Nazione come punto fondamentale dell'impalcatura costituzionale: questo non perché ritenesse che già esistesse una sola e consolidata Nazione ispanica, quanto tutto il contrario. Come difatti ebbe modo di dichiarare Primo de Rivera nel suo primo discorso alla commissione costituzionale dell'*Asamblea nacional* nell'ottobre del 1927

> Repito, pues descentralización cuanto sea posible; pero nada de concentración de regiones, porque no se puede olvidar que España está compuesta, no de regiones diversas, sino de naciones. En la memoria de los habitantes de esas regiones está todavía viva su historia como nación independiente, que llegó hasta el siglo XV; es decir, que solo hace cinco siglos que existían como nación, y cinco o seis siglos no son nada en la vida de un pueblo, y han quedado de ello tales rastros, conservan con tanto gusto su bandera propia, sus atributos, su habla, que no fué extendida a la totalidad de la Nación, que si se permitiera que se comenzara a hablar de regiones, tengo la seguridad que no trascurriría medio siglo sin que se produjeron verdaderas guerras regionales[42].

La tonica generale che il Direttorio volle imprimere ai lavori dell'*Asamblea Nacional* fu dunque quella di pensare l'autonomia come uno strumento eminentemente amministrativo, capace di privare d'azione politica non solo i regionalismi più attivi, ma di costruire una nozione di cittadinanza svincolata dal possesso del potere politico. In questo senso è veramente illuminante l'uso strumentale che, per corroborare la visione unitarista dello Stato, venne fatto del dibattito che riprendeva quota in area tedesca sul superamento dell'anomalia prussiana a favore del rafforzamento delle istituzioni del *Reich*.

Si guardi ad esempio una serie di articoli usciti su una testata come l'*ABC*. Il 20 gennaio del 1928 il giornale d'area conservatrice si preoccupava di riportare una breve rassegna stampa dei diversi commenti che suscitò la riunione della *Länderkonferenz* in diverse testate tedesche, tema che venne ripreso e sviluppato pochi giorni dopo, il 27 gennaio, in un articolo significativamente intitolato *La decadencia del federalismo*[43]. In questi articoli venne data una visione quanto meno distorcente della forza delle idee unitariste portate avanti dal *Lutherbund* e dalla *Länderkonferenz*, volta a mettere in risalto un accordo di fondo su questa tendenza all'unificazione, che in realtà era tutt'altro che pacificamente accettata da mondo politico e giuridico tedesco:

> Se han producido luego dos hechos considerables. Uno es la formación de la "Liga para renovar el Reich" presidida por el ex-canciller' Luther, y con un programa francamente unitario, que sin suprimir los Estados los reduce a una insignificante. Autonomía de administración y concentra en el Reich todos los atributos de soberanía que en aquellos quedaban. El otro hecho, todavía más importante, porque entra en el terreno de la acción práctica, es la conferencia que han celebrado estos días en Berlín los jefes de los países alemanes confederados. Aunque la reunión ha señalado bastante distancia entre la tendencia. Del Norte, demasiado centralizadora, y la del Sur, más apegada a las tradiciones locales, los acuerdos han sido categóricos en favor de una reforma de sentido unitario en la constitución imperial.

> Es de mucha importancia que tan fácilmente se haya logrado la conformidad de todos los alemanes para un programa, que tiende a suprimir los estados como entidades políticas vivas.

A dare la certezza che il vero destinatario dell'articolo fosse il pubblico spagnolo lo conferma la chiusura del pezzo:

> Es que fracasa en todas partes el regionalismo político. La historia enseña que los estados federativos tienden a centralizarse. La evolución retardada, como en Suiza, por la fuerza de las tradiciones, o por la modestia y sencillez de los fines nacionales, o impulsada como en Alemania, por los progresos formidables de la vida interior y la complejidad de los problemas comunes, es hacia la unidad. Se va más o menos de prisa, pero ya no hay pueblo sano y culto que deje di ir a la unidad, aunque acá o allá queden, como una llaga de la moderna civilización, exiguas minorías que sueñen en deshacer la historia y retroceder a régimen de tribus o taifas.

Il problema dell'unitarismo venne ripreso il mese successivo, in un lungo editoriale di Alfredo Manes, corrispondente culturale dell'*ABC* in Germania. L'autore, approfondendo le posizioni sostenute dall'*Erneurnbund* e dando una visione più sfumata e vicina alla realtà dei risultati della prima *Länderkonferenz*, insistette sulla trascendenza politica di questa riforma, affermando come

> Si en Alemania se habla hoy tanto de unificación, es porque la fuerza de las cosas hace sentir, con más claridad cada día, la urgente conciencia, la necesitad inevitable de unificar[44].

Da questi articoli traspare con chiarezza come il progetto unitario portato avanti dalla dittatura fosse in realtà da inserire in un più ampio movimento costituzionale di respiro europeo. Unità verso cui avrebbe marciato anche una realtà dalla forte tradizione federale come quella tedesca, che anzi poteva divenire un modello a cui ispirarsi, al punto che anche un canale istituzionale ufficiale come quello dell'ambasciata spagnola si occupò attentamente della questione.

Questo fu possibile anche grazie alla nomina nel 1927 come ambasciatore a Berlino di un personaggio come Fernando Espinosa de los Monteros, protagonista sin dalle prime battute del Direttorio militare ed attento osservatore dell'evoluzione dei modelli amministrativi stranieri già nelle prime settimane del primoriverismo.

Un'attenzione che mostrò anche durante il suo incarico diplomatico presso la capitale tedesca, facilitato nel compito dalla preparazione giuridica che sviluppò negli anni giovanili in Germania, conseguendo lì il titolo di Dottore[45].

Già nelle relazioni inviate dall'ambasciatore a Madrid alla fine del 1927 si trovano diversi riferimenti all'avanzare di un movimento favorevole all'unitarismo, riportando notizia delle conferenze tenute in settembre da Jarres nell'ambito dell'assemblea de municipi tedeschi e del successo dell'intervento dato da Weisemann a inizio novembre con tema l'unificazione[46].

Lo stesso Espinosa de los Monteros si spinse a fare comparazioni fra l'evoluzione in senso unitarista che molte forze politiche tedesche perseguono e la situazione spagnola: nell'*Informe* n. 310 del 12 novembre 1927 l'ambasciatore affermava difatti come

> Esta tendencia, unitaria, interior de Alemania y austro-alemána, cuya más simple expresión es "patria política genuinamente única y descentralización administrativa", coincide con la idea similar que para nuestro País se expresa acertadamente en "La Nación" de 8 del actual bajo el rótulo "La vertebración de España". El artículo ha sido extensamente resumido en la prensa de Berlín y hace pensar en la similitud de una rea-

> lidad española con otra alemana. Esto ha hecho compatible el respeto y amor a peculiaridades regionales con la unificación de la legislación no solo penal sino también civil y tributaria en aras de la patria única, cuya condición de tal se esfuerzan lo más a acentuar a expensas de prejuicios aquí históricos y en cierto modo caducos.

Ma è soprattutto a partire dal 1928, con l'inizio della *Länderkonferenz*, che i riferimenti si moltiplicano: nelle diverse note informative che l'ambasciatore invia a Madrid sulla vita politica tedesca vi sono costanti notizie della conferenza dei *Länder*, commentando le sessioni e rimarcandone sempre il carattere centralizzatore[47]. Espinosa de los Monteros non si limitò peraltro a riferire dell'apertura dei lavori, ma perlomeno sino alle riunioni di novembre si preoccupò di relazionare sulla sua evoluzione e sulle distinte posizioni assunte dai due principali protagonisti, vale a dire Prussia e Baviera.

Tutta questa documentazione assume una rilevanza ancora maggiore se messa in relazione con la pubblicazione, a partire dal 1927, del *Boletín de la Asamblea Nacional*, prosecuzione dell'antico *Boletín analítico de los principales documentos parlamentarios extranjeros*[48]. In questo bollettino non si trovavano difatti solo le traduzioni della più importante produzione legale internazionale organizzata per paesi, ma veniva anche riportata per i diversi stati una sorta di riassunto dei più rilevanti avvenimenti e cambiamenti di politica interna. La sezione, intitolata *Noticias políticas y parlamentarias* già nel primo numero diede un'accurata descrizione della convocazione e risoluzioni della prima riunione della Conferenza dei *Länder*[49], riportandone nel 1929 le conclusioni ed i progetti di riforma in modo piuttosto dettagliato[50].

In questo modo l'ambasciata berlinese divenne una delle porte attraverso cui si veicolò tramite canali istituzionali ufficiali un percorso di riforma territoriale, come quello intrapreso dalle *Länderkonferenz*, in presa diretta.

Un compito che non venne meno né con la caduta della dittatura né tanto meno con l'avvento della Repubblica, tutt'altro: già solo la vicenda che interessò il ricambio dell'ambasciata berlinese con la vittoria del fronte repubblicano, che si risolse solo con la nomina provvisoria di un personaggio *super partes* come Américo Castro, dimostrò la delicatezza del ruolo di ambasciatore presso il *Reich* weimariano[51].

Inutile ritengo sia spendere parole di presentazione su un personaggio della caratura intellettuale di Castro, già all'epoca unanimemente riconosciuto come uno dei maestri della filologia e altrettanto stimato in Germania come in Spagna.

Decisamente meno nota è la sua esperienza come ambasciatore, vuoi per la corta durata dell'incarico, vuoi perché forse oscurato dalla notorietà politica del suo successore, Araquistáin[52]. La brevità del suo mandato non toglie però nulla all'interesse che il suo ufficio come ambasciatore ricopre, specie considerando che il suo incarico coincide di fatto con tutta la tappa costituente repubblicana (Castro si insediò ufficialmente nell'ambasciata berlinese l'11 maggio del 1931 e rassegnò le proprie dimissioni il 31 dicembre dello stesso anno).

Anche in questo caso gli *Informes* di politica nazionale e internazionale risultano particolarmente interessanti: nel clima di tensione che caratterizzò i mesi fra aprile e giugno sul tema del referendum di dissoluzione del *Lantag* prussiano balzarono un'altra volta agli onori della cronaca i temi

della riforma dei rapporti *Reich-Länder*, di modo che nell'agosto del 1931, proprio nel periodo in cui si iniziò la discussione degli articoli riguardanti il titolo preliminare ed i problemi dell'organizzazione nazionale nella costituente spagnola, Castro relazionava sui rinnovati progetti di fusione *Reich-Prussia*. Non bisogna dimenticare come Castro arrivi a Berlino proprio nelle delicate settimane in cui si teneva il referendum sul dissolvimento del *Lantag* prussiano, tema che riempì le pagine delle sue relazioni al ministero e che ovviamente riproponeva il problema del rapporto *Reich*-Prussia in tutta la sua violenza[53]. Quello che risultava chiaro nei suoi *Informes* era che in Germania si ritenesse ancora possibile la riforma del sistema: per quanto la situazione commissaria in cui si incontrava la repubblica denunciasse l'ingolfamento a cui era giunta la giovane democrazia tedesca, si riteneva comunque di poter trovare una via d'uscita attraverso la soluzione del rapporto governo centrale-Prussia.

Le notizie che Américo Castro inviava da Berlino si riferivano a un sistema sì in difficoltà, ma non ancora caduto in quella irreversibile crisi sistemica che lo portò al Nazionalsocialismo. Il *Reich* weimariano poteva dunque ancora essere faro e guida per una giovane repubblica come quella spagnola, che anzi in piena fase costituente poteva trarre profitto dai progetti che avrebbero dovuto risolvere la difficile e patologica situazione in cui si incontrava Weimar.

Se dunque il percorso di riforma territoriale weimariano poteva essere strumentalmente utilizzato per i progetti di costruzione di una "Nazione politicamente unitaria" del primoriverismo, a maggior ragione diveniva un modello di ispirazione per l'articolazione di una giovane democrazia che voleva risolvere il secolare enigma nazionale spagnolo con l'affermazione dell'autonomia.

Ciò non deve stupire più di tanto: se difatti i settori culturali affini al Direttorio sottolinearono la tensione verso l'unitarismo, ponendo in secondo piano come l'intera struttura della riforma tendesse all'istituzione di un'autonomia differenziata, la repubblica al contrario lesse il modello delle *Länderkonferenz* con le stesse lenti di rafforzamento della democrazia che vennero utilizzate nella repubblica tedesca.

Un'ulteriore prova di come non fosse non tanto e non solo il testo costituzionale weimariano in sé, quanto la sua evoluzione il referente ultimo a cui attinse la costituente repubblicana al momento di dare forma e soluzione al proprio problema territoriale arriva dal mondo dell'editoria giuridica.

Nel maggio del 1931 una casa editrice che tanto collaborò alla diffusione del pensiero giuridico europeo in Spagna come la *Labor* pubblicò la *Constitución de la República de Weimar* nella versione commentata da Otthmar Bühler, affidandone la traduzione a Josè Rovira Armengoll, traduttore in spagnolo della *Critica della ragion pura* di Kant. In sé non c'era una vera necessità di una nuova traduzione per il testo: a parte le versioni in francese (peraltro molte delle quali decisamente poco filologiche), una buona e recente traduzione era già disponibile, vale a dire quella di Pérez Serrano e González Posada. La versione di Bühler aveva però il pregio di un esteso commento articolo per articolo, più accessibile e maneggiabile rispetto a quella realizzata da Anschutz e Giese, ma sicuramente rigorosa. Soprattutto non si limitava a dare una versione commentata della carta costituzionale: oltre di-

fatti a constare di una bibliografia ragionata e di una interessante introduzione storica disponeva di un capitolo conclusivo dal titolo *Resumen de las ideas fundamentales y juicio sobre la nueva Constitución del Reich, así como acerca de la práctica constitucional desarrollada desde 1919*[54]. Quello che offriva questa edizione era dunque non una visione statica della Costituzione come testo in sé, quanto piuttosto una visione dinamica ed aggiornata della vita costituzionale weimariana: una caratteristica particolarmente interessante questa, specie riferita al problema federale, la cui soluzione del 1919 «fue pronto considerata de caracter meramente provisional por casi todos los interesados»[55]. L'esposizione chiara e sintetica, che si ritrova nel testo, delle distinte posizioni in gioco, vale a dire unitarista, preussiana e dell'*Erneurbund*, la descrizione succinta ma rigorosa delle *Länderkonferenz* come un termine medio fra il progetto originale di Preuss ed il modello *Reichsland*, fecero di questo testo un eccellente modo per dare ulteriore diffusione, proprio agli albori della stagione costituente repubblicana, alla

> […] experiencia que de este admirable texto jurídico alemán se ha sacado durante los doce años que lleva de aplicación: así se evitarían tanto el escollo de formular principios meramentes teóricos, sin posibilidad de trascendencia futura, como el irreflexivo prurito de adaptar instituciones a veces fracasadas, a veces hijas de otras circunstancias que difieren de las del País en que se hace la adaptación[56].

Una esperienza, quella della riforma territoriale della tarda repubblica weimariana, che suscitò un vivo interesse, peraltro non solo fra gli specialisti. Se difatti il mondo culturale spagnolo giunse a conoscere direttamente da fonti in lingua originale i progetti e le dinamiche che portarono all'elaborazione della *differenzierte Gesamlösung*, come dimostra l'acquisizione non più tardi di settembre del 1931 da parte della *Residencia de estudiantes* del saggio di Medicus sulle *Länderkonferenz*, anche la carta stampata generalista si interessò al tema[57].

Il primo settembre del 1931 uscì sul *Crisol* un articolo in prima pagina dal titolo «Las autonomías regionales»: scopo dichiarato era di mettere in evidenza come fosse necessario spingere avanti la discussione sui temi fondamentali che riguardavano l'organizzazione della repubblica, primo fra tutti il nodo dell'autonomia territoriale[58].

Fu d'altronde durante il mese di settembre del 1931 che i costituenti spagnoli affrontarono il delicato tema dell'organizzazione territoriale[59]. Proprio sullo scontro ideologico che si stava inevitabilmente producendo sulla nozione di autonomia pose l'accento il citato articolo, evidenziando come l'obiettivo dovesse dunque essere quello di non impantanarsi su posizioni irriducibili, quanto piuttosto quello di

> […] encontrar la fórmula – si es original tanto mejor – que por acertar el interés de sus regiones promueva el interés de España entera. Es necesario restituir a cada una de aquellas su natural centro de gravedad, ponerlas en condiciones de que desarrollen su personalidad de forma normal, de que, en los límites de sus posibilidades reales, si basten a sí mismas, sin tener que acudir para todo al poder central, omnipresente[60].

Un problema non semplice, anche solo tecnicamente, da risolvere nei ridotti tempi a disposizione della costituente. Un problema in cui però si poteva guardare fuori dai confini spagnoli:

> Ahora mismo, en Alemania (en cuyos gobiernos locales se han encastillado, con mayor empeño

> aún que los antiguos príncipes, los gobernantes de los *Länder*) se está tratando de estudiar una reforma del Reich que haga menos costosa la administración pública.

Di quali riforme si stesse parlando lo posero in evidenza due articoli di *El Sol*: il primo, datato 9 settembre, dal titolo *La crisis del federalismo alemán*, prese le mosse da un'intervista concessa da Arnold Brecht, direttore generale dell'amministrazione prussiana, all'*Europe nouvelle*. La tonica generale dell'articolo è decisamente diversa da quella del *Crisol*, evidenziando come anche uno stato di tradizione federale come quello tedesco cercasse un percorso verso l'unitarismo. L'articolo si inseriva nella discussione che si era innescata in *Cortes* a favore dell'introduzione del termine *federal*, che proprio nella parte centrale di settembre prese fuoco, cercando di dimostrare la generale confusione con cui la la stampa e diversi uomini politici maneggiavano la delicata questione del federalismo. Emblematica a riguardo la chiusura dell'articolo:

> Que la prensa que ahora controvierte el apellido de la república no se apoye en noticias atrasadas[61].

Dall'altro si cercava di mettere in evidenza come al superamento del modello federale weimariano contribuissero ragioni contemporaneamente politiche, economiche, ma soprattutto di efficienza amministrativa[62].

Un punto di vista che venne ribadito in un successivo articolo del 20 settembre, in cui, collegando la crisi economica in cui versava la Germania con l'urgente necessità di una riforma che la sgravasse un'amministrazione spesso duplicata, si sottolineò come

> Es el deseo que se siente en toda Alemania – a pesar de su particular idiosincrasia metodista – de una honda reforma que simplifique la actual administración, en beneficio del poder central que comprende, por la experiencia de cada día, que debe ser robusto y rápido.

Questo secondo articolo ha, inoltre, un interesse particolare: se difatti entrambi i pezzi riportano in maniera dettagliata le risoluzioni della conferenza dei *Länder*, articolate per punti, in quello del 20 settembre l'esposizione del progetto di riforma venne così chiosata:

> Estas proposiciones, que se llaman sintéticamente "solución total y diferencial", han encontrado un ambiente muy favorable, aunque todavía no han sido recogidas por ningún partido político en sus programas.

A questo punto risulta chiaro quale fosse quel «criterio personal y sugestivo, pero harto discutible, defendido entre nosotros por el culto profesor D. Miguel Cuevas que sostiene la superación de los viejos conceptos de Estado unitario y del Estado federal por un tipo nuevo modelado sobre el caso de la Alemania contemporánea» di cui parló Pérez Serrano nel suo classico commentario alla Costituzione del 1931: il termine *Gesamtlösung*, può essere senza alcun problema tradotto come *solución integral*[63]. Il termine era dunque tutt'altro che oscuro o inesatto, come venne tacciato da buona parte della pubblicistica dell'epoca. Lo stesso Adolfo Posada pensò ad un errore linguistico: «quizá se ha querido decir integrado, lo que sería una cosa muy distinta de integral, expresión que, según la Academia española, se aplica "a las partes que entran en la composición de un todo"»[64].

La definizione di *Estado integral* fu dunque il tentativo di dare forma icastica al protagonismo che i costituenti spagnoli

del 1931 volevano assumere, ed assunsero, nella costruzione di una nozione di territorio come elemento costitutivo delle democrazie novecentesche, capace di restituire, attraverso l'articolazione complessa dell'autonomia, quella pluralità che tanto mancava alla monoliticità della sovranità, quand'anche sostenuta dal crisma popolare. Da qui che i più sensibili fra i padri costituenti italiani del 1946 alla questione del territorio avessero guardato con tanto interesse tanto a questo modello come a quello weimariano[65]: più che interrogarsi su due modelli ci si chiedeva come divenire parte di un percorso comune nel solco del costituzionalismo democratico.

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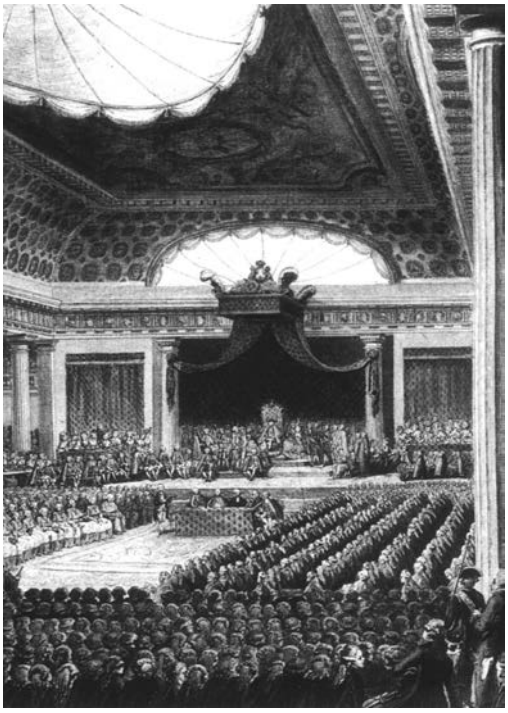

On the Italian Style: The Eclectic Canon and the Relationship of Theory to Practice as key-elements of Italian Legal Culture (19th - 20th Centuries)

LUIGI LACCHÈ

1. *Introduction*

In the 1960s the comparativist John Henry Merryman (1920-2015) wrote, after a period of study in Italy[1], three articles published in the *Stanford Law Review*[2]. In aggregate these articles invoked an 'Italian style', searching for specific characteristics in contemporary doctrine, interpretation and law within the *civil law tradition*. Merryman considered the Italian legal system to be an 'archetype'[3], more 'typical', in some respects, than the French and German systems[4]. In recent years, 'Italian law'[5] as a 'juridical model'[6] has given rise, in Italy, to extensive research. In this essay, I will identify some original characteristics and 'enduring traits' underlying the style or rather the *habitus* of italian jurists in its historical development. I am convinced that what I call the *eclectic canon* (§ 3) – seen as an interpretative paradigm and a set of issues – can help us to understand better what is genuinely distinctive in Italian legal experience during the nineteenth and part of the twentieth century (and perhaps beyond). It is a concept that can contribute to a recasting of the traditional 'tale' about the making and the evolution of Italian legal culture (§ 2). The aim of this *new approach* is also to challenge some clichés or historiographical stereotypes. According to the now familiar 'tale', the history of the formation of Italian legal culture assumes the guise of an *opera* in two acts giving rise to an imposing *tradition*. This representation is not an *invention*, for it has a real historical foundation but it is not sufficient to restore to us the overall framework. At the same time, the reference to the *eclectic canon* allows us to grasp the relationship between theory and practice as an enduring feature of Italian legal culture (§ 4). This approach cannot be based on a typically rule- or legal system-oriented procedure because, on the contrary, it impinges upon several dimensions of the law that depend on culture and societal issues. One of the many merits of John Henry Merryman has been his

readiness to take into consideration *Italian style* from a more realistic point of view, one consonant with Mauro Cappelletti's methodological preoccupations[7] and Gino Gorla's comparative-legal history approach, two positions «[…] very critical of Italian legal scholarship generally and of formalism and historicism, in particular»[8]. The structural approach that I propose here, based above all on the notion of 'culture', can offer to comparative legal studies a stimulus to relativise the often-reiterated commitment to positivism. Moreover, the reference to the *eclectic canon* in terms of legal culture is a way of contributing to a realistic definition of legal tradition. For, according to Merryman, legal tradition is

> a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which is a partial expression. It puts the legal system into cultural perspective[9].

2. *An Opera in Two Acts: The Tales of Alfredo Rocco and Francesco Carnelutti*

Merryman has written that

> Italy is perhaps the only one of the major civil law nations to have received and rationalized the two principal, and quite different, influences on European law in the nineteenth century: the French style of codification and the German style of scholarship[10].

This statement corresponds to historical reality and it is, as we shall see, the principal explanation used to characterise the Italian law tradition, taking into account developments in civil law (and in particular the influence of Napoleon's civil code) and German *Rechtswissenschaft*.

In fact, the making of Italian legal science has been told as a tale divided into two main periods[11]. It is argued that the first period is marked by French influence, a consequence of Napoleonic domination[12]. The French model was organized at that time (and also afterwards) as a more organic and system-building codification with at its heart the civil code (*Code Napoléon* after 1807) and a modern and efficient system of public administration. According to this 'model', legal order is based on State law[13] and on the exegetical work of jurists commenting upon legal texts. The 'French period' drew symbolically to a close in the 1870s due to the humiliating defeat suffered in the Franco-Prussian war and the growing prestige of the *Modell Deutschland* in the European political arena and in many scientific fields. This second period is characterised by 'German method' and the Pandectist movement. Their methods and concepts seemed more appropriate and useful to represent the private legal order and to frame the space of political sovereignty. «Consider – John Merryman wrote – German legal science; it has never taken deep root in France, but the Italians have, in this sense, become more German than the Germans»[14].

In this article I only have the space to recall two scholars from among the many I might have mentioned. Their narratives shed a great deal of light upon the making of Italian legal culture. In 1911 Alfredo Rocco[15] traced – fifty years after political unification – a profile of private law doctrine. He quoted Savigny's remarks from

the 1820s and passed a negative judgement upon French influence. The introduction of French codes had, Rocco claimed, interrupted the continuity of Italian legal tradition. The national development of private law had been paralyzed.

> Therefore, scientific activity in these fields of law was almost entirely limited to the translations of French works, and bad translations for the most part; and they still reflected the state of the culture among Italian jurists of that period, and not only of legal culture[16].

But the unification of Italy laid the foundations and called into being a new approach common to many legal scholars based in the Universities then undergoing a process of transformation. However, before forging something new, Italian jurists had to learn. Change required a period of assimilation[17] of 'German' scientific method in order to develop the passion and the practice of scientific investigation[18].

Roman private law and *Modell Deutschland* were two dimensions presaging a new and more hopeful era. Italian scholars began to visit German Universities oriented, according to the Humboldt model, around a strong scientific vocation. They returned to Italy determined to disseminate a scientific approach and a number of new methods. But this transition towards 'Germanism' could not be immediate. Two phenomena had to coexist.

> Whereas on the one hand there was a proliferation of commentaries, treatises, jurisprudence articles consisting simply of a rehearsing of the opinions of French jurists and of a pedestrian exegesis, on the other hand the Universities witnessed a complete and profoundly fruitful renewal of method[19].

The Italian school of law – Rocco noted – was born from this apparent conflict, subsequently undergoing further independent refinement. Just as in the period of assimilation/imitation, so too in the 'constructive era' Italian jurists reiterated their commitment to Roman law[20], invoking the prestige of an extraordinary civilization blessed with a 'natural' scientific vocation to spread the pandectist hegemony. Another distinguished romanist, Vittorio Scialoja[21], «was perhaps the first to understand that Italian legal science had to free itself from foreign influence in order to go its own way»[22]. Legal science could now address the task of recasting the legal system and formulating a general theory. Much, Rocco conceded, had been done, but much still remained to be done[23].

In 1935 Francesco Carnelutti[24] spoke of a 'legal Italian school' and recalled in a positive sense the 'formidable pressure' exerted by German legal science on Italian during the nineteenth century. A century since the triple movement substitution/assimilation/construction had begun. Carnelutti's account does not differ so much from the tale told by Rocco. In 1950 Carnelutti had been commissioned to write a *Profile of legal Italian thought* for an American volume – never published – dedicated to different aspects of Italian thought. When Italy became a State «the legal hegemony, at any rate in continental Europe, belonged incontestably to France. We felt for a long time – he noted – the weight of this primacy»[25]. The Napoleonic civil code was the model but its influence was not only about legislative reception because «the mold of law or in other words of its own conception of law, at that time and for a long period subsequently was essentially French»[26]. Then the 'second act' began. German scholars

saw once again in Roman law outstanding raw materials.

> German Pandectics thus arose as the original kernel of modern legal dogmatics. Thereupon a legal science that was profoundly transformed in form and content emerged. The formal alteration was most evident in the substitution of *system* for *commentary*. We began to understand the value of the concept and even more of the order of concepts [...][27].

According to Carnelutti, this work was at first unknown to Italy, its discovery being due to a number of great jurists. Credit is due here to Vittorio Scialoja for Roman law; Orlando for constitutional law, Anzilotti for international law, Chiovenda for civil procedural law, Cammeo for administrative law, Polacco for civil law, Vivante for commercial law. «Thanks to these and, as I have said, to many other jurists the Italian approach has abandoned French method and adopted German method in law studies»[28]. Already in 1935 Carnelutti was proud to stress the fact that by this date Italian scholars had no cause to envy their German colleagues. Indeed, they had founded a general, integrated, theory of law[29]. Italian legal science[30] was in a first phase oriented towards foreign models, but quite soon it gained full autonomy, crystallising in the process an entirely original vision[31].

3. *The Eclectic Canon*

The tale of the 'opera in two acts' is essentially a frame serving to illustrate a general trend. What then is the problem? First of all, we should not judge Italian, national, legal culture during the nineteenth century using ex-post concepts, that is to say, employing the paradigm of the «true» scientific method. In fact, we note that the essential nature and 'quality' of Italian legal culture during the nineteenth century have been assessed in terms of two major paradigms.

The first paradigm depends on Savigny's comments during the 1820's when he made a number of trips to Italy, visiting Law Faculties and colleagues, and meeting his many Italian correspondents. He was thus quite familiar with the Italian context, but he judged it in terms of his own scientific paradigm and the 'Humboldt Model'. To simplify, our starting point has to do with the fact that Italian legal culture would not have been, at the beginning of the nineteenth century, *Wissenschaftlich*-oriented. I use this German word deliberately because it evokes, and derives from Friedrich Carl von Savigny's vision. In *Über den juristischen Unterricht in Italien* (1828)[32] the great German scholar described the existing situation as regards Italian legal culture. Law was little studied as *Rechtswissenschaft*. Law scholars had to pursue a specific *Beruf*; they were University Professors using and developing a method in order to build a new scientific legal theory. According to this scheme, Italian legal culture did not match the 'German paradigm'. In Italy lawyers appeared to be too much concerned with practice; Universities were weak, their curricula old-fashioned. The consequence was that Italians should, it was argued, set about changing their approach to the organisation of legal knowledge, to scholarly research and to the writing of legal studies. Savigny's judgement represented a fairly accurate picture of the Italian legal milieu, but the leader of the *Historische Schule* did not understand that in Italy there was a real pluralism in re-

gard to the sites and circumstances of legal culture making. So overpowering was the *Rechtswissenschaft* paradigm that it served to obscure and to devalue the *Italian style*.

The second paradigm is reflected in the perspective of Vittorio Emanuele Orlando[33]. We could consider his thought to be a sort of 'terminus'. In Palermo, in 1889, this young but confident jurist gave an inaugural lecture on *The technical criteria for the legal reconstruction of public law*[34]. After political unification (1860-1870), Italy was faced with the task of building a unitary legal system. From 1870 to the 1880s a number of Italian jurists, in a handful of the better legal Faculties, had begun to follow the 'German method' and the Pandectist movement. In 1889, however, Orlando declared that it was the task of his generation to entrench and strengthen the new Italian State. A new public law science was urgently needed in order to overcome the excesses of the exegetical method; a new scientific paradigm was required. According to Orlando, Public Law Scholars were too much inclined to be historians, philosophers or 'sociologists' rather than jurists. In the last analysis, the main adversary was eclecticism. Orlando, at the end of nineteenth century, evoked the by then triumphant German method and the great effort made by Italian Universities and jurists to change their orientation. Universities should have a monopoly over the scientific approach, and be synonymous with 'theory'. By now there had clearly emerged a conceptual constellation based on the Universities as sites characterised more and more by such words as science, system, national culture. A number of dichotomies were taking hold: theory/practice, scientific/eclectic, systematic/chaotic, national/local.

Francesco Carnelutti (1879-1965)

The problem is that this conceptual framework has been projected ex post on the previous sixty years, serving as the main criterion not for understanding the past but for making value judgements[35]. Even the 'opera in two acts' featuring in the accounts given by Alfredo Rocco or by Francesco Carnelutti was influenced by this narrative.

For these reasons we should for our part endeavor to know and understand the evolution of Italian legal culture in its specific historical context. The «new approach» that I suggest here entails reference to what I define as the *eclectic canon*. It has to do with the general category of 'eclecticism' but it is something different and more than this. It is an approach that can help us to grasp the

Alfredo Rocco (1875-1935)

real complexity of Italian legal culture, going beyond the 'tale' divided into two chapters (French influence first, German influence subsequently). This scheme remains useful but it is only a part of the story, so we need to integrate it within a more complex account, thereby complicating the plot. With these preoccupations in mind I have developed the concept of *eclectic canon*.

This canon is designed to represent and give a name to a *cultural structure* that has been elaborated during the first half of nineteenth century in the majority of the Italian states prior to political unification. It deals also with the idea that Italian culture of the Restoration period ought not to be seen as a 'crisis period' before the birth of the 'scientifica era' in the second half of the century when the scientific paradigm, or so the argument went, had won against pragmatism, the exegetical approach and eclecticism.

The word 'canon' evokes here the consolidation of a core of jurists and authors, principles and themes establishing a common lexicon, shared categories and issues. The canon does in fact reflect affinities between jurists working in different parts of Italy. Reading Italian jurists we can appreciate that the *eclectic canon* has a fundamental core, based on two remarkable thinkers. I mean Giambattista Vico (1668-1744) and Giandomenico Romagnosi (1761-1835), philosophers, jurists and historians. These two authors, their works but also the associated mythology and discourses form the central pivot of this canon.

Vico and Romagnosi loom large in Italian legal culture. Indeed, they represent a *cultural foundation* that was in place prior to the actual creation of the so-called Schools (Exegèse, Historische Schule, Philosophical or Benthamit School…). The eclectic canon has *national* roots and is a *deep stratum*. It does not produce a system or a legal order. It deals above all with the *habitus*[36], the way of being of a jurist. It has to deal with a constellation of deep images[37]: the need for a genealogy, «by bridging between strong precursors and strong successors»[38]. Italian jurists have eminent ancestors: Roman *iurisperiti* and medieval 'glossators' and 'commentators'. But at the beginning of nineteenth century it is necessary to reconstitute the last 'link' in the chain of time: thus Vico and Romagnosi are the bridge towards a real Italian legal culture during the *Risorgimento*.

The adjective 'eclectic' underlines the structure of the canon, that is, the aim to reconcile different orientations and 'schools'. Pellegrino Rossi[39] is perhaps the first European jurist to suggest that the 'solution' lies in carefully appraising and then 'combining' the three 'Schools', the major cultural trends in evidence at the time of the political Restoration in Europe.

> Nous pensons qu'il est surtout nécessaire de ne pas perdre de vue les trois diverses écoles de jurisprudence qui règnent actuellement en Europe, c'est-à-dire l'école *exégètique*, l'école *historique*, et l'école *philosophique*. Leur réunion seule peut amener la fusion du véritable esprit philosophique avec le positif du droit, moyennant la théorie des principes dirigéans… Ces écoles restant séparées, l'une perd de vue les choses et les principes pour ne s'occuper que de mots; la seconde prend pour la vie réelle les hommes et les choses qui ne sont plus; la troisième ressemble à une jeunesse sans expérience, qui au milieu de ses riantes illusions, prend ses désirs pour ses règles et méprise ce qu'elle ne connaît pas. C'est un malheur très-réel que l'éloignement actuel de ces diverses écoles[40].

Girolami Poggi, a talented lawyer and magistrate in Tuscany, echoed Rossi's suggestion a few years later. Each scientific orientation taken on its own was defective. Each contained positive elements but only their combination stood any chance of founding «a perfect treatise of jurisprudence»[41]. In 1832 Poggi wrote that Vico and Romagnosi – two great Italians – were respectively the inventor of the philosophy of history and the creator of a method applied to the moral and political sciences. Juridical eclecticism has been seen as a 'fourth' School but for us it represents the *habitus* of the Italian jurist throughout the nineteenth century. In Italy there is discernible the influence of the French eclectic philosophy of Victor Cousin. The *eclectic canon* is clearly linked to 'eclecticism' as a general category but, as I have said, it is also something more specific. In Italy the core is represented by the combination of certain aspects of Vichian and Romagnosian thought. We need a sort of *anthropological approach* in order to apprehend the eclectic canon as a deep stratum of the Italian, national, legal culture. The concept of *stratum* recalls an historical approach widely used and developed in the context of anthropological and comparative law studies[42]. It is linked to the concept of *tradition*[43] and implicitly to the notion of 'cryptotypes'[44] or to that of a 'hidden' cultural model.

The eclectic canon is therefore a *stratum* above which schools, methods, codifications and legal orders flow in the course of time. This phenomenon helps also to account for the fact of Italian legal culture being so 'open' towards other cultures, as indeed the proliferation of translations and commentaries would seem to indicate[45]. But the eclectic canon is not only a *deep stratum*. It also testifies to the fact that Italian legal culture possesses a genealogy: Vico and Romagnosi as the founding fathers of a tradition. This culture has deep national roots and historical continuity. And consequently the canon can play an important legitimising function: to bolster ideological awareness of the 'natural' propensity of the 'Italian approach' to favour the *juste milieu*. This is a 'political-philosophical' propensity as Cesare Balbo[46] noted, but it is also the *Beruf* of the Italian jurist to temper excesses, to reconcile 'extremes'. The national 'genius'- one of the central elements of the *Risorgimento* – owed much to jurists drawing upon the cultural network succeeding Vico and Romagnosi. The bond of kinship was based on an approach that may be termed 'Historical-philosophical-dogmatic'[47]. Giuseppe Pisanelli, one of the protagonists of Italian unification, would say in the first Chamber of Deputies that in Italy – and especially in Naples –

> There was a School […] which included at the same time the rational element and the phenomenal element, embracing both history and phi-

losophy; it was the School arising out of the great mind of Vico! This is the real law School [...][48].

Vico/Vichianism and Romagnosi/Romagnosianism are the key cultural ingredients. History, philosophy and dogmatics taken alone are not sufficient to found a sound legal education and an effective practice as a jurist. Only a balanced mixture can provide a correct solution. An Italian *Beruf* entails tempering extreme positions. The correct approach should be historical-philosophical-dogmatic.

In the eclectic canon as *stratum* we find at one and the same time history and reason, the chain of times and the *filosofia dell'incivilimento* (philosophy of civilization), the idea of progress and the spirit of moderation, the nation and the different Italian traditions, the relationship between theory and practice.

L'Italie – Victor Molinier wrote in 1842 –, cette terre toujours feconde en hautes intelligences, qui cultive la science avec amour, nous offrira des hommes trop peu connus en France, et dont les travaux peuvent être placés en face de ceux qu'a produits l'Allemagne. Pendant que l'école de Paris vulgarise les doctrines toujours exactes mais souvent sèches et nebuleuses de la Germanie, il nous conviendrait, à nous hommes du midi, d'importer en France celle de l'Italie[49].

We could say that the speculative dimension of the eclectic canon is fragile but as a *cultural and anthropological presence* it is robust. History and philosophy are called upon to fertilise dogmatics. The *Italian style* is born here. We plainly cannot explain it using the *Rechtswissenschaft* paradigm and the Humboldt model.

4. *Against the Excesses: 'The Close Marriage that Should Occur Between Theory and Practice'*

Another component of the eclectic canon is of the utmost importance, and it is the key perhaps to a deeper understanding of Italian legal tradition. A characteristic of the *Italian style* – constantly reiterated by all Italian jurists in their different ways – would be that of the combination/dilemma of theory and practice[50], one of the enduring traits of Italian tradition connected to the anthropology of the jurist and to the idea of a law science tempered by that of 'culture'[51]. Starting from the 1880s no Italian author could ignore the process of scientification of the Universities characterised by the initial applications of 'German method' and the *assimilation* – to use Rocco's expression – of the Pandectist mouvement. So, Pietro Cogliolo, in his unusual book *Malinconie universitarie* (1887), often contrasts the relative backwardness of the Italian University with the great strides made by the German. Nevertheless, when he comes to define an ideal conception of the jurist he deals with the theme of excesses. The 'real jurisconsult' is the one who can balance theory with the reality of things.

Two opposing tendencies, the practical and the scientific, have always contended in diverse guises since the world began: happy the period in which a fruitful armistice can be enjoyed[52].

Practice and systematics by themselves succumb to excess.

But there is an enlightened practice that is capable of elevating itself and combining with science; it reconciles theorems, furnishes the facts to be observed, tests and retests in the reality of things the truth of formal principles; and the scientist must take into account this practice, while

> Universities must study it. Our lectures are not empirical yet nor are they metaphysical; they do not crawl along the ground, but nor do they fly in the clouds; they supply at one and the same time theories and practical notions[53].

In the same years we find in Vincenzo Simoncelli[54], who had been a student in Naples of Emanuele Gianturco, the idea of Roman law as the «inspired creation of perfect practical and theoretical jurists [...]»[55]. Indeed, Gianturco, a highly original jurist, had underlined the limits of the exegetical method when searching for a systematic order of exposition following the *Italian style*. It would be ill-advised, he reckoned, to go from the prevailing and «essentially *practical* system of the French School» to its polar opposite. It was against «the natural tendency of the Italian mind, abhorring excesses in every aspect of national activity»[56].

The same Simoncelli recalled how Romagnosi had taught civil law without reducing it to a mere commentary upon the code, and how for Vico, a century before Savigny, the jurist should be a philosopher in order to establish the principles of the law and a historian in order to discover the causes and conditions that determine the development of these principles, with a particular reference to the positive laws of a nation[57]. According to Simoncelli we needed to enhance «the great models of Germany» but also to profit from its mistakes. Moreover, Jhering had already attacked «the so-called 'constructionists' and their method of dogmatic isolation»[58]. Windscheid likewise observed that the legal concepts are fundamental but still remain hypotheses and not mathematical axioms. «It follows that the lawyer cannot stand apart, a hermit of science, but must keep a watchful eye on life»[59].

Simoncelli was particularly concerned to quote Savigny's foreword to the *System des heutigen römischen Rechts* where he analysed the historical experience of the separation between theory and practice[60]. Savigny criticized always, since the *Beruf*, the main vice of his time: the separation between the two moments of practice and theory[61]. In the *System* he reaffirmed the heuristic dimension of the historical approach but he took care to stress the fact that the famous controversy with Thibaut in 1814 was over and done with, and that every absolutisation led to error. This also applied to correct knowledge of the dual element in what is right, the theoretical (doctrine, teaching, exposition) and the practical (application of rules to real life cases).

> The healing remedy lies in the fact that everyone in his special activities keeps well fixed before his eyes the original unity, so that in some way every theoretical jurist retains and cultivates a practical sense, while every practical jurist retains and cultivates a theoretical sense. If he does not, if the separation between theory and practice becomes absolute, there inevitably arises a danger that theory degenerates into something vain and practice into manual labor[62].

Savigny did not speak of everyday practice, but of the «sense or the practical spirit' that had to belong to the 'scientific' jurist as well as to the practical jurist, who had to take into account the 'scientific criterion'»[63]. «So if the deadly sin of our current legal circumstances consists of an ever more marked separation of theory and practice, only in restoring their natural unity can a remedy be found»[64]. It was finally the unity, so natural, bright and efficacious, to be found among Roman jurisconsults: «Uni-

versity and Court – Simoncelli exhorted in conclusion – have to meditate on this advice and implement it, working together to restore to Italy what was the most radiant glory of its genius»[65]. They were not obliged to abdicate to the scientific paradigm because theory was the most powerful aid to practice[66]. But practice is not the «contemplative ecstasy of mystical hermits»[67].

A few years later it was Vittorio Scialoja, 'prince' of the Italian Romanists, who addressed this issue. In 1911, inaugurating the Roman Law Society, he observed that

> Italian legal life [lacked] the close relationship that should obtain between theory and practice; and we wish our Society to combine the theory and practice, of what, that is, should be the true law, because the purely practical law and the purely theoretical law are only parts, and parts that most of the time run the risk of being mere fragments. It is absolutely necessary that theory and practice not look from a distance and with a sense of reverential respect towards each other, with a reverence that comes from lack of knowledge and unfamiliarity. It is absolutely necessary that theory and practice reconstitute their unity, not only objectively, but also in the soul of each of us. And thus we will engage in work that is genuinely Italian[68].

On several occasions, at least since 1881, Scialoja had dealt with the methodological problem of teaching Roman law, and more generally that of the construction and dissemination of legal knowledge 'scientifically prepared' in Italian Universities[69]. It is superfluous to add that in the Pandectist approach there was no place for the 'exegetical method'. Studies were flourishing thanks to the efforts made to assimilate 'German method', «important work, crucial for the progress of our scientific spirit»[70]. The *Beruf* of the modern jurist in the civil law tradition was to integrate the historical dimension of Roman law, the individualistic foundation of European civil law, with Savigny's idea of system.

The University in Scialoja's conception could only be that of 'science', with a specific method in teaching and learning[71], supported by practical activities and the analysis «of case studies drawn from real life, examining them in relation to theoretical principles that apply to them»[72]. «The University must be scientific, the University must be theoretical [...]»[73]. Practice, properly understood, is what we learn in the course of 'practicing our profession'. Consequently, Scialoja did not agree with the lawyer Mario Ghiron, who had criticised the undue value generally accorded to theory in the German universities[74], which left the student with a «massive ignorance of real life, and [the] inability to understand the law as a living tool for engaging in every day activities [...]»[75]. Scialoja, for his part, while stressing the practical purpose of legal studies, felt obliged to admit that the assimilation process «ran and runs the risk of becoming excessive»[76].

> We have got to a point – and I think it is worth spelling it out – in which the character given to the theoretical study of the law serves no other purpose than to bring this study into a cloudy sphere, from which only damaging hail can descend on practice and not fructifying rain[77].

The Italian lawyer was not to be a mere exegete; indeed, he should not be far removed from reality and practice. And once again the 'core' of the *Italian style* lay in its vocation to mediate between a historical and a comparativist approach. Because «We, as Italians, that is reasonable people who do not allow themselves to be swayed by violent impulses, we can say that they are one and the same thing»[78].

Many other scholar underlined the 'eclectic' stance of Italian jurists. So, Biagio Brugi, who has written a short but comprehensive summary of Italian legal developments after unification, invoking what he judges to be the dominant feature of the 'Italian approach', insisted that «no science can be closed off as in pure theory: much less Jurisprudence».

> It would be superfluous – Brugi observed in 1911 – to mention here the work of our old law teachers: professors and legal practitioners: lawyers, advisers, judges. Moreover the teaching of law in our universities continued to be theoretical and practical at one and the same time, even in their heyday; we have already seen that even in a period of decline they still bore some fruit as practical schools. There has been much debate, over the last half century, as to whether the Universities should have a scientific purpose and be professional schools; the contrary view, so rigidly argued, seems repugnant to the Italian cast of mind. Our natural inclination is to put the doctrine to a practical purpose: to enlighten future lawyers, offering them a way to understand and do their duty in civil society[79].

Likewise Alfredo Rocco, on the occasion of the same fiftieth anniversary, confirmed that there was indeed a particularly Italian vocation. Using the systematic method, refined by German lawyers to an exquisite degree of perfection, the Italian civil lawyers of this period took care to avoid the excessive formalism and the abstruse metaphysics of the German doctrine; it is the merit of the Italian school to have combined the use of generalisations and of systematic method with the social element of law, thus arriving at a clearer vision of the practical function of jurisprudence[80].

> However, the result was not entirely positive. Law practitioners had played almost no part in the creation of an Italian school of law. Indeed, case law had been in effect excluded, everyday practice remaining "faithful to the old exegetes". Legal doctrine, being thus too isolated, had failed to renew the legislative field of private law, except in the case of the Commercial code. The failure of the Italian school of law lay in its not yet having been able to produce 'a comprehensive treatise of civil law that might serve to guide and enlighten the practitioners'[81].

As we have seen, in 1935 Francesco Carnelutti recalled the role of German legal science in having raised, on Roman foundations, the columns of Pandectics destined to preside over the modern phase of legal science[82]. But having achieved the first, necessary, assimilation, Italian science had soon reached the stage of autonomy, and even a high degree of originality while the Germans, for their part, seemed to have lost their lustre[83]. Concepts remained the indispensable tools of science, although the process was not without its risks. There was the danger, first of all, of

> losing contact with the ground and getting lost in the clouds. There is thus some justification for the mistrust felt by practitioners. When scholars are accused of being abstracted from reality, the reproach is unfair because they can-not operate save by abstracting; but there is truth in the charge, given the imperfection of their means, which not infrequently do not so much penetrate reality as lead them off into a world of chimeras[84].

Only living contact with reality can overcome this problem. Rational means (the concept) must be 'integrated' through intuitive means (art). Of this fact there are wonderful examples that might be cited.

> The justification for this, indeed, the credit must go, and we should frankly acknowledge it, to the combination of the study of law with the practice of it which is in an intrinsic feature of the mores of Italian scholars[85].

The possibility (or necessity…) of reconciling science and art, theory and practice, teaching [law] and being a lawyer is an antidote to theoretical and conceptual isolation.

Carnelutti's remarks bring to mind those dazzling observations, made almost a hundred years ago, by the great German jurist Carl Mittermaier who, unlike Savigny, had shown in a positive light one of the enduring features of the 'eclectic canon'.

Thus the law professors (in Italy) are also among the greatest lawyers; and this union of

> the ordinary business of living with science means that there is no need in Italy for the bitter division between theoreticians and practictioners that prevails in Germany. There, the professors, being too removed from life, advance their theories to the detriment of the practitioner; the latter therefore heaps scorn upon the theoretician at every turn. The most distinguished law professors in Rome, Naples, Pisa and Bologna are at the same time distinguished lawyers. Even the taste that Italian people have for art and poetry, exercises a salutary influence on the scientific works of the scholars and the activities of statesmen […] Those who relish public debate should attend the court sessions in Naples! What manly, dignified and lucid eloquence, consisting of more than merely empty phrases, may be heard in the discourses of many Neapolitan lawyers! It is a pleasure to follow the skilled orator who knows how to get to the very heart of a question, and analytically disentangle every implication with admirable perspicacity. By way of confirmation of the practical approach and delicate touch of Italians, I would again cite the scientific conferences that were held in Pisa, Florence, Turin, Padua, Lucca and Milan[86].

The Italians were thus practical jurists, but 'guidés par la science', as Mittermaier liked to put it.

As Carnelutti recalled,

> thus it was that in Italy, as perhaps in very few other countries in the world, there were formed what could be described as the great 'law clinicians'. The fact that the most important of them, Vittorio Scajola, came to the art of law by way of Roman law is perhaps a sign that this integral vocation comes down to us by inheritance? The art of law is assuredly more a Roman thing than it is a science […][87].

Were these 'clinicians' educated in a school? Indeed, they were not, since no such school existed. It was in fact the Italian temperament that led the best lawyers to become both scholars and artists in their practice of the law[88].

Carnelutti returned to this topic on several occasions, and for the last time in the early 1960s[89]. In the course of refining his argument he bolstered his conceptualism[90] with a realistic view based on the recovery of natural law and the concept of legal experience. So, in his *Profile of Italian legal thought* – originally written to offer to American readers a taste of *Italian style*, he emphasised once again Italian *Beruf* in order to circumvent the dreaded gap between science and practice. Italian legal science continued to believe in the dogmatic but less and less in dogmatism, that is to say, in the mere self-sufficiency of concepts; more 'realistic' than 'positivist', with, once again, a temperament that was betwixt and between:

> a special ability to balance between the two extremes, the abstract and the concrete, which would be, respectively, if I am not mistaken, the Germanic temperament or the Anglo-Saxon temperament. Latin temperament is a kind of bridge between these extremes[91].

As in 1935 Carnelutti once again pointed out the sense of balance of the *Italian style*:

> it never separates, not even in the field of law, theory from practice, so that Italian professors of law, almost all of them, do in fact practice within

the legal profession (and it would be better if, as in some American countries, there was also the possibility of being a professor and at the same time a judge): eminent figures consequently emerge, *law clinicians*, entirely analogous to medical clinicians, and they are the living expression of the realism of Italian legal science[92].

It is interesting to observe that while Italian legal science was focusing (during the first half of the twentieth century) on 'system-building', searching for concepts and a higher order of abstraction, seeking to avoid any confusion between legal and social, economic and historical facts, emphasising positive law regardless of justice and nonlegal criteria, jurists such as Alfredo Rocco and Francesco Carnelutti (among others) – often cited as 'system-builders' by those subscribing to the Pandectist paradigms – were referring to an 'Italian way' of being a jurist, which entailed combining eclectically science and art, theory and practice.

In the mid-1960s John Henry Merryman went on to describe the evolution of the *Italian style*. The Constitution of 1948 laid the foundations for viewing legal order and system-building in a different fashion. 'Legal science' was for him a synonym for «*traditional*, *orthodox* doctrine [...] criticised by many thoughful jurists, and some of these criticisms will be described here, but the critics are the *avanguardia*, the voice (perhaps) of the future»[93]. Merryman grasped the main lines along which Italian legal science had been transformed[94]. Since then many things have changed, but it is not obvious to say what the *Italian style* is now. Anyhow, that's another story[95].

[1] Merryman has told Pierre Legrand why and how he began studying Italian law. He spent the academic year 1963-64 at the Comparative Private Law Institute of the University of Rome "La Sapienza", associating with 'two extraordinary Italian scholars', the comparativist Gino Gorla and the romanist Giuseppe Pugliese. See P. Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, in «The American Journal of Comparative Law», 47, 1, 1999, pp. 15 ff. In his *Note on the Italian style* (in J.H. Merryman, *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law*, Boston, Kluwer Law International, 1999, p. 175), Merryman observed that the three articles were written «in the company and with the enthusiastic encouragement and generous assistance of the late great Italian comparatist Gino Gorla and were revised in 1964-65 in response to suggestions by Mauro Cappelletti, who later became a colleague at Stanford and a major international figure in comparative law». Merryman's intellectual affinity with Mauro Cappelletti and Gino Gorla is underlined also by C. Amodio, *In memoriam: Professor J.H. Merryman*, in «The Italian Law Journal», 2, 2015, pp. 213 ff.

[2] *The Italian Style. Doctrine*, in «Stanford Law Review», 18, 1, 1965, pp. 39-65; *Law*, in «Stanford Law Review», 18, 2, 1966, pp. 396-437; *Interpretation*, in «Stanford Law Review», 18, 3, 1966, pp. 583-611. These articles were soon published in italian in «Rivista trimestrale di diritto e procedura civile», *Lo stile italiano: la dottrina*, with a note by Gino Gorla, 4, 1966, pp. 1170-1216; *Le fonti*, 3, 1967, pp. 709-754; *L'interpretazione*, 2, 1968, pp. 373-414. These essays were published together, in modified form, in M. Cappelletti, J.M. Perillo, J.H. Merryman, *The Italian Legal System. An introduction*, Stanford, Stanford University Press, 1967. With these articles and other works on Latin-America as his starting point, Merryman published a broader and more general book on *The civil law tradition. An introduction to the*

Legal Systems of Western Europe and Latin America, Stanford, Stanford University Press, 1969; translated in italian as *La tradizione di* civil law *nell'analisi di un giurista di* common law, Milano, Giuffrè, 1973, with a preface by G. Gorla who had reviewed the original version in «Rivista trimestrale di diritto e procedura civile», XXIV, 1970, pp. 1121-1124. The 'Italian style' articles can now be read in Merryman, *The Loneliness of the Comparative Lawyer*, cit., pp. 177-308.

[3] «Indeed the Italian style is, in a sense, a paradigm of the civil law. Much of the legal tradition of the contemporary civil law world has its origin and its principal development in Italy», Merryman, *'The Italian Style: Doctrine'*, in Cappelletti, Perillo, Merryman, *The Italian Legal System*, cit., p. 165. See also Merryman, *The civil law tradition*, cit., p. 60.

[4] This assumption has been contested by some scholar but Merryman never changed his mind: Legrand, *John Henry Merryman and Comparative Legal Studies*, cit., p. 52.

[5] P. Costa, *Un diritto italiano? Il discorso giuridico nella formazione dello Stato nazionale*, in G. Cazzetta (ed.), *Retoriche dei giuristi e costruzione dell'identità nazionale*, Bologna, il Mulino, 2013, pp. 163-200.

[6] See in particular S. Lanni, P. Sirena, *Il modello giuridico - scientifico e legislativo - italiano fuori dell'Europa*, Napoli, ESI, 2013; M. Bussani (ed.), *Il diritto italiano in Europa (1860-2014). Scienza, giurisprudenza, legislazione*, in «Annuario di diritto comparato e di studi legislativi», 2014; the essays collected by C. Pinelli in «Rivista italiana per le scienze giuridiche», 6, 2015, pp. 53-360.

[7] Underlined by Cappelletti himself: *John Henry Merryman the Comparativist (1986-1987)*, in «Stanford Law Review», 39, 1986-1987, pp. 1079-1081.

[8] Legrand, *John Henry Merryman and Comparative Legal Studies*, cit., p. 17.

[9] Merryman, *The civil law tradition*, cit., p. 2.

[10] Merryman, *The Italian Style: Doctrine*, cit., pp. 165-166.

[11] See L. Lacchè, *Argumente, Klischees und Ideologien: Das „französische Verwaltungsmodell" und die italienische Rechtskultur im 19. Jahrhundert*, in R. Schulze (ed.), *Rheinisches Recht und Europäische Rechtsgeschichte*, Berlin, Duncker & Humblot, 1998, pp. 295-313.

[12] M. Broers, *Europe under Napoleon 1799-1815*, London, Arnold, 1996; J.S. Woolf, *Napoleon's Integration of Europe*, London, Routledge, 2002.

[13] Merryman emphasised the effects of this attitude: *The Italian Style: Doctrine*, cit., pp. 179-186.

[14] Merryman, *The civil law tradition*, cit., p. 150. «The influence of the *Pandettistica* was particularly great in Italy. It affected Italian doctrine first, and through the doctrine it came to dominate the legal process, in legal education, the writings of judges, and the works of scholars» (Merryman, *The Italian Style: Doctrine*, cit., pp. 169-170). «I think you may have seen that I say somewhere that the Italians were more German than the Germans» (Legrand, *John Henry Merryman and Comparative Legal Studies*, cit., p. 17).

[15] Alfredo Rocco (1875-1935), jurist (in commercial law and civil procedure) and politician, was one of the leaders of the nationalist movement, he then joined Fascism and was Minister of Justice between 1925 and 1932.

[16] A. Rocco, *La scienza del diritto privato in Italia negli ultimi cinquant'anni*, 1911, then in *Studi di diritto commerciale ed altri scritti giuridici*, Roma, Società editrice del "Foro Italiano", 1933, I, p. 5. Likewise Biagio Brugi, again in 1911, evoked Savigny's paradigm (on which see below): *Giurisprudenza e Codici*, in *Cinquanta anni di storia italiana*, Milano, Hoepli, vol. II, sez. IV, 1911, p. 2.

[17] Rocco's narrative would be reiterated almost word for word by F. Ferrara, *Un secolo di vita del diritto civile (1839-1939)*, then in *Scritti giuridici*, Milano, Giuffrè, 1954, pp. 273 ff.

[18] Rocco, *La scienza del diritto privato*, cit., p. 10. «Outside the Universities commenting upon the Code article by article began quickly to seem dull, pedestrian and inadequate» (Brugi, *Giurisprudenza e Codici*, cit., p. 32.

[19] Rocco, *La scienza del diritto privato*, cit., pp. 15-16.

[20] For a recent summary see M. Brutti, *I romanisti italiani in Europa*, in Bussani (ed.), *Il diritto italiano in Europa*, cit., pp. 211 ff.

[21] Vittorio Scialoja (1856-1933) was the most influential Italian scholar in Roman law studies between the nineteenth and the first part of the twentieth century as well as a prominent politician.

[22] Rocco, *La scienza del diritto privato*, cit., p. 19. Scialoja, once again in 1911, underlined the fact that Italian legal doctrine had acquired a measure of originality (*Diritto e giuristi nel Risorgimento italiano*, 1911, then *Studi giuridici*, V, *Diritto pubblico*, Roma, Anonima Romana Editoriale, 1936, p. 12).

[23] Rocco, *La scienza del diritto privato*, cit., p. 3.

[24] Francesco Carnelutti (1879-1965) has been one of the most important scholars and a very famous lawyer. He dealt with many fields of law, starting with civil procedural law.

[25] F. Carnelutti, *Profilo del pensiero giuridico italiano*, (1950), then in *Discorsi intorno al diritto*, Padova, Cedam, 2, 1953, p. 167.

[26] Carnelutti, *Profilo del pensiero giuridico italiano*, cit., p. 167.

[27] Carnelutti, Ivi, p. 168.

[28] Ivi, p. 169.

[29] F. Carnelutti, *Profilo dei rapporti tra scienza e metodo sul tema del diritto*, 1960, then in Id., *Discorsi intorno al diritto*, cit., p. 324.

[30] «It is summed upin the phrase *legal science*, which carries with it the assumption that the study of law is a science, in the same way

that the study of other natural phenomena – say those of biology or physics – is a science. The work of the legal scholar is like the work of other scientists, not the search for scientific truth, for ultimates and fundamentals; not concerned so much with individual cases as with generic problems, the perfection of learning and understanding; not, in a word, with engineering but with pure science» (Merryman, *The Italian Style: Doctrine*, cit., p. 170).

[31] See Brugi, *Giurisprudenza e Codici*, cit., pp. 31-32, 144-145. Cf. on this point F. Marin, *"Germania docet?" Modello tedesco e scienza italiana nell'opera di Biagio Brugi*, in «Annali dell'Istituto storico italo-germanico in Trento», XXVIII, 2002, pp. 133 ff.

[32] «Zeitschrift für geschichtliche Rechtswissenschaft», 6, 1828, pp. 201-228. For a broad reconstruction L. Moscati, *Italienische Reise. Savigny e la scienza giuridica della Restaurazione*, Roma, Viella, 2000.

[33] Orlando (1860-1952) was the founder of the so called 'Italian School of Public Law'. He was a prominent jurist and an important politician (he was prime minister, as well as holding other cabinet posts at the beginning of twentieh century).

[34] V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico*, in «Archivio giuridico» 62, 1889, p. 122. For further elements see Lacchè, *Argumente, Klischees und Ideologien*, cit. On Vittorio Emanuele Orlando and the different destinies of the Italian School of Public Law, I have to refer here for an overview to L. Lacchè, *Lo Stato giuridico e la costituzione sociale. Angelo Majorana e la giuspubblicistica di fine secolo*, in G. Pace Gravina (ed.), *Il "giureconsulto della politica". Angelo Majorana e l'indirizzo sociologico del Diritto pubblico*, Macerata, eum, 2011, pp. 23-53 and G. Cianferotti, *Le Università italiane e la Germania*, Bologna, il Mulino, 2016, pp. 161-177.

[35] A. Mazzacane, *A Jurist for united Italy: the training and culture of Neapolitan lawyers in the nineteenth century*, in M. Malatesta (ed.), *Society and the Professions in Italy 1860-1914*, Cambridge, Cambridge University Press, 1995, pp. 80-110.

[36] P. Bourdieu, *Habitus, code et codification*, in *Actes de la recherche en sciences sociales*, 64, September 1986, pp. 40-44. Cfr. also Id., *Distinction: a social critique of the judgement of taste*, Harvard, Harvard University Press, 1984.

[37] On this challenging idea see A.M. Banti, P. Ginsborg, *Per una nuova storia del Risorgimento*, in *Il Risorgimento*, «Storia d'Italia», Annali 22, 2007, pp. XXVIII ff.

[38] «The deepest truth about secular canon-formation is that it is performed by neither critics nor academies, let alone politicians. Writers, artists, composers themselves determine canon, by bridging between strong precursors and strong successors», H. Bloom, *The Western Canon. The books and school of the Ages*, New York, Riverhead Books, 1995, p. 487.

[39] Rossi (1787-1848) was born in Italy in 1787 but lived subsequently in Geneva (1819-1833) and in Paris (1833-1848). He was murdered in 1848 while he was in Rome heading the new Pope's government. An eclectic scholar, politician and diplomat, Rossi addressed many scientific matters, such as criminal law, economics, constitutional law. He was one of the most important European jurists of the first half of the nineteenth century.

[40] P. Rossi, *Sur les principes dirigéans*, in «Annales de législation et de jurisprudence», II, 1821, pp. 188-189.

[41] *Saggio di un trattato teorico-pratico sul sistema livellare secondo la legislazione e giurisprudenza toscana*, Firenze, Tipografia Bonducciana, II, 1832, p. 11.

[42] U. Mattei, P.G. Monateri, *Introduzione breve al diritto comparato*, Padova, Cedam, 1997, pp. 144 ff.

[43] P.G. Monateri, *Presentazione* to N. Rouland, in N. Rouland, *Antropologia giuridica*, Milano, Giuffrè, 1992, p. XIII.

[44] See R. Sacco, *Introduzione al diritto comparato*, Torino, Utet, 1997, pp. 125 ff.

[45] See F. Ranieri, *Le traduzioni e le annotazioni di opere giuridiche straniere nel sec. XIX come mezzo di penetrazione e di influenza delle dottrine*, in *Atti del III Congresso Internazionale della Società Italiana di Storia del diritto*, Firenze, Olschki, III, 1977, pp. 1487-1504; M.T. Napoli, *La cultura giuridica europea in Italia. Repertorio delle opere tradotte nel secolo XIX*, Napoli, Jovene, 1987; P. Beneduce, *"Traduttore-traditore". Das französisches Zivilrecht in Italien in den Handbuchern der Rechtswissenschaft und –praxis*, in R. Schulze (ed.), *Französisches Zivilrecht in Europa während des 19. Jahrhunderts*, Berlin, Duncker & Humblot, 1994, pp. 215 ff.; G. Alpa, *La cultura delle regole. Storia del diritto civile italiano*, Roma-Bari, Laterza, 2000, pp. 126-149.

[46] C. Balbo, *Pensieri sulla storia d'Italia. Studi*, Firenze, Le Monnier, 1858, p. 401.

[47] See also P. Ungari, *L'età del codice civile. Lotta per la codificazione e scuole di giurisprudenza nel Risorgimento*, Napoli, ESI, 1967; Napoli, *La cultura giuridica europea in Italia*, cit.; F. Masciari, *La codificazione civile napoletana. Elaborazione e revisione delle leggi civili borboniche (1815-1850)*, Napoli, ESI, 2006, pp. 326 ff.

[48] Quoted by G. Vallone, *Teoria e pratica del diritto in Giuseppe Pisanelli*, in C. Vano (ed.), *Giuseppe Pisanelli. Scienza del processo, cultura delle leggi e avvocatura tra periferia e nazione*, Napoli, Jovene, 2005, pp. 324-325.

[49] *Cours d'introduction générale à l'étude du droit. Discours d'ouverture*, in «Revue de législation et de jurisprudence», 15, 1842, pp. 365-386.

[50] R. Orestano, *Introduzione allo studio del diritto romano*, Bologna,

il Mulino, 1987, p. 233. Hence Italian style tried to connect Weberian *Idealtypen* of legal thought considered as two opposite possibilities of knowing law in a specialized fashion (M. Weber, *Economy and Society. An outline of interpretive Sociology*, ed. by G. Roth, C. Wittich, Berkeley-Los Angeles, University of California Press, 1978.

51 On this point R. Ferrante, *Scienza e cultura giuridica europea nell'età dei codici*, in Id., *Un secolo sì legislativo. La genesi del modello ottonovecentesco di codificazione e la cultura giuridica*, Torino, Giappichelli, 2015, pp. 80-83.

52 P. Cogliolo, *Malinconie universitarie*, Firenze, Barbèra, 1887, pp. 88-89. On these reflexions see *amplius* G. Mecca, *Manuali di scienze giuridiche, politiche e sociali. Letteratura universitaria e insegnamento del diritto in Italia tra Otto e Novecento*, in G. Tortorelli (ed.), *Non bramo altr'esca. Studi sulla casa editrice Barbèra*, Bologna, Pendragon, 2013, pp. 184 ff.

53 Cogliolo, *Malinconie universitarie*, cit., p. 143.

54 Cfr. P. Grossi, *Interpretazione ed Esegesi (Anno 1890 – Polacco versus Simoncelli)*, in Id., *Assolutismo giuridico e diritto privato*, Milano, Giuffrè, 1998, pp. 33-68. On the 1880s and the *Methodenstreit* see P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950*, Milano, Giuffrè, 2000, pp. 19 ff. Also F. Treggiari, *"Questione del metodo" e interpretazione delle leggi in uno scritto di Vincenzo Simoncelli*, in «Rivista trimestrale di diritto e procedura civile», XLIV, 1990, pp. 119-138.

55 V. Simoncelli, *La teoria e la pratica del diritto*, in «Monitore dei tribunali», 2, 1889, then in *Scritti giuridici*, Roma, Società editrice del "Foro Italiano", II, 1938, p. 43.

56 E. Gianturco, *Sistema di diritto civile italiano (parte generale e diritto di famiglia)*, Napoli, Pierro, I, 1892. Cfr. Alpa, *La cultura delle regole*, cit., pp. 178 ff.

57 Gianturco, *Sistema di diritto civile italiano*, cit., pp. 39-42.

58 Ivi, p. 40.

59 Ivi, p. 41.

60 On this aspect Orestano, *Introduzione allo studio del diritto romano*, cit., pp. 31 ff.; H. Mohnhaupt, *La discussion sur "theoria et praxis" aux XVIIe et XVIIIe siècles en Allemagne*, in *Confluence des droits savants et des pratiques juridiques*, Actes du Colloque de Montpellier, Milano, Giuffrè, 1979, pp. 277-296; J. Schröder, *Wissenschaftstheorie und Lehre der "praktischen Jurisprudenz" auf deutschen Universitäten an der Wende zum 19. Jahrhundert*, Frankfurt am Main, Klostermann, 1979.

61 M. Bretone, *Diritto e tempo nella tradizione europea*, Roma-Bari, Laterza, 2004, p. 75.

62 F.C. von Savigny, *Sistema del diritto romano attuale*, translated by V. Scialoja, *Author's foreword*, Torino, UTE, I, 1886, p. 10, quoted by Simoncelli, *La teoria e la pratica del diritto*, cit., pp. 46-47.

63 Savigny, *Sistema del diritto romano attuale*, cit., pp. 10-11.

64 Ivi, p. 13.

65 Simoncelli, *La teoria e la pratica del diritto*, cit., p. 47.

66 A similar vision in G.P. Chironi in his inaugural lecture of 1885 *Sociologia e diritto civile*. Cfr. E. Genta, *"Sociologia e diritto": l'eclettismo liberale di Gian Pietro Chironi*, in Cazzetta (ed.), *Retoriche dei giuristi*, cit., pp. 307-308.

67 Simoncelli, *L'insegnamento del diritto civile e G.D. Romagnosi*, in «Rendiconti del R. Istituto lombardo di scienze e lettere», XXXII, 1899, then in *Scritti giuridici*, p. 55.

68 V. Scialoja, *Per un programma di studi del circolo giuridico*, published in «Bollettino del circolo giuridico di Roma», 1911 and in «Rivista di diritto commerciale», 1911, with the title *Diritto pratico e diritto teorico*, then in *Scritti e discorsi politici*, Roma, Anonima Romana Editoriale, VII, 1936, p. 160.

69 V. Scialoja, *Sul metodo d'insegnamento del diritto romano nelle Università italiane* (it contains *Lettera aperta al Prof. F. Serafini*, in «Archivio giuridico» 26, 1881, pp. 486 ff., then in *Scritti e discorsi politici*, VII, pp. 181-190. See on this aspect G. Cianferotti, *Germanesimo e Università in Italia alla fine dell'800. Il caso di Camerino*, in «Studi Senesi», XXXVIII, III s., 1988, pp. 339 ff.; F. Amarelli, *L'"insegnamento scientifico del diritto" nella lettera di Vittorio Scialoja a Filippo Serafini*, in «Index», 18, 1990, pp. 59-69; A. Schiavone, *Un'identità perduta: la parabola del diritto romano in Italia*, in Id. (ed.), *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, Roma-Bari, Laterza, 1990, pp. 283 ff.; G. Cianferotti, *L'Università di Siena e la «vertenza Scialoja». Concettualismo giuridico, giurisprudenza pratica e insegnamento del diritto in Italia alla fine dell'Ottocento*, in *Studi in memoria di Giovanni Cassandro*, Roma, Ministero per i beni culturali e ambientali, 1991, pp. 212 ff.; Id., *Università e scienza giuridica nell'Italia unita*, in I. Porciani (ed.), *Università e scienza nazionale*, Napoli, Jovene, 2001, pp. 19 ff.; M. Nardozza, *Tradizione romanistica e 'dommatica' moderna. Percorsi della romano-civilistica italiana nel primo Novecento*, Torino, Giappichelli, 2007, pp. 51 ff.; and above all M. Brutti, *Vittorio Scialoja, Emilio Betti. Due visioni del diritto civile*, Torino, Giappichelli, 2013; Brutti, *I romanisti italiani in Europa*, cit., pp. 216 ff.

70 Scialoja, *Per un programma di studi del circolo giuridico*, cit., p. 160.

71 Scialoja, *Ordinamento degli studi di giurisprudenza in relazione alle professioni*, Lecture of 18th January 1914, at the Roman Law Society, in *Scritti e discorsi politici*, VII, pp. 208, 210.

72 Scialoja, *Sul nuovo Regolamento per la Facoltà di Giurisprudenza*, 1902, then in *Scritti e discorsi politici*, VII, pp. 195-196.

73 Scialoja, *Ordinamento degli studi di giurisprudenza*, cit., p. 208. «[…]

In the universities we have always to remember that it is our task to prepare the mind of the student, and does not give him an "handbag" of practical notions, because he will procure them for itself, from time to time […] What the young man needs to know is how to find the solution of the issues; he must have the intellectual capacity to understand them and to solve them» (Scialoja, *Sugli studi giuridici e sulla preparazione alle professioni giudiziarie*, 1913, Adress given in the Senate, in *Scritti e discorsi politici*, VII, p. 201).

74 Mario Ghiron took into account the reform proposals mooted by E. Zitelmann: *L'educazione del giurista*, italian translation by M. Ghiron, in «Rivista di diritto civile», IV, 1912, pp. 289-324. Zitelmann proposed an alternance system between initial training, intermediate theoretical training, internships at a more advanced level, a further five semesters of theoretical preparation, and then professional training.

75 M. Ghiron, *Studi sull'ordinamento della facoltà giuridica*, Roma, Athenaeum, 1913, p. 64. Scialoja criticized him: *Ordinamento degli studi di giurisprudenza*, cit., pp. 216-217. «[…] the theoretical education is the first preparation for practice», p. 210.

76 Scialoja, *Per un programma di studi del circolo giuridico*, cit., p. 160.

77 *Ibidem*.

78 Scialoja, *Per un programma di studi del circolo giuridico*, cit., p. 162.

79 Brugi, *Giurisprudenza e Codici*, cit., pp. 29-30.

80 Rocco, *La scienza del diritto privato in Italia*, cit., p. 24. Rocco was speaking about the «new italian school of civil law […] according to the orientation predicted by Gianturco, Chironi, Polacco».

81 Rocco, *La scienza del diritto privato in Italia*, cit., pp. 32-33.

82 F. Carnelutti, *Scuola italiana del diritto*, Milano, Giuffrè, 1935, p. 7.

83 «The men, of course, are different; each has his own character, his qualities and his shortcomings; but it is certain that, for example, Chiovenda for procedural law, Alfredo Rocco for commercial law, De Ruggiero for civil law, Anzilotti for international law, Rocco Arturo for criminal law have, already in the field of purification and construction of concepts, a stature, that all the countries of the world, starting with Germany, might envy», Ivi. «But while in Germany the dogmatic effort failed to reflect these divisions between major areas of legal order, it fell to Italy to carry it further and to elaborate a *real general theory of law*. There is a strong argument for speaking of an *integrated Italian theory of law*» (Carnelutti, *Profilo dei rapporti tra scienza e metodo sul tema del diritto*, cit., p. 324).

84 Carnelutti, *Scuola italiana del diritto*, cit., p. 8.

85 Ivi, p. 9.

86 C. Mittermaier, *Delle condizioni d'Italia*, Milano-Vienna, Tendler e Schafer, 1845 con un capitolo inedito dell'autore e con note del traduttore versione dell'Ab. Pietro Mugna, pp. 27-28.

87 Carnelutti, *Scuola italiana del diritto*, cit., p. 9. In the same meaning C. Schmitt, *Die Lage der europäischen Rechtswissenschaft* (1943-1944), in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954. Materialen zu einer Verfassungslehre*, Berlin, Duncker & Humblot, 1958, pp. 386-429. See also A. Carrino, *Carl Schmitt and European Juridical Science*, in Ch. Mouffe (ed.), *The Challenge of Carl Schmitt*, London-New York, Verso, 1999, pp. 180 ff. and, critically, Bretone, *Diritto e tempo*, cit., pp. 127 ff.

88 Carnelutti, *Scuola italiana del diritto*, cit., pp. 9-10. On the methodology and the conceptual "fantasy" of Carnelutti see. N. Irti, *In memoria di Francesco Carnelutti. Le tre Facoltà giuridiche di Roma per un grande interprete di diritto* and *La "metodologia del diritto" di Francesco Carnelutti*, in Id., *Scuole e figure del diritto civile*, Milano, Giuffrè, 2002, respectively pp. 319-321 and 323-338.

89 Carnelutti, *Le fondazioni della scienza del diritto*, in «Rivista di diritto processuale», I, 1954; Id., *La missione del giurista*, in «Rivista di diritto processuale», 1959: «And if the mission of the jurist is to know the law, nor the exegesis nor dogmatic are enough to exhaust it. In simple words, it all comes down to the mutual implication of knowing and doing, which is beautifully expressed in the formula of Vico: *verum ipsum factum*. The gap between the theoretical dimension and the practical one can be a necessity; but a few times like this the word necessity expresses so exactly the idea of the deficiency to be» (then in *Discorsi intorno al diritto*, cit., p. 255).

90 See also Carnelutti, *Profilo dei rapporti tra scienza e metodo sul tema del diritto*, cit., p. 325, with some criticism of Kelsen and his *reine Rechtslehre*. Salvatore Pugliatti likewise called for a middle ground: «La giurisprudenza come scienza pratica», in «Rivista italiana per le scienze giuridiche», IV, 2, 1950, pp. 49-86, then in *Grammatica e diritto*, Milano, Giuffrè, 1978, p. 120.

91 Carnelutti, *Profilo del pensiero giuridico italiano*, cit., p. 177.

92 Ivi, pp. 177-178.

93 Merryman, *The Italian Style: Doctrine*, cit., p. 167.

94 «On the whole the most incisive and perceptive criticism of the legal science comes from Italian scholars themselves, and since the fall of fascism a number of forces have been at work which indicate that Italian legal thought is taking new directions. To some contemporary Italian jurists the traditional doctrine represents the forces of reaction standing in the way of needed legal reforms. Other see it as a useful movement that has spent itself, and think that the time has come to move on to the next productive stage in

the development of Italian legal sciences [...]» (*The Italian Style: Doctrine*, cit., p. 195).

95 See above, nt. 6.

La chimera *Antifa-Block*. Alla ricerca della forma di governo per una "Weimar migliore" nella Zona di Occupazione Sovietica*

RONALD CAR

1. *Introduzione*

"Bonn non è Weimar": con tale motto fu riassunto il percorso di edificazione della Repubblica Federale Tedesca in mezzo alle rovine del nazismo[1]. In realtà il dopoguerra non fu una "ora zero" come si sosteneva, né nella zona ovest, né in quella est. Il lascito di Weimar vi si inseriva in modo selettivo, nella misura in cui corrispondeva ai dettami del nuovo ordine che si andava costruendo. Ad essi dovevano corrispondere il concetto di democrazia, il sistema dei valori costituzionalmente garantiti e la conseguente intelaiatura istituzionale[2]. Come afferma Heinrich A. Winkler, «i padri costituenti di Bonn avevano raramente citato Schmitt e tuttavia egli era perennemente presente, ma a rovescio»[3]: rappresentanza al posto del plebiscito, normativismo al posto del decisionismo, Corte costituzionale al posto del Presidente della Repubblica quale "difensore della costituzione". All'indomani della promulgazione della Legge fondamentale della RFT nel 1949, Werner Weber, allievo di Carl Schmitt, riconosceva in essa una evidente fuga dall'elemento democratico-plebiscitario di Weimar. La nuova costituzione a suo dire era priva di legittimazione democratica: essa era un diritto dei giuristi (*Juristengesetz*), non il diritto del popolo (*Volksgesetz*) e fondava uno Stato giurisdizionale che si appellava in modo del tutto indebito alla autorità del popolo[4].

Mentre sono abbastanza ben studiati gli effetti degli insegnamenti di Weimar sulla formazione della Germania occidentale[5], lo stesso non si può dire per la Zona d'Occupazione Sovietica (SBZ - *Sowjetische Besatzungszone*). Eppure, per i contemporanei fu Berlino – nonostante le devastazioni e la divisione in zone d'occupazione – il cuore politico e culturale di un paese di cui si attendeva una veloce riunificazione. Di conseguenza fu lì che i rappresentanti delle forze politiche eredi di quelle di Weimar discussero del futuro assetto istituzionale dell'intera nazione. Tali dibattiti

Quelle: Deutsche Fotothek

Riunione del Antifa-Block a Berlino 1° agosto 1945

sono finora rimasti usualmente negletti dalla maggior parte della storiografia che, con uno sguardo *ex post*, tende a screditarli come mero preludio alla dittatura comunista avviata nel 1948. Tuttavia, l'involuzione autoritaria del sistema politico non era predeterminata; dopo la dittatura hitleriana erano ben pochi coloro che si auguravano l'avvio di una seconda dittatura. La via democratica, per quanto ad uno sguardo *a posteriori* apparisse predestinata al fallimento a causa della occupazione sovietica, era condivisa con toccante fervore da molti esponenti di tutte le forze politiche, comunisti inclusi.

Anche il contesto storico, usualmente descritto come del tutto avverso alle speranze democratiche, va rivalutato con maggiore attenzione. Come aveva sintetizzato uno dei più affermati studiosi della Germania comunista, Hermann Weber, «il potere illimitato dell'Amministrazione Militare Sovietica (SMAD) nella SBZ indica che non si può parlare di una "preistoria democratica"» della RDT; ciò non di meno in quel periodo vi furono dei «segni di democrazia»[6]. «Tendenze democratiche», «libertà nella cultura e libertà di stampa, pluralismo nei partiti politici e nella società», precisa Weber, «furono tollerati anche dalle forze di occupazione sovietiche», col risultato che «dal 1945 al 1947 le strutture staliniste e i tentativi democratici esistevano uni accanto agli altri». Dopo gli anni di orrore nazista, antifascisti di diversi schieramenti politici erano accomunati nel sincero intento di «erigere una "Germania migliore" proprio nella SBZ»[7]. Questi sforzi e lo spirito di collaborazione tra partiti naufragarono però con «l'introduzione dello sta-

linismo nel 1948/49»[8]. Quanto all'unione forzata della SPD-est e KPD nella SED, come sottolinea Weber, è errato ricondurre la sua nascita entro un piano prestabilito di assorbimento dei partiti socialdemocratici nei paesi sotto il controllo sovietico. In primo luogo perché nel 1946 sia il PCUS, sia la KPD ritenevano che non vi fossero ancora le condizioni sociali per esercitare il "ruolo guida". In secondo luogo, perché in Ungheria, Cecoslovacchia e Polonia ciò è avvenuto due anni più tardi (tra giugno e dicembre 1948) applicando gli "insegnamenti" del caso tedesco[9].

Questa preistoria quasi-democratica è stata di regola oggetto di studi concentrati più sul suo graduale soffocamento che sul periodo in sé[10]. Lo scopo della presente indagine è inverso: l'ideazione e il ruolo di una istituzione governativa inedita – il "Fronte unitario dei partiti antifascisti-democratici", chiamato usualmente *Antifa-Block* – nel triennio 1945/1948 saranno trattati dal punto di vista dei suoi protagonisti animati dalla speranza di erigere su di esso una struttura costituzionale democratica per una "Germania migliore", intesa come una "Weimar migliore". Come avviene usualmente nel momento della ideazione di un nuovo quadro istituzionale, lo sguardo degli esponenti politici era rivolto all'indietro, vale a dire alle crisi istituzionali degli anni Venti, di cui cercavano di evitare gli errori.

Imparare da Weimar significava fare diversamente da Weimar, tanto nelle zone occidentali, quanto in quella orientale. Qui però, si intendeva ripartire da Weimar valorizzando la sua forte impronta democratico-popolare, cercando anzi di rafforzarla correggendo il disegno istituzionale weimariano in direzione contraria a quella della Zona Ovest. Non si ommettevano le voci di quanti come Carl Schmitt da destra e Hermann Heller da sinistra avevano criticato negli anni Venti il tentativo di placare il conflitto sociale celandolo sotto il manto delle grandi coalizioni parlamentari[11]. Piuttosto, si prese atto che le coalizioni non avevano mitigato la lotta tra forze "marxiste" e "borghesi", ma che ebbero come esito l'impotenza del *Reichstag*, il discredito della democrazia parlamentare e l'avvio della dittatura presidenziale. Per evitare il ripetersi di tali dinamiche, nel dopoguerra si tentò di sviluppare una istituzione in grado di superare le fragilità e le disfunzioni dei governi di coalizione.

L'intento originario dell'*Antifa-Block* va vagliato quindi dal punto di vista di quanti nel 1945 volevano costringere i partiti che esprimevano interessi sociali contrastanti a trovare una sintesi, al fine di adeguare la democrazia parlamentare alle contraddizioni della società di classe. In nome del interesse comune si era deciso di vincolare il processo decisionale alla regola dell'unanimità e di negare ai partiti il diritto di uscire dal governo e presentarsi all'opinione pubblica come forza di opposizione. L'accettazione di questa seria limitazione della libertà di manovra dei partiti testimoniava la difficoltà a distinguere tra opposizione legittima e ostruzionismo guidato da interessi di parte. La costrizione alla collaborazione "costruttiva" tra i partiti dell'*Antifa-Block* rivelava il timore di ricadere nello "Stato dei partiti" (*Parteienstaat*) di Weimar, raffigurato come sistema partitico destinato all'egoismo autodistruttivo dalla "legge ferrea della oligarchia" formulata da Robert Michels[12].

Oltre a testimoniare l'importanza dell'esperienza weimariana, l'*Antifa-Block* era pensato anche per rendere possibili i sviluppi democratici nel contesto dell'oc-

cupazione sovietica. La sostituzione del principio maggioritario con l'unanimità e l'obbligo per tutti i partiti a partecipare alle responsabilità governative serviva ad includere il Partito Comunista nell'area di governo ed evitare il formarsi di una coalizione anticomunista tra gli altri partiti. Data la debolezza elettorale della KPD, i promotori della "via democratica al socialismo" erano consapevoli che le modalità tradizionali di formazione dei governi parlamentari avrebbero escluso i comunisti dal potere. Tale esito non solo era inaccettabile per i sovietici, ma avrebbe anche ridato forza al cosiddetto "settarismo", ossia al (auto-) isolamento e alle tendenze putschiste nella KPD, come era già avvenuto negli anni Venti.

Agli occhi dei politici berlinesi l'istituzione governativa ispirata al *Blocksystem* appariva pertanto come la chiave di volta per ideare una costituzione democratica per la Germania, la cui riunificazione doveva seguire i termini del compromesso raggiunto tra l'Unione Sovietica e le potenze occidentali alla conferenza di Potsdam. Le speranze democratiche dipendevano quindi dalle potenzialità istituzionali dell'*Antifa-Block* a favorire la collaborazione efficace tra i comunisti e gli altri partiti nella zona sovietica. Una prima bozza costituzionale redatta a Berlino Est nel 1946 non includeva ancora il *Block* come regola per la formazione dei governi; essa fu inserita nella versione finale adottata dalla Commissione costituzionale nel 1948, seguendo – seppure non in modo compiuto – l'elaborazione teorica proposta dal costituzionalista Alfons Steiniger nel saggio *Blocksystem* pubblicato nell'ottobre 1947[13].

Tuttavia, già dall'inizio del 1948, con i lavori sulla costituzione ancora in corso, i protagonisti di primo piano come Otto Grotewohl (vicepresidente del Partito di Unità Socialista – SED, e presidente della Commissione costituzionale) si rendevano conto che gli spazi per soluzioni ispirate al compromesso di Potsdam erano compromessi. La definitiva rottura dei rapporti tra i ministri degli Affari esteri delle cinque Potenze fu sancita alla conferenza di Londra il 15 dicembre 1947[14]. Sul piano interno l'avvio della Guerra Fredda permise alla corrente stalinista guidata da Walter Ulbricht di conquistare il potere nella Segreteria centrale della SED. Da quel momento la SED smise di osservare le regole della collaborazione paritaria nell'*Antifa-Block*; se la principale regola politica adottata sia a Bonn, sia a Berlino Est era «meglio tutto in mezza Germania che metà nell'intera Germania»[15], le regole istituzionali del *Block* dovevano essere stravolte di conseguenza. Invece di impedire il riformarsi dello Stato dei partiti (*Parteienstaat*), esso fu strumentalizzato dal partito-Stato (*Staatspartei*) per monopolizzare il potere in modo apparentemente democratico.

Dal momento della nascita della RDT fino alla sua fine, il *Block*, rinominato Fronte nazionale (*Nationale Front des demokratischen Deutschland*), rimase lo strumento istituzionale usato per controllare i settori della società che si richiamavano ai sopravvissuti partiti "borghesi" – le ormai screditate *Blockparteien*. Medesimo destino ebbe anche la carta costituzionale ideata sui presupposti del *Blocksystem*: essa fu riutilizzata per conferire legittimità alla fondazione dello Stato tedesco-orientale il 7 ottobre 1949. Nota come "costituzione borghese", fungerà da mera copertura alla dittatura del partito unico fino alla sua sostituzione con una più consona "costituzione socialista" nel 1968.

Non sorprende che i costituzionalisti delle zone occidentali invitati tra il 1946 e 1948 ad esprimere il loro parere furono scettici nei confronti del *Blocksystem*. I più prestigiosi tra di essi, Gustav Radbruch, Ulrich Scheuner e Hans Peters[16], incentrarono le obiezioni sulla supremazia del legislativo e la conseguente sottomissione del giudiziario che giudicavano pericolosa per la democrazia. Inoltre, fu rilevato che l'obbligo di tutti i partiti di partecipare al governo si traduceva nell'impossibilità di profilarsi di fronte all'opinione pubblica come una forza di opposizione legalmente riconosciuta.

In realtà, tali obiezioni, benché fondate, non coglievano il problema alla radice, poiché la dittatura del partito unico non sarà costruita sfruttando gli espedienti inseriti nei meccanismi costituzionali del *Blocksystem*. Piuttosto, a soli 10 giorni dalla sua promulgazione la costituzione formale sarà subordinata nella sua interezza – in nome della superiore legittimità dell'ideologia leninista – da una "costituzione ombra". Questa vera "costituzione politica" della RDT era formata da un insieme sistemico di 11 "linee guida" diramate senza troppo clamore il 17 ottobre 1949 dalla Segreteria ristretta del *Politbüro* della SED guidata da Ulbricht. La loro adozione è stata a ragione giudicata un «colpo di Stato sotto ogni aspetto»[17]. In pieno contrasto con il dettato costituzionale esse sottomettevano ad Ulbricht tutte le attività e le decisioni «d'importanza» della Camera e del governo[18].

Al di là del pessimo esito complessivo della "via democratica al socialismo", rimane aperta la questione delle potenzialità dell'istituto *Antifa-Block* in sé, a cui la presente ricostruzione cercherà di fornire le risposte. In particolare si proverà a valutare se e in che misura partiti divisi da interessi sociali contrapposti erano in grado di coniugare il pluralismo politico e una collaborazione unanime. La denuncia di ogni opposizione in nome della "democrazia armata" poteva essere una risposta valida alla crisi del parlamentarismo di Weimar? Ed infine, le (relativamente) libere elezioni locali e regionali, svolte nella SBZ nel settembre e ottobre 1946, avevano dato prova che le regole del *Blocksystem* potevano contenere il conflitto politico che accompagna le procedure democratiche di voto?

2. *KPD e la "Via tedesca al socialismo"*

Discutere dell'eredità di Weimar durante gli anni della dittatura comportava per i comunisti l'obbligo di fornire delle risposte non evasive al difficile tema delle responsabilità per l'ascesa del nazismo, visto il loro atteggiamento nei confronti della SPD e della democrazia parlamentare. Una volta sconfitto il nazismo, la democrazia tedesca doveva rinascere ripartendo da Weimar (come proponeva la SPD in esilio) o contro Weimar (come sosteneva la KPD fino al 1933)? La questione era stata affrontata a più riprese dalla direzione del partito esiliata a Mosca, che aveva dato vita al Comitato Nazionale "Germania libera"[19] con a capo Wilhelm Pieck, Walter Ulbricht e Anton Ackermann. Quest'ultimo aveva elaborato già nel 1937 in Spagna una revisione delle posizioni della KPD nei confronti del costituzionalismo democratico, ispirata alla linea del fronte popolare. A tale scopo, egli aveva redatto una critica della costituzione di Weimar in cinque punti, incentrata sulla mancata democratizzazione dell'apparato

amministrativo dopo la caduta dell'Impero guglielmino[20].

Ackermann ribadì tale posizione nell'"Appello al popolo tedesco" del Comitato Centrale della KPD durante le battaglie cruciali sul fronte orientale in aprile e dicembre 1942: dopo la vittoria, i comunisti avrebbero accettato le regole dello stato costituzionale democratico, ossia il principio di maggioranza e lo stato di diritto. La condizione era che si permettesse al governo provvisorio di attuare le misure atte a rovesciare i rapporti di potere nella società, come già avevano tentato di fare i socialdemocratici di sinistra della USPD tramite il Consiglio dei Commissari del Popolo (*Rat der Volksbeauftragten*) nel novembre 1918[21].

Il vertice moscovita pubblicò nel dicembre 1944 il programma d'azione della KPD per la Germania post-nazista ricorrendo alla formula della "democrazia armata" coniata da Ernst Fraenkel negli ultimi mesi di Weimar. Secondo l'*Aktionsprogramm des Blocks der kämpferischen Demokratie*[22], l'accettazione della democrazia "borghese" doveva essere preceduta dal superamento delle debolezze di Weimar: alle elezioni libere per l'Assemblea Costituente si sarebbe giunto dopo la fusione di partiti e organizzazioni sociali in un governo unitario di "democrazia armata", antesignano dell'*Antifa-Block*.

Poco più di un mese dopo la sconfitta definitiva del Terzo Reich – il 10 giugno 1945 – con l'ordine n. 2, l'Amministrazione militare sovietica in Germania (SMAD) autorizzò nella zona sovietica e a Berlino la formazione di «partiti antifascisti», come anche di «sindacati liberi e organizzazioni dedite alla realizzazione di interessi e diritti dei lavoratori». L'ordine firmato dal capo dell'amministrazione sovietica Maresciallo Zhukov precisava che gli obiettivi dei partiti antifascisti dovevano essere «il definitivo sradicamento dei residui di fascismo e il rafforzamento delle basi della democrazia e delle libertà borghesi in Germania e lo sviluppo dell'iniziativa e dell'autodeterminazione delle ampie masse della popolazione in tale senso»[23].

Il giorno successivo, Ackermann dovette spiegare nell'appello della KPD l'inatteso invito di Zhukov a ricostituire il pluralismo politico. Esso giungeva infatti del tutto inaspettato sia per gli alleati occidentali, sia per i politici tedeschi, inclusi i militanti comunisti che non si aspettavano il ritorno alla "democrazia formale" che durante gli anni di Weimar avevano combattuto in nome della lotta di classe[24]. Per chiarire la nuova linea, Ackermann ribadì il programma d'azione del "Blocco per la democrazia armata". «Anche l'operaio socialdemocratico ci darebbe oggi ragione», affermava il teorico della KPD nell'"Appello per una Germania antifascista-democratica" del 11 giugno 1945,

> che la peste fascista si è potuta diffondere in Germania solo perché nel 1918 erano rimasti impuniti i criminali di guerra, perché non si è combattuto per una vera democrazia, perché la Repubblica di Weimar aveva garantito gioco libero alla reazione, perché l'odio antisovietico di alcuni capi democratici aveva spianato la via a Hitler e il rifiuto di un fronte unico antifascista aveva paralizzato le forze del popolo. Nessuna ripetizione degli errori del 1918![25]

Alla critica del compromesso di Weimar faceva seguito la frase decisiva, con cui la KPD aderiva al campo del costituzionalismo democratico:

> Noi siamo dell'avviso che sarebbe sbagliato imporre alla Germania il sistema sovietico, poiché tale via non corrisponde alle esigenze attuali di

> sviluppo in Germania. Siamo piuttosto dell'avviso che gli interessi decisivi del popolo tedesco prescrivono nella situazione attuale un'altra via per la Germania, quella dell'edificazione di un regime antifascista democratico, una Repubblica parlamentare-democratica con tutti i diritti e libertà per il popolo[26].

L'appello si chiude con un programma d'azione in dieci punti che «possa fungere da base per la costituzione di un blocco di partiti antifascisti democratici (il partito comunista, il partito socialdemocratico, il partito della *Zentrum* ed altri)»[27]. Il "blocco" delineato nell'appello di Ackermann appare dunque come una riproposizione della coalizione di Weimar, più la KPD, che a differenza del 1919 non si rifiutava di partecipare alle elezioni. Inoltre, mentre le elezioni per la Costituente di Weimar avevano ridotto all'insignificanza i socialdemocratici indipendenti della USPD, nel 1945 la KPD godeva del decisivo appoggio dei sovietici.

Lo stesso 11 giugno 1945, a Berlino si erano riuniti 14 membri della SPD abolita nel giugno 1933, per fondare il Comitato Centrale del rinato partito ed elaborare un appello in risposta alla KPD. Alla redazione avevano partecipato i futuri capi della SPD orientale: Otto Grotewohl, Erich Gniffke e Max Fechner (significativamente Grotewohl e Fechner avevano partecipato alla nascita della Repubblica di Weimar da membri della USPD).

Il direttivo della SPD propose una «unità organizzativa della classe operaia», ossia unificazione con la KPD. Oltre ad essere un'esigenza strategica, l'unificazione rappresentava «una riparazione morale per gli errori politici del passato»[28]. Come è stato osservato, la proposta di fusione si fondava sull'idea antistorica di ritorno alle origini del movimento operaio tedesco. Il partito unito era inteso – in particolare da Grotewohl – come una «rinnovata e più radicale SPD, in grado di assorbire tutte le forze e forme di espressione della classe operaia, come il potente partito di Bebel prima del 1914». L'auspicata ricucitura dello scisma «significava il ritorno dei comunisti – che egli privatamente chiamava "i rinnegati" – nella grande casa rinnovata della socialdemocrazia»[29]. L'appello della SPD era una mano tesa alla "via tedesca al socialismo" di Ackermann:

> Accogliamo nel modo più caloroso l'appello del Comitato Centrale della KPD dell'11 giugno 1945, che giustamente afferma che la via per la ricostruzione della Germania dipende dalle sue esigenze attuali e che gli interessi decisivi del popolo tedesco richiedono nell'odierna situazione l'istituzione di un regime antifascista democratico e di una Repubblica democratico-parlamentare con tutti i diritti democratici e libertà per il popolo[30].

La consonanza tra i due partiti sul piano costituzionale è riassunta nella parola d'ordine della neonata SPD: «democrazia nello Stato e nelle amministrazioni locali, socialismo nell'economia e nella società!»[31]. Benché a differenza di quello comunista l'appello socialdemocratico non adoperasse espressamente la formula della "democrazia armata", il suo significato è esplicitato in termini chiari: «In una Repubblica antifascista-democratica le libertà democratiche possono essere accordate solo a coloro che le riconoscono appieno. Le libertà democratiche sono però negate a coloro che le intendono utilizzare solo per oltraggiare e distruggere la democrazia»[32]. Il programma d'azione afferma però anche l'intento di portare a compimento lo Stato di diritto sociale fondato sugli istituti di de-

mocrazia economica, che la USPD non aveva avuto la forza di realizzare all'Assemblea di Weimar[33].

La vicinanza delle posizioni programmatiche esposte nei rispettivi appelli non poteva però cancellare la differenza fondamentale nel rapporto dei due partiti con l'occupante sovietico. Nel vertice della KPD persisteva una profonda ambiguità tra la "via tedesca" di Ackermann a quella di Walter Ulbricht, che, da persona di fiducia di Stalin, doveva garantire l'allineamento del partito alle richieste dei sovietici[34]. Per l'SPD invece, a causa del sostegno incondizionato dei comunisti nei confronti dei sovietici (anche di fronte agli attacchi alla popolazione civile e alle requisizioni), l'"unità organizzativa" con la KPD stava velocemente perdendo attrattiva. Per loro, come anche per i partiti "borghesi" CDUD (*Christlich-Demokratische Union Deutschlands*) e LDPD (*Liberal-Demokratische Partei Deutschlands*) che si sarebbero costituiti nelle settimane successive, era di importanza fondamentale «tenere una finestra aperta verso l'occidente per evitare l'accerchiamento sovietico»[35]. Agli occhi di Grotewohl, del cristiano-democratico Kaiser e del liberale Külz, la priorità era l'abbattimento delle barriere tra le zone e la riunificazione dello Stato tedesco. La nuova linea ideata da Grotewohl era di porre la SPD come «terza forza tra la KPD e i partiti borghesi, garante di una Germania unificata che fungesse da bilico tra Est e Ovest»[36].

Accomunati dalle sofferenze patite tra le rovine di Berlino e con pochi contatti con il resto della Germania, i capi dei nuovi partiti "borghesi" non si contrapponevano frontalmente ai partiti marxisti. Come testimonia l'appello del 26 giugno 1945, la CDUD invocava sul piano costituzionale uno «stato veramente democratico» che riconoscesse la proprietà privata, ma entro l'ottica della responsabilità sociale e che avviasse la ricostruzione introducendo la pianificazione economica. La pesante responsabilità che il capitale monopolistico legato alla siderurgia ebbe nell'ascesa del nazismo è riconosciuta anche dalla CDUD, al punto da affermare che

> è essenziale assicurare per sempre il potere statale dalle influenze illegittimi provenienti dagli agglomerati di potere economico, e che le risorse minerarie passino nel dominio statale. L'industria mineraria e altre ditte inclini al monopolio che hanno un ruolo chiave nella nostra vita economica devono essere sottoposte in modo chiaro al potere statale[37].

Benché in modo assai poco esplicito, l'appello invoca anche «un coinvolgimento dei latifondi», ossia la loro nazionalizzazione, affinché si «possa assicurare al maggior numero possibile di tedeschi l'accesso ad una propria zolla e ad un lavoro autonomo».

L'inviolabilità della proprietà privata e l'economia di mercato erano invece difesi appieno nell'appello della LDPD del 5 luglio 1945. Tuttavia, anch'esso ammette la possibilità di sottomettere al controllo pubblico le «imprese coinvolte» e le «eccessivamente grandi aziende agricole» (vale a dire le due categorie menzionate ai punti 6 e 7 del proclama della KPD: le «proprietà dei bonzi nazisti e dei criminali di guerra» e i «latifondi degli *Junker*»[38]), a condizione che esse «risultino adatte e pronte e nell'interesse del bene comune preminente»[39]. Il futuro ordine costituzionale delineato dalla LDPD rientra nel canone classico dello Stato liberale e si sostiene sull'autorità del ceto giuridico tradizionale. Al punto 14 del loro programma si specifica, difatti, il bisogno

di «ripristinare l'indipendenza e l'efficienza del ceto professionale di funzionari pubblici». Al punto 15 si aggiunge che «un ceto giuridico indipendente è l'organo volto a custodire l'ordine legale»[40]. Per ultimo, il punto 16 ribadisce il ruolo fondamentale dei meccanismi di rappresentanza della volontà popolare (a discapito di quelli plebiscitari) e dei corpi intermedi nella vita democratica[41]. Nelle istruzioni riservate per la formazione delle sezioni locali, emesse il 24 luglio 1945, il vertice della LDPD precisava che il nuovo partito cercava i propri aderenti

> alla destra della SPD, vale a dire nei settori della vecchia *Deutsche Demokratische Partei*, *Deutsche Volkspartei*, *Deutschnationale Volkspartei* e *Wirtschaftspartei*. […] La LDP e i restanti tre partiti hanno formato a Berlino un blocco. […] Il blocco costituisce un sostituto per il mancante Parlamento. Il rapporto con gli altri partiti, almeno al vertice, è del tutto buono. Non siamo lì per combatterci tra noi, bensì tutti i partiti vogliono lavorare per la ricostruzione della Germania. Su ciò che c'è da introdurre in parte abbiamo opinioni diverse, su altri aspetti riusciremo però ad intenderci[42].

3. Antifa-Block: *istituzione permanente o coalizione di emergenza nazionale?*

Il 14 luglio 1945, su iniziativa della KPD i quattro partiti ammessi dall'Amministrazione Militare Sovietica avevano formato il Fronte unitario dei partiti antifascisti-democratici, o *Antifa-Block*[43]. Il comitato del "blocco" era composto da cinque rappresentanti di vertice di ciascun partito, votati alla ricerca della decisione unanime giacché ogni partito era dotato del potere di veto. I membri del comitato fondativo erano: per KPD Wilhelm Pieck, Walter Ulbricht, Franz Dahlem, Anton Ackermann e Otto Winzer; per SPD Erich Gniffke, Otto Grotewohl, Gustav Dahrendorf, Helmut Lehmann e Otto Meier; per CDUD Andreas Hermes, Walter Schreiber, Jakob Kaiser, Theodor Steltzer, Ernst Lemmer; per LDPD Waldemar Koch, Eugen Schiffer, Wilhelm Külz e Arthur Lieutenant.

Il comunicato fondativo invocava l'obiettivo comune di «salvare la nazione», il che era possibile «solo operando una fondamentale svolta nella vita e nel pensiero del nostro popolo» ossia «creando un ordine antifascista-democratico»[44]. Come emerge dal protocollo della seduta redatto dal socialdemocratico Gniffke, il presidente della CDU Andreas Hermes si era opposto in nome del suo partito all'adozione del termine *Block* poiché essa «indica un legame troppo stretto, che contraddice l'intenzione di costruire una democrazia parlamentare»[45]. Il nome adottato fu "fronte unitario" (*Einheitsfront der antifaschistisch-demokratischen Parteien*), ma nella prassi si sarebbe mantenuta l'espressione *Block*.

L'argomento di Hermes non contraddiceva la volontà di lavorare in comune, ma solo finché perduravano le condizioni emergenziali del dopoguerra. La sostituzione della competizione tra partiti con il principio comunitario fu da lui accettata solo come eccezione alla norma. Tale approccio rivelava il perdurante influsso delle convinzioni diffuse all'epoca di Weimar, secondo le quali lo stato d'emergenza sospendeva (ma senza abolire) quanto Max Weber definì la "razionalità di mercato" della moderna società individualistica, per riattivare il mitizzato «agire in comunità»[46]. Però, a differenza di quanto auspicavano i promotori comunisti del *Blocksystem*,

per la CDU l'«affidamento reciproco in caso di necessità»[47] non doveva pregiudicare, ma anzi confermare l'esistenza di rispettive sfere di autonomia e di differenze di classe.

Difatti, il vertice della CDU spronava i propri membri di collaborare con gli altri partiti, come risulta dalla lettera circolare emanata dal suo Ufficio centrale il 5 luglio 1945[48] e dagli appunti del presidente Hermes alla data del 12 agosto 1945, secondo cui «nella convinzione che solo il fronte unico sia in grado di garantire l'uscita dalle attuali difficoltà partecipiamo al lavoro comune dei partiti antifascisti-democratici e siamo decisi di impegnarci con tutte le forze al suo rafforzamento e approfondimento. Non divisione, bensì raccolta può e deve essere il nostro obiettivo»[49]. Nel suo rapporto alla CDU sull'andamento della seduta fondativa del "fronte unitario", Hermes notava come «i colloqui avevano a volte assunto una forma concitata, ma avevano condotto ad un risultato positivo. L'importante è che si è evitata la formazione di un blocco, che avrebbe ostacolato la libertà di movimento del partito»[50]. La denominazione adottata – fronte unitario – indicava a suo dire che la normale competizione tra partiti si sospendeva per un periodo limitato. Superato lo stato di eccezione si sarebbe dovuto rientrare nella normalità delle dinamiche parlamentari, come si affermava anche nell'editoriale della «Neue Zeit», organo ufficiale della CDU:

> Bisogna attribuire un significato del tutto particolare alla decisione riguardante il trattamento paritario di tutti i partiti del fronte unitario […] La parità decretata può apparire a qualcuno come un espediente. Tale parità in uno Stato democratico diventerà superflua quando sarà possibile determinare in modo inequivocabile la volontà del popolo tramite le elezioni ed essa sarà pienamente realizzata[51].

Nel corso della seduta fondativa, Wilhelm Pieck aveva ribadito in nome della KPD alle obiezioni di Hermes con un argomento radicato nella interpretazione dell'esperienza di Weimar che stava acquistando una posizione dominante, ossia che la stessa democrazia parlamentare non poteva nascere senza un lavoro preparatorio, le cui difficoltà potevano essere sostenute solo con un forte impegno comune[52]. Külz, esponente del LDP suffragava la richiesta di Hermes sostenendo che il termine fronte unitario era preferibile a blocco proprio per il fatto che l'obiettivo finale era la democrazia parlamentare. A detta di Külz, che era stato deputato all'Assemblea costituente di Weimar nelle fila della sinistra liberale (*Deutsche Demokratische Partei* – DDP), dopo il 1918

> Non vi fu nessun blocco unitario e nessun fronte unitario di partiti democratici. Purtroppo non vi fu neanche una socialdemocrazia unitaria. In quei momenti turbolenti, la USPD aveva fatto notare – a mio avviso giustamente – che per formare una democrazia bisognava prima formare dei democratici. Essi avevano richiesto che si attendesse con la convocazione dell'Assemblea costituente fintanto che non fossero superati i travagli del dopoguerra e che al popolo tedesco fosse reso comprensibile il concetto di una repubblica democratica[53].

Alla rilettura degli eventi che avevano pregiudicato lo sviluppo della democrazia di Weimar si aggiunse anche il socialdemocratico Otto Meier, all'epoca membro della USPD:

> Le posizioni chiave nell'economia e nell'amministrazione erano rimaste nelle mani della reazione, che si era riunita nei cosiddetti partiti popolari. Dopo aver depredato il popolo durante la guerra e l'epoca dell'inflazione e riempito i

Sede della SPD a Berlino Est durante le elezioni per l'Assemblea di Berlino, ottobre 1946

loro fondi propagandistici, lì si era sviluppato assieme ai nazisti un fronte contro la democrazia, il "fronte di Harzburg" di infausta memoria. Noi che avevamo assistito a questi sviluppi, abbiamo il dovere di trarne l'insegnamento[54].

Le parole di Meier, che premettevano alla realizzazione della democrazia parlamentare una profonda ristrutturazione dei rapporti sociali, furono accolte con riserva dagli esponenti della CDU. Andreas Hermes si dichiarò a favore di una trasformazione strutturale, ma non per una espropriazione senza risarcimento e solo dopo la verifica di ogni singolo caso. Il liberale Eugen Schiffer, che all'Assemblea costituente di Weimar fu capo della frazione della DDP, sostenne la posizione di Hermes aggiungendo che «la certezza del diritto non è solo una questione giuridica, ma è una esigenza vitale in una moderna democrazia parlamentare»; la necessità di espropriazioni può essere determinata solo da «giudici autonomi interiormente ed esteriormente»[55].

Il "fronte unitario" nasceva così su uno stretto crinale: da un lato l'accettazione senza riserve delle regole parlamentari da parte di tutte le forze politiche. In particolare per gli esponenti della SPD, la speranza di non ripetere gli errori della prima Repubblica si fondava sull'apertura di credito nei confronti della linea democratica della KPD. Dall'altro lato però, il fatto che il programma comune del Fronte fosse legittimato dal concetto di emergenza nazionale non faceva che spostare il problema sull'interpretazione delle cause dell'emergenza. Se si seguiva l'interpretazione degli esponenti non solo comunisti, ma anche socialdemocratici, che riconducevano le cause del fascismo in ultima analisi alla struttura sociale della

Germania di Weimar, ne conseguiva che gli obiettivi delle politiche emergenziali del blocco antifascista sarebbero stati raggiunti solo con una complessiva ristrutturazione della società in senso socialista.

Come forma di governo, l'*Antifa-Block* celava pertanto una contraddizione interna che favoriva tendenze antidemocratiche. La collaborazione interpartitica vincolata all'unanimità poteva funzionare solo fintanto che si accantonavano le questioni di classe, ma al contempo la legittimazione stessa di tale lavoro in comune aveva come compito ultimo proprio la soluzione del conflitto di classe. La questione di classe, e dunque di potere, minacciava di condurre l'*Antifa-Block* o verso lo stallo, o verso la sovversione delle sue regole da parte dell'autorità sovietica e dei comunisti.

Oltre al rapporto tra parlamentarismo e conflitto sociale, la pesante eredità di Weimar richiamava a mente anche il concetto di coalizione, associato a pratiche di ostruzionismo e di veti incrociati dei partiti e all'incapacità dei governi di promuovere un'energica politica a lungo termine. L'intenzione di sviluppare una forma di governo in grado di superare tali disfunzionalità emerge nel comunicato del Fronte unitario del 12 agosto 1945, dedicato alle decisioni adottate dalle potenze vincitrici alla conferenza di Potsdam. La soddisfazione per la scelta dagli alleati di riavviare la vita democratica in tutta la Germania[56] viene accompagnata da un rinnovato impegno per l'accantonamento della competizione tra i partiti:

> In tale unità risiede la garanzia che il nazismo sarà estirpato assieme a tutte le sue radici, che saranno puniti gli inauditi crimini contro il nostro e gli altri popoli e che la Germania sarà condotta verso il rinnovamento democratico. Il fronte unitario eviterà l'errore che fu compiuto dopo il crollo del 1918. All'epoca la frantumazione e le divisioni tra le forze democratiche avevano permesso ai reazionari di riunire le forze e di ricostruire il loro apparato di potere. Tale apparato di potere fu usato da Hitler per condurre una guerra criminale, che ha trascinato il popolo tedesco nel più grande tracollo della sua storia[57].

Secondo il giudizio storico condiviso da tutti i partiti del blocco, fu l'inefficacia delle coalizioni di Weimar ad aprire la strada al potere incontrollato dell'amministrazione statale negli anni dei governi presidenziali tra il 1930 e 1933; questo, a sua volta, aveva agevolato l'affermarsi della dittatura nazista. Tale interpretazione del passato dava peso all'intenzione del vertice della KPD di trasformare l'*Antifa-Block* da eccezione in regola, come emerge dall'auspicio di Wilhelm Pieck del 1 novembre 1945, di farne «un'alleanza continuativa, se non duratura»[58].

Il costituzionalista e membro del SED Alfons Steiniger fornirà nel 1947 l'elaborazione teorica della differenza tra un governo di coalizione e il *Block*. Quest'ultimo secondo Steiniger promuove

> la regola cardine della solidarietà. Se la regola nello Stato bipartitico è: la maggioranza ha sempre ragione; se nel sistema proporzionale alla regola si può a malapena dare un nome (perché secondo l'esperienza il programma della coalizione è in ogni caso talmente disparato che questa si dissolve prima di poter agire sul meccanismo amministrativo in modo integrato), nello Stato determinato dal *Block*, nella repubblica popolare, la regola è: l'insieme ha sempre ragione[59].

"L'insieme" del blocco risolve per Steiniger non solo i limiti tecnici del governo di coalizione, ma soprattutto la contraddizione di fondo, tra la forza unitaria della volontà popolare e quella divisiva degli interessi socio-economici:

> Più è disunita la struttura sociale, più è necessaria un'organizzazione politica del popolo in cui tutti i gruppi minoritari democratici collaborano in modo responsabile nel governo [...] Dal punto di vista pratico si può obiettare che le coalizioni contro natura non reggono. Per un blocco in cui si è costituzionalmente obbligati a partecipare, verso cui non si può minacciare l'uscita dal governo, ciò non vale [...] giacché si è costretti a trovare un governo comune che unisca l'amico e il nemico nel lavoro collettivo, su cui uno avrà più da dire e l'altro meno, ma nessuno può negare la sua collaborazione[60].

Vi è indubbiamente stata, da parte delle forze d'occupazione sovietiche e della KPD, una forte pressione sui partiti borghesi affinché aderissero alla regola della "solidarietà obbligatoria". Ad esempio, il 4 luglio 1945, in occasione delle trattative tra la KPD, la SPD e la LDPD per la creazione del comitato unitario per la città di Berlino, i liberali furono obbligati ad allinearsi alle posizioni della sinistra. Concretamente, dovettero inserire nell'appello fondativo della LDPD un chiaro riferimento alla «corresponsabilità dell'intero popolo tedesco per la seconda guerra mondiale e al conseguente obbligo di risarcimento». Inoltre, ai liberali è stato intimato che la loro posizione all'interno del blocco sarebbe stata compromessa se avessero continuato a collaborare con «l'ambiente reazionario composto dai vecchi membri del partito popolare (DVP) e nazional-popolare (DNVP)»[61].

Le pressioni della KPD provocarono presto la reazione del cristiano-democratico Andreas Hermes. Nell'ottobre 1945 egli dichiarò durante la seduta del Fronte che «attualmente il Fronte unitario non rispecchia effettivamente la situazione politica e le opinioni di tutti i partiti, bensì esprime piuttosto il predominio di determinati indirizzi»[62]. Per tutta risposta, i sovietici imposero nel dicembre 1945 la sua destituzione dal vertice della CDUD, in base al punto 4 dell'ordine n. 2 proclamato da Zhukov, che poneva «sotto il controllo dell'Amministrazione Militare Sovietica tutte le organizzazioni ai punti 1 e 2»[63] (ossia partiti e sindacati). Come aveva riassunto il primo presidente della LDPD Waldemar Koch nella dichiarazione per la stampa del 1° novembre 1945,

> il lavoro comune nel blocco sarà alla lunga possibile solo se ciascun partito cercherà di comprendere il punto di vista degli altri, invece di perseverare in una politica di classe. [...] Nella riforma agraria si è giunti ad un'intesa apparente per via di una risoluzione comune, che fu possibile solo tralasciando dalla risoluzione i punti essenziali, nei quali divergevano le opinioni dei partiti (ad esempio, la confisca senza compensazione dei possessori delle grandi tenute e dei latifondisti, contro i quali non vi era alcuna accusa, né sul piano politico, né umano)[64].

Complessivamente però, come emerge dai diari del leader liberale Wilhelm Külz, i partiti borghesi avevano buoni motivi per entrare nel blocco e il loro desiderio di collaborare con i partiti marxisti per ricostruire un paese materialmente e moralmente in rovine non era solo frutto di costrizione[65]. La piattaforma del Fronte unitario concordata il 14 luglio del 1945 comprendeva la maggior parte delle richieste avanzate dalle CDUD e LDPD e le modalità di lavoro nel blocco promuovevano il mutuo riconoscimento tra i partiti e la cultura del compromesso. Dal punto di vista dei comunisti, tale soluzione li tranquillizzava contro il riformarsi di maggioranze a loro ostili (effettivamente, Jakob Kaiser della CDU aveva proposto all'SPD nel 1945 di formare un unico "partito del lavoro" per isolare i comunisti[66]). Come è stato non a torto

sintetizzato, la struttura istituzionale del blocco conteneva nella sua fase iniziale «un potenziale reale per sviluppare una politica democratica»[67].

4. *Il Partito di Unità Socialista e la democrazia contrattata*

Non vi è alcun dubbio che l'assorbimento della SPD da parte della KPD nell'aprile 1946 fu un duro colpo per la fiducia reciproca che l'Antifa-Block tentava di promuovere. Difatti, benché non tutti nella SPD fossero contrari all'unificazione, a nessuno sfuggì il ruolo determinante delle pressioni sovietiche. Jakob Kaiser, capo della CDU dal dicembre 1945 al dicembre 1947 (quando anch'egli come Hermes fu deposto dai sovietici), e Erich Gniffke, vicepresidente della SPD e poi della SED fino all'autunno 1948 (quando fuggì all'ovest) concordano nel ricondurre il cedimento di Grotewohl all'incontro che ebbe con il maresciallo Zhukov agli inizi di febbraio 1946. Il leader della SPD, sostengono, si sarebbe arreso di fronte ad una combinazione di minacce e di promesse di allontanare Ulbricht dal vertice della KPD[68].

D'altronde, dopo essere stata abbandonata al proprio destino dalla SPD occidentale guidata da Kurt Schumacher, la dirigenza della SPD orientale si trovò di fronte alla scelta se rinunciare del tutto all'attività politica nella zona sovietica o accettare l'unificazione. Non restò quindi che confidare che l'ampio sostegno popolare dell'SPD avrebbe indotto i comunisti a mantenere le promesse di democrazia[69]. Da parte della KPD, Ackermann premetteva la fusione come condizione indispensabile per mantenere aperta la "via democratica al socialismo". La questione «se la classe operaia possa giungere in possesso dell'intero potere politico per via democratico-parlamentare o solo con l'utilizzo della violenza rivoluzionaria», scriveva nel febbraio del 1946, «dipende solo dalla velocità con cui si realizzerà il partito unitario!»[70].

L'atto fondativo del Partito di Unità Socialista (*Sozialistiche Einheitspartei Deutschlands* – SED) del 21 e 22 aprile 1946, riproponeva la legittimazione antifascista che fu già alla base dell'*Antifa-Block*. Lo sguardo continuava ad essere rivolto al passato, verso le cause dell'ascesa del «Hitlerfaschismus». Questi «era lo strumento di dominio dei più rozzi reazionari e della parte imperialista del capitale finanziario, dei padroni dei complessi industriali degli armamenti, delle grandi banche e dei latifondi», giunti al potere «a causa della divisione della classe operaia»[71]. Dato il nesso immediato tra l'ideologia fascista e i potentati economici, l'impegno per una Germania antifascista implicava non solo il ripristino degli istituti parlamentari, ma anche la ristrutturazione radicale della società. Raffigurata come un obbligo morale nei confronti del passato, la trasformazione dei rapporti sociali si sovrapponeva alle condizioni richieste dalla KPD per accettare la via democratica, giacché ambedue presupponevano «l'unità del movimento operaio e il blocco di tutti i partiti antifascisti-democratici»[72].

L'atto fondativo non poteva evitare il nodo dottrinale tra socialdemocrazia e comunismo, ossia la questione di priorità tra il consenso popolare e la lotta di classe. Secondo i termini dell'accordo, la via elettorale era accettata fintanto che i capi della SED consideravano democratico il com-

portamento della loro controparte nella lotta di classe:

> L'odierna situazione particolare in Germania, che si è venuta a creare con la distruzione del reazionario apparato di potere statale e con la costruzione dello stato democratico su nuove basi economiche, include la possibilità di impedire alle forze reazionarie di ostacolare con la violenza e la guerra civile la definitiva liberazione della classe operaia. Il partito dell'unità socialista della Germania ambisce ad una via democratica al socialismo; essa però ricorrerà ai mezzi rivoluzionari, se la classe capitalista abbandonerà il terreno della democrazia[73].

Come nel primo dopoguerra, l'accordo rivela una "democrazia contrattata"[74] con una controparte riluttante. Se nel 1918 la SPD era costretta a contrattare la democrazia con l'esercito imperiale, nel 1946 la SPD orientale fu obbligata a un patto simile con la KPD (e per loro tramite i sovietici). Ernst Thape, uno dei capi della SPD sassone che, dopo essere stato tra i promotori dell'unificazione fu costretto a fuggire all'occidente il 28 novembre 1948, spiegò la scelta del compromesso nei termini dei rapporti di potere effettivo nel partito:

> Mi era chiaro che la potenza occupante avrebbe esercitato tutta la sua influenza per assicurare ai comunisti la guida del nuovo partito. Ma come politico e marxista sapevo che movimenti popolari e correnti di partito non si possono creare a piacimento, nemmeno con l'autorità assoluta di una potenza occupante [...] Poiché i socialdemocratici costituivano più della metà del nuovo partito e fornivano un numero preponderante di funzionari qualificati, la loro affermazione alla testa del partito sarebbe stata solo una questione di tempo. Questo calcolo non si è avverato perché io davo per scontata la democrazia interna, che in realtà non ci fu neanche per un secondo[75].

Per precisare l'affermazione di Thape, va notato che tra 1946 e 1948 la Segreteria centrale della SED fu divisa da un duro conflitto interno tra i sostenitori della via democratica (gli ex socialdemocratici e i comunisti seguaci di Ackermann) e la corrente minoritaria di Ulbricht. Pur di preservare il fragile compromesso che consentiva la cooperazione istituzionale nell'*Antifa-Block*, lo scontro nel partito fu tenuto nascosto a prezzo di sacrificarne la democrazia interna. Quando, ad esempio, alla riunione della Presidenza della SED del 22-23 gennaio 1947 si dovette chiarire il contrasto tra l'identità storica della KPD e la bozza costituzionale ispirata alla "via democratica al socialismo", l'ex socialdemocratico Erich Lübbe denunciò che la Segreteria centrale aveva impostato i lavori in modo da non dare ai membri della Presidenza il tempo per studiare la bozza[76]. Grazie a tali sotterfugi si riuscì a tenere aperto lo spiraglio per un futuro (almeno parzialmente) democratico. Ancora nel luglio 1947, nell'articolo *La nostra via al socialismo*, il vertice della SED poté istruire le sedi locali che la via al socialismo doveva passare per le urne:

> poiché nei nostri principi e obiettivi affermiamo la possibilità di giungere al potere con mezzi democratici miriamo ad una maggioranza elettorale che ci dia una superiorità numerica tale da autorizzarci ad esercitare il potere legalmente e porre mano a provvedimenti che ci condurranno al socialismo. [...] Le condizioni oggettive per la costruzione del socialismo sono date. Ora si devono costruire le condizioni soggettive, vale a dire, le masse devono essere convinte che il socialismo costituisce una necessità pratica e ideale. [...] E questo cambiamento nel pensiero dobbiamo oggi introdurre in tutto il popolo. Questo compito può essere adempiuto solo reclutando da tutti i settori del nostro popolo i nuovi membri per il Partito dell'Unità Socialista e quindi per il socialismo[77].

5. *Il* Blocksystem *alla prova delle urne*

Il banco di prova decisivo per l'*Antifa-Block* furono le elezioni comunali e quelle nei distretti, nei *Länder* e nella città di Berlino del settembre e ottobre 1946. Si rendeva evidente la necessità di escogitare un approccio teorico compiuto per superare la contraddizione tra il principio comunitario che doveva guidare i lavori nel *Block* e quello della competizione tra partiti nella campagna elettorale. Nella circolare inviata ai propri militanti il 5 luglio 1946 la Segreteria Centrale della SED ripropose la usuale strategia di premettere il comune nemico del passato, il nazismo, alle contrapposizioni del presente:

> Dobbiamo evitare l'acuirsi dei contrasti tra i partiti che in generale si possono notare durante una campagna elettorale. Il rapporto della SED verso gli altri partiti sarà determinato anche durante la campagna elettorale dal punto di vista politico che ha condotto alla formazione del blocco antifascista-democratico dopo il crollo del nazismo. Bisogna evitare che una miope politica aggressiva della SED offra un pretesto per eventuali tentativi degli altri partiti di svincolarsi dall'azione comune democratica. Si devono evitare atteggiamenti imprudenti che potrebbero spingere gli altri partiti verso una opposizione nei confronti della SED, piuttosto essi devono essere trattenuti sulla linea della comune responsabilità per l'opera di ricostruzione fatta insieme finora. Le elezioni non devono disperdere i presupposti psicologici per il futuro lavoro in comune nel blocco unitario. È possibile che la CDU e la LDP tentino per ragioni di agitazione politica di accentuare le distanze dalla SED nella propaganda elettorale. Bisogna contrapporsi ad eventuali tentativi di lasciare che la SED sostenga da sola la responsabilità per la ricostruzione, affinché in futuro sia possibile riprendere insieme il lavoro di ricostruzione, assumersi insieme la responsabilità di fronte al popolo e combattere insieme per la democrazia[78].

I sospetti che la CDUD e LDPD avrebbero condotto una campagna «contro il socialismo» compromettendo la collaborazione nell'*Antifa-Block* erano infondati[79]. Sebbene in particolare i liberali avessero rese chiare le loro posizioni in favore della libertà d'impresa e contro le confische della proprietà privata, il programma della LDPD adottato alla prima conferenza del 3-4 febbraio 1946 segnò il loro distacco dalle posizioni del mondo imprenditoriale di Weimar. Il programma si sforzava di conciliare la cultura dell'impresa con la democrazia economica, riconoscendo il ruolo dei consigli d'azienda e dei sindacati. Il punto 5 invocava la «organizzazione democratica della vita aziendale. Il rapporto tra l'imprenditore e il personale non è fondato sul dominio, bensì sulla fiducia tra uomo e uomo. Gli obiettivi dell'impresa si perseguono per via della fiduciosa collaborazione tra i rappresentanti del personale e la direzione». Inoltre il punto 7 riconosceva «i sindacati quali istituti essenziali della vita sociale nella società moderna. [...] La loro opera deve contribuire all'appianamento sociale e al superamento dell'idea della lotta di classe»[80].

Parimenti, benché fosse identificata presso l'opinione pubblica e le autorità sovietiche come l'oppositore più deciso al marxismo, la CDU non poneva in primo piano l'aspetto ideologico. La sua attività era rivolta per lo più alla difesa degli interessi economici del ceto medio. Tranne per la richiesta di reintrodurre l'educazione religiosa nelle scuole, dominavano aspetti pragmatici, come la difesa dei piccoli e medi imprenditori e contadini, o la riattivazione delle pensioni dei dipendenti pubblici del passato regime[81].

Lo scontro ideologico fu però deliberatamente fomentato da Walter Ulbricht. L'articolo *Strategia e tattica della SED*, che egli pubblicò in piena campagna elettorale, mirava chiaramente a suscitare la diffidenza dei partiti borghesi nei confronti della SED e compromettere la regola della collaborazione unanime nell'*Antifa-Block*. «Anche nella SED alcuni compagni dubitano nel successo della politica del blocco», scriveva Ulbricht rivelando lo scontro che dilaniava il partito,

> Questi compagni spesso non capiscono la differenza tra la politica del blocco e una politica di coalizione. Mentre l'essenza della politica di coalizione consiste nel fatto che, in una situazione caratterizzata dall'ininterrotto dominio dei gruppi industriali, delle grandi banche e dei latifondisti, la borghesia sia la forza dominante, laddove i rappresentanti degli operai si trovano più o meno a loro rimorchio, l'essenza della politica del blocco consiste nel comune impegno ad eliminare il potere dei criminali di guerra, dei gruppi industriali, delle grandi banche e dei latifondisti militaristi, affinché la classe operaia assuma il ruolo guida nello sviluppo democratico. Dopo che i vecchi partiti borghesi si erano rivelati incapaci di risolvere la questione vitale del nostro popolo, e come aveva detto il presidente della CDU, signor Kaiser, avevano cercato la salvezza nel fascismo, i destini della nazione devono essere presi in mano dalle nuove forze emergenti dal popolo lavoratore. La SED tiene presente nella sua politica che la lotta tra le forze progressiste democratiche da un lato e la reazione dall'altro lato si rispecchia anche nei mutamenti dentro i partiti. […] Ambedue i partiti borghesi, CDU e LDP, sono dei partiti la cui guida subisce una forte influenza non solo dei settori del grande capitale, ma anche dei settori del capitale monopolistico occidentale. Poiché dopo la seconda guerra mondiale questi reazionari non possono più organizzarsi nel partito tedesco-nazionale [DNVP; n.d.a.], essi usano l'Unione Cristiano-Democratica e il Partito Liberal-Democratico, i quali hanno già un certo seguito politico, per perseguire i loro interessi reazionari. […] Proprio nell'interesse della politica del blocco è indispensabile svolgere un'aperta critica dei settori reazionari presenti in ambedue partiti borghesi e informare la popolazione sulle manovre reazionarie svolte negli organi amministrativi da alcuni membri dei due partiti borghesi[82].

Nonostante le esortazioni congiunte a «condurre la contesa elettorale in forma dignitosa e oggettiva»[83], l'asprezza della campagna elettorale ricordò a molti le contrapposizioni di Weimar. Secondo l'inviato berlinese della «Neue Zeitung» (quotidiano pubblicato a Monaco di Baviera dal Governo Militare degli Stati Uniti - OMGUS), furono in particolare i toni aspri della campagna per le elezioni comunali berlinesi del 20 ottobre 1946 a pregiudicare la collaborazione. In tale occasione, si afferma nell'articolo, «il comitato unitario berlinese fu a detta degli altri partiti strumentalizzato unilateralmente dalla SED»[84]. La CDU berlinese denunciò la SED per «tentativi di diffamazione che ricordavano il Terzo Reich»[85].

Lo status speciale della capitale, controllata in modo congiunto da tutte le quattro potenze, permetteva di mantenere in vita un'autonoma SPD berlinese. Questa si affermò come chiara vincitrice con 48,7% dei voti, mentre la SED (che nelle aspettative dei suoi fondatori doveva sommare i voti della SPD e della KPD) si fermò al 19,8%. Ma, oltre a sconfessare i loro calcoli elettorali, le elezioni rivelarono un più generale errore di prospettiva di una classe politica formatasi nella Repubblica di Weimar. Il desiderio di ripararne gli errori, vissuto da molti di loro come obbligo morale nei confronti delle vittime del nazismo, ne intrappolava i giudizi in un costante raffronto col passato. Il voto dei berlinesi mostrò invece come le identità politiche del passato stes-

sero gradualmente mutando con l'emergere della nuova società del dopoguerra.

Le vecchie affiliazioni ebbero un ruolo nella scelta degli elettori, come dimostra il 21,2% dei voti per la SED nel quartiere di Wedding, vecchia roccaforte della KPD ora nella zona di controllo francese. Ma complessivamente ebbe più peso la nuova realtà sociale che si formava sotto l'influenza delle potenze occupanti. Nel settore sovietico i risultati della SED erano considerevolmente migliori (29,9%) rispetto al settore britannico (10,4%) e americano (12,7%, nonostante il loro settore racchiudesse il quartiere di Neukölln, che negli anni Venti fu un bastione comunista). Inoltre era evidente che le ingerenze dei sovietici avevano screditato la SED presso una parte dei loro potenziali elettori. Dalla crisi del 1929 al crollo di Weimar, la polizia agli ordini della SPD prussiana aveva combattuto una cruenta guerriglia tra i caseggiati popolari di Prenzlauer Berg controllati dalla KPD[86]. Ora che erano sotto l'occupazione sovietica, il 41% dei suoi abitanti preferiva la SPD, mentre la SED si fermava al 31%[87].

6. *Conclusioni: da Stato dei partiti a partito-Stato*

Il primo duro colpo alla fiducia reciproca tra i partiti del blocco venne il 1° dicembre 1946 con la dissoluzione del Fronte unitario per la città di Berlino. A differenza del resto della Zona Est, nella capitale amministrata congiuntamente dalle quattro potenze i partiti locali potevano soppesare liberamente i pregi e i difetti del *Blocksystem*. A 17 mesi dalla nascita del Fronte unitario, il loro giudizio era negativo, dimostrando chiaramente che la forma di governo fondata sulla collaborazione tra i partiti promossa dalla KPD/SED non poteva reggersi sull'occultamento del conflitto in nome dell'emergenza nazionale. Inoltre, le prevaricazioni della SED e dell'amministrazione sovietica avevano eroso la fiducia reciproca tra le forze politiche. Infine, nel 1948 la SED modificò le regole dell'*Antifa-Block* per relegare la CDUD e LDPD in minoranza inserendo nel blocco i rappresentanti delle "organizzazioni di massa" sotto il suo controllo e di due nuovi partiti fantoccio, la *National-Demokratische Partei Deutschlands* - NDPD e la *Demokratische Bauernpartei Deutschlands* - BDB[88].

Non sorprendono quindi le posizioni espresse da Jakob Kaiser alla seduta del Fronte unitario del 6 agosto 1947, sul fatto che «la necessità del lavoro in comune non ha bisogno di particolari spiegazioni» viste le difficoltà del dopoguerra, ma che «per il resto, non bisogna fare del lavoro nel blocco una *Weltanschauung*»[89]. Suo collega Johann Baptist Gradl (rimosso dalla presidenza della CDU dai sovietici assieme a Kaiser nel dicembre 1947) aggiungeva che le prevaricazioni della SED, in particolare nei comitati comunali e distrettuali del Fronte unitario, «non costituivano episodi isolati, bensì una generale linea politica unilaterale perseguita dalla SED»[90].

La scelta della Commissione costituzionale di inserire nella futura costituzione il *Blocksystem* come regola per la formazione dei governi era argomentata dal suo teorico Alfons Steiniger e da Otto Grotewohl con riferimenti all'esperienza di Weimar, mentre sottaceva le più recenti esperienze dell'*Antifa-Block*. Chi invece, specialmente nelle zone occidentali, ne stigmatizzava l'adozione sottolineando la repressione

dei partiti d'opposizione, non forniva una risposta alternativa ai quesiti ereditati da Weimar. Inoltre, dopo la rottura dei rapporti tra le potenze occupanti nel dicembre 1947 i lavori della Commissione costituzionale si erano praticamente fermati in attesa della decisione sovietica, mentre si moltiplicavano le avvisaglie di un atteggiamento più aggressivo da parte di Ulbricht. Già il 31 gennaio 1948 alla conferenza del Ministero degli Interni egli affermò che i compiti della polizia dovevano essere dedotti dal «suo nuovo ruolo nella lotta di classe. […] Lo scopo dell'apparato statale è di reprimere le forze fasciste e militariste. Non vogliamo ripetere la Repubblica di Weimar e non permetteremo che si adoperi la parola d'ordine della libertà per la libertà d'azione degli agenti del nostro nemico»[91].

Le occasionali affermazioni pubbliche di Grotewohl in favore della democrazia parlamentare continueranno ancora fino alla decisiva svolta alla undicesima seduta della SED del 28-30 giugno 1948[92]. Il significato del suo discorso di chiusura della era chiaro già dal titolo: *Il nostro partito come forza guida*. «Dobbiamo affrontare le conseguenze politiche e strategiche che derivano per noi dalla divisione della Germania, provocata dalle decisioni di Londra[93]. La divisione della Germania ci impone di rispondere chiaramente da quale parte si collocherà la Zona di Occupazione Sovietica nei prossimi anni». Di conseguenza, gli spazi politici per il pluralismo politico entro l'*Antifa-Block* non esistevano più:

> La divisone della Germania rende intollerabile qualsiasi tentativo di accattivarsi le simpatie delle potenze occidentali, per questo non c'è più posto. Se ci fosse ancora una possibilità per realizzare le fantasiose idee dei partiti borghesi, che dicono sempre che noi dovremmo considerarci come un ponte tra est e ovest, una soluzione compromissoria di questo tipo ci permetterebbe nel migliore dei casi di ricostruire il capitalismo e la solita repubblica borghese. (Molto giusto!) Ma questo, compagni, non è l'obiettivo politico che noi abbiamo in mente. Non è ciò che vogliamo. Dunque dalla situazione creatasi a Londra consegue la chiara risposta che l'orientamento del nostro partito nell'esecuzione del piano economico deve essere orientato in modo chiaro e senza riserve verso l'est. […] Il tipo di sviluppo che caratterizza i paesi della democrazia popolare assieme al piano economico è l'unica possibilità di sviluppo che ci rimane nella nostra zona e che noi come partito marxista-leninista dobbiamo adottare con chiarezza[94].

* Il presente saggio è un estratto che anticipa i risultati del progetto *Ripensare Weimar a Berlino Est. La genesi della "costituzione borghese" della RDT (1945-1948)*. Tutte le traduzioni sono da attribuire all'autore.

1 La formula "Bonn non è Weimar" è stata coniata dal giornalista svizzero F.R. Allemann in *Bonn ist nicht Weimar*, Köln, Kiepenheuer & Witsch, 1956.

2 Cfr. U. Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*, Princeton-Oxford, Princeton University Press, 2015, pp. 1-5.

3 H.A. Winkler, *Weimar, Bonn, Berlin. Zum historischen Ort des Grundgesetzes*, in «Vierteljahrshefte für Zeitgeschichte», 57/4, 2009, pp. 485-496, qui p. 489.

4 W. Weber, *Weimarer Verfassung und Bonner Grundgesetz*, Göttingen, Fleischer, 1949.

5 Si veda tra gli altri, Ch. Gusy, *Die Weimarer Verfassung und ihre Wirkung auf das Grundgesetz*, in S. Lasch (hrsg.), *Die Weimarer Verfassung – Wert und Wirkung für die Demokratie*, Erfurt, Friedrich-Ebert-Stiftung, 2009, pp. 27-50; W. Pyta, *Welche Erwartungen weckte die Weimarer Verfassung und welche Erfahrungen vermittelte sie an die Gründerväter der Bundesrepublik Deutschland?*, in ivi, pp. 51-72; H.A. Winkler

(hrsg.), *Weimar im Widerstreit. Deutungen der ersten deutschen Republik im geteilten Deutschland*, München, Oldenbourg Verlag, 2002; E. Eichenhofer (hrsg.), *80 Jahre Weimarer Reichsverfassung - was ist geblieben?*, Tübingen, Mohr Siebeck, 1999.

6 H. Weber, *Die DDR 1945-1990*, München, Oldenbourg, 2006, p. 153.

7 *Ibidem*.

8 *Ibidem*.

9 H. Weber, *Einleitung. Zum Transformationsprozeß des Parteiensystems in der SBZ/DDR*, in ivi (hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie. Dokumente und Materialien zum Funktionswandel der Parteien und Massenorganisationen in der SBZ/DDR 1945-1950*, Köln, Verlag Wissenschaft und Politik, 1982, p. 49.

10 Tra i lavori dedicati alla prima costituzione della RDT del 1949 vanno segnalati quelli pubblicati nella RFT negli anni della Guerra Fredda: M. Draht, *Verfassungsrecht und Verfassungswirklichkeit in der sowjetischen Besatzungzone: Untersuchungen über Legalität, Loyalität und Legitimität. Mit einem Anhang: Verfassung der "DDR" im Wortlaut*, Bonn, Bundesministerium für Gesamtdeutsche Fragen, 1956; S. Mampel, *Die Entwicklung der Verfassungsordnung in der Sowjetzone Deutschlands von 1945 bis 1963*, Tübingen, Mohr, 1964; D. Müller-Römer, *Die Grundrechte in Mitteldeutschland*, Köln, Verlag Wissenschaft und Politik, 1965. Dopo l'unificazione e l'apertura degli archivi della RDT fu possibile arricchire il quadro storico; cfr. H. Amos, *Die Entstehung der Verfassung in der Sowjetischen Besatzungszone/DDR 1946-1949: Darstellung und Dokumentation*, Münster, LIT-Verlag, 2006.

11 Sul rapporto tra omogeneità politica e disomogeneità sociale quale punto centrale della riflessione di Heller e Schmitt si veda H. Heller, *Politische Demokratie und soziale Homogenität* [1928], in ivi, *Gesammelte Schriften*, Tübingen, Mohr, 1992, vol. II, pp. 421-433; C. Schmitt, *Legalität und Legitimität*, München, Duncker & Humblot, 1932; trad. it. in *Le categorie del politico*, a cura di G. Miglio e P. Schiera, Bologna, il Mulino, 1998, pp. 211-244. Sulla questione si veda inoltre O. Kirchheimer, *Costituzione senza sovrano: saggi di teoria politica e costituzionale*, introduzione e cura di A. Bolaffi, Bari, De Donato, 1982; M. Llanque (hrsg.), *Souveräne Demokratie und soziale Homogenität. Das politische Denken Hermann Hellers*, Nomos, Baden-Baden, 2010; Ch. Müller, I. Staff (hrsg.), *Der soziale Rechtsstaat: Gedächtnisschrift für Hermann Heller 1891-1933*, Baden-Baden, Nomos, 1984.

12 Sulla critica dei partiti nella Repubblica di Weimar e sul ruolo della teoria di Michels cfr. W. Durner, *Antiparlamentarismus in Deutschland*, Würzburg, Königshausen und Neumann, 1997, in particolare pp. 86-127; Ch. Gusy, *Die Lehre vom Parteienstaat in der Weimarer Republik*, Baden-Baden, Nomos, 1993; infine il classico K. Sontheimer, *Antidemokratisches Denken in der Weimarer Republik: die politischen Ideen des deutschen Nationalismus zwischen 1918 und 1933*, München, Nymphenburger Verlagshandlung, 1962, pp. 188-210.

13 A. Steiniger, *Das Blocksystem: Beitrag zu einer demokratischen Verfassungslehre*, Berlin, Akademie Verlag, 1947.

14 Per una ricostruzione dettagliata dell'atteggiamento delle quattro potenze prima e dopo la conferenza di Londra di novembre/dicembre 1947 riguardo alla costruzione di un governo unitario per la Germania previsto dagli accordi di Potsdam, si veda Ch. Weisz, H.-D. Kreikamp, B. Steger (Hrsg.), *Akten zur Vorgeschichte der Bundesrepublik Deutschland 1945-1949*, Band IV, *Januar-Dezember 1948*, München, Oldenbourg, 1983, pp. 7-18.

15 Il motto è stato coniato nella cerchia politica del governo di Bonn, ma secondo un giudizio storico ormai unanime, questa «frase attribuita ad Adenauer … poteva ugualmente bene provenire da Ulbricht»; J. Roesler, *Momente deutsch-deutscher Wirtschafts- und Sozialgeschichte 1945 bis 1990: eine Analyse auf gleicher Augenhöhe*, Leipzig, Leipziger Universitäts-Verlag, 2006, p. 36.

16 Sui pareri di Gustav Radbruch del 8 maggio 1947, di Ulrich Scheuner del 26 agosto 1948 e di Hans Peters del 5 dicembre 1946 si consiglia la ricostruzione offerta da Amos, *Die Entstehung der Verfassung in der Sowjetischen Besatzungszone/DDR* cit., pp. 77-79, p. 231.

17 Cfr. ivi, p. 323.

18 *Richtlinien über die Fertigstellung von Vorlagen und wichtigen Materialien für die Regierung und Regierungsstellen zur Entscheidung durch die zuständigen Organe des Parteivorstandes sowie über die Kontrolle der Durchführung dieser Entscheidungen (17.10.1949)*, pubblicato in H. Mohnhaupt (hrsg.), *Normdurchsetzung in osteuropäischen Nachkriegsgesellschaften: (1944-1989); Einführung in die Rechtsentwicklung; mit Quellendokumentation*, Bd. 5: *Deutsche Demokratische Republik: (1958-1989)*, Halbband 2: K.A. Mollnau (hrsg.), *Dokumente*, Dritter Teil: *Dokumente zum Recht, zur Gesetzgebung, Justiz und Rechtwissenschaft der DDR aus dem zentralen Parteiarchiv der SED, insbesondere aus dem internen Archiv des Politbüros*, Frankfurt am Main, Klostermann, 2004, pp. 3-11.

19 Il *Nationalkomitee Freies Deutschland* (NKFD) fu fondato il 12 luglio 1943 vicino a Mosca su iniziativa sovietica. Cfr. S.R. Arnold, G.R. Ueberschär (Hrsg.), *Das Nationalkomitee "Freies Deutschland" und der Bund Deutscher Offiziere*, Frankfurt am Main, Fischer-Taschenbuch-Verlag, 1995.

20 Si veda a proposito A. Sywottek, *Deutsche Volksdemokratie: Studien zur politischen Konzeption der KPD 1935-1946*, Düsseldorf, Bertels-

mann-Univ.-Verl., 1971, pp. 63-77.

[21] Il proclama *Aufruf an das deutsche Volk* è pubblicato in P. Erler, H. Laude, M. Wilke (Hrsg.), *"Nach Hitler kommen wir" : Dokumente zur Programmatik der Moskauer KPD-Führung 1944/45 für Nachkriegsdeutschland*, Berlin, Akademie Verlag, 1994, pp. 24-50.

[22] *Aktionsprogramm des Blocks der kämpferischen Demokratie*, pubblicato in ivi, pp. 290-303.

[23] *Befehl Nr. 2 des Obersten Chefs der Sowjetischen Militärischen Administration (10.06.1945)*, in «Verordnungsblatt der Stadt Berlin», 1945, p. 28.

[24] Sulla sorpresa tra I comunisti tedeschi si vedano i ricordi di Wolfgang Leonhard, membro del "gruppo Ulbricht", giunto da Mosca a Berlino nel maggio 1945 con il compito di ricostruire il partito in W. Leonhard, *Die Revolution entlässt ihre Kinder*, Köln-Berlin, Kiepenheuer & Witsch, 1955, p. 389.

[25] *Aufruf des ZK der KPD vom 11. Juni 1945*, pubblicato in Erler, Laude, Wilke (Hrsg.), *"Nach Hitler kommen wir": Dokumente* cit., pp. 390-397, p. 393.

[26] Ivi, p. 395.

[27] Ivi, p. 397.

[28] *Sozialdemokratische Partei Deutschlands (SPD): Aufruf vom 15. Juni 1945 zum Neuaufbau der Organisation*, pubblicato in O.K. Flechtheim, *Die Parteien der Bundesrepublik Deutschland*, Hamburg, Hoffmann & Campe, 1973, pp. 212-15, p. 215.

[29] L. Caracciolo, *Der Untergang der Sozialdemokratie in der sowjetischen Besatzungszone. Otto Grotewohl und die "Einheit der Arbeiterklasse"*, in «Vierteljahrshefte für Zeitgeschichte», n. 36/2, 1988, pp. 281-318, p. 287.

[30] *Sozialdemokratische Partei Deutschlands (SPD): Aufruf vom 15. Juni 1945 zum Neuaufbau der Organisation*, in Flechtheim, *Die Parteien* cit., p. 213.

[31] *Ibidem*.

[32] *Ibidem*.

[33] Ivi, p. 214.

[34] Alla seconda riunione del vertice della KPD del 8 luglio 1945 furono divisi i compiti tra i quattro membri della Segreteria provvisoria: il Presidente del partito Wilhelm Pieck fu incaricato della linea generale, Franz Dahlem della selezione dei quadri di partito e della fondazione delle sezioni locali, Anton Ackermann della propaganda, cultura e editoria, mentre Walter Ulbricht assunse il ruolo strategicamente centrale di tramite con l'amministrazione sovietica. Cfr. M. Kubina, *Der Aufbau des zentralen Parteiapparates der KPD 1945-1946*, in M. Wilke (Hrsg.), *Anatomie der Parteizentrale: Die KPD/SED auf dem Weg zur Macht*, Berlin, Akademie Verlag, 1998, pp. 69-72.

[35] Caracciolo, *Der Untergang der Sozialdemokratie* cit., p. 288.

[36] Ivi, p. 286.

[37] *Aufruf der Christlich-Demokratischen Union an das deutsche Volk (26. Juni 1945)*, pubblicato in Th. Stammen (Hrsg.), *Einigkeit und Recht und Freiheit: westdeutsche Innenpolitik 1945-1955*, München, DTV, 1965, pp. 82-85, p. 84.

[38] *Aufruf des ZK der KPD vom 11. Juni 1945*, pubblicato in Erler, Laude, Wilke (Hrsg.), *"Nach Hitler kommen wir": Dokumente* cit., p. 396.

[39] *Aufruf der Liberal-Demokratische Partei Deutschlands (LDPD) (5. Juli 1945)*, pubblicato in Flechtheim, *Die Parteien* cit., p. 193.

[40] Ivi, p. 194.

[41] *Ibidem*.

[42] Istruzioni riservate per la formazione delle sezioni locali della LDPD del 24 luglio 1945, pubblicate in Weber (hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., pp. 186-187.

[43] *[Gründungs-Erklarüng des zentralen Einheitsfront-Ausschusses vom 14. Juli 1945] Einheitsfront der antifaschistisch-demokratischen Parteien*, pubblicato in Siegfried Suckut, *Blockpolitik in der SBZ, DDR 1945-1949. Die Sitzungsprotokolle des zentralen Einheitsfront-Ausschusses; Quellenedition*, Köln, Verl. Wiss. u. Politik, von Nottbeck, 1986, pp. 64-65.

[44] Ivi, p. 64.

[45] *Verlauf der Gründungssitzung, Gedächtnisprotokoll von Erich W. Gniffke (SPD)*, in Suckut, *Blockpolitik in der SBZ, DDR 1945-1949* cit., p. 62.

[46] M. Weber, *Wirtschaft und Gesellschaft – Die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte. Nachlaß*, Teilband 1: *Gemeinschaften*, hrsg. W.J. Mommsen, Tübingen: Mohr Siebeck, 2001; trad. it. *Economia e società. L'economia in rapporto agli ordinamenti e alle forze sociali*, vol. I: *Comunità*, Milano, Donzelli, 2005, pp. 71-77.

[47] Cfr. ivi, p. 72.

[48] *Vorläufige Richtlinien für die einleitende Arbeit in Stadt Berlin*, lettera circolare n. 1 del 5 luglio 1945, riportata in Suckut, *Blockpolitik in der SBZ, DDR 1945-1949* cit., p. 18.

[49] A. Hermes, *Und setzet ihr nicht das Leben ein; Andreas Hermes - Leben und Wirken. Nach Briefen, Tagebuchaufzeichnungen und Erinnerungen*, Stuttgart, Seewald, p. 299.

[50] *Protocoll der 3. Sitzung des CDU-Gründerausschusses vom 19 Juli 1945*, pubblicato in Suckut, *Blockpolitik in der SBZ, DDR 1945-1949* cit., p. 64.

[51] *Die Verantwortung der Einheitsfront. Gleichmäßige Behandlung aller Parteien*, in «Neue Zeit», 7 settembre 1945.

[52] *Verlauf der Gründungssitzung, Gedächtnisprotokoll von Erich W. Gniffke (SPD)*, in Suckut, *Blockpolitik in der SBZ, DDR 1945-1949* cit., p. 62.

[53] Ivi, p. 63.

[54] *Ibidem*.

[55] *Ibidem*.

[56] Punto 3(IV) della sezione sui Principi politici da applicare alla futura Germania parla di «immediata trasformazione della vita politica tedesca su basi democratiche»; in *Mitteilung über die Dreimächtekonferenz von Berlin (Potsdamer Abkommen), 02.08.1945*.

[57] *Erklärung der Einheitsfront der antifaschistischen-demokratischen*

Parteien Deutschlands zu den Beschlüssen der Berliner Konferenz, 12 August 1945, pubblicato in Suckut, *Blockpolitik in der SBZ, DDR 1945-1949* cit., p. 83.

58 Dichiarazione di Wilhelm Pieck al «Tagliches Rundschau» del 1 novembre 1945, riportata in ivi, p. 21.

59 Steiniger, *Das Blocksystem* cit., p. 52.

60 Ivi, p. 20, p. 32.

61 *Berlin, den 4. Juli 1945. Besprechung zwischen Vertretern der KPD, der SED und der Lib. Dem. P. im Stadthaus Berlin-Mitte*, pubbicato in Weber (hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., p. 294.

62 Dichiarazione di Andreas Hermes riportata in Suckut, *Blockpolitik in der SBZ, DDR 1945-1949* cit., p. 26.

63 *Befehl Nr. 2 des Obersten Chefs der Sowjetischen Militärischen Administration (10.06.1945)* cit., p. 28.

64 Dichiarazione di Waldemar Koch in *Einheitsfront ist Voraussetzung für Deutschlands Aufbau. Erklärungen der Parteivorsitzenden*, in «Tagliche Rundschau», 1 novembre 1945.

65 Cfr. le annotazioni dal diario di Wilhelm Külz alla data del 16 agosto 1945, in Sekretariat des Zentralvorstandes der LDPD (Hrsg.), *LDPD in der Übergangsperiode 1945-1961: Dokumente*, Band I, gesammelt von M. Bogisch, Berlin, Buchverlag Der Morgen, 1976, pp. 40 ss.

66 Cfr. S. Suckut, *Zum Wandel von Rolle und Funktion der Christlich-Demokratischen Union Deutschlands (CDUD) im Parteiensystem der SBZ/DDR (1945-1952). Einleitung*, in Weber (hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., pp. 117-129, qui p. 120.

67 Cfr. E. Krippendorff, *Die Liberal-Demokratische Partei Deutschlands in der Sowjetischen Besatzungszone 1945/48: Entstehung, Struktur, Politik*, Düsseldorf, Droste, 1961, p. 83.

68 E. Gniffke, *Jahre mit Ulbricht*, Köln, Verlag Wissenschaft und Politik, 1966, p. 137.

69 L. Caracciolo, *Der Untergang der Sozialdemokratie* cit., pp. 281-318.

70 A. Ackermann, *Gibt es einen besonderen deutschen Weg zum Sozialismus?*, in «Einheit», n. 1, febbraio 1946, pp. 22-32, pubblicato in Weber (hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., p. 64.

71 *Protokoll des Vereinigungsparteitages der SPD und KPD am 21. und 22. April 1946 in der Staatsoper zu Berlin*, pubblicato in H. Weber, *Die Sozialistische Einheitspartei Deutschlands 1946-1971*, Hannover, Verlag für Literatur und Zeitgeschehen, 1971, p. 59.

72 *Ibidem*.

73 Ivi, p. 62.

74 Il concetto di "democrazia contratta" di Weimar è utilizzato nel senso indicato da Gian Enrico Rusconi in G.E. Rusconi, H.A. Winkler, *L'eredità di Weimar*, Roma, Donzelli, 1999, pp. 33-35.

75 Ernst Thape in A. Malycha, *Partei von Stalins Gnaden?: die Entwicklung der SED zur Partei neuen Typs in Jahren 1946 bis 1950*, Berlin, Dietz, 1996, p. 301.

76 Lettera del 15 febbraio 1947 di Erich Lübbe, membro della presidenza della SED per Berlino, alla Segreteria Centrale, pubblicata in Weber (Hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., p. 74. Non a caso, l'anno successivo Lübbe fu tra i socialdemocratici che abbandonarono la SED fuggendo a Berlino ovest.

77 L'articolo *Unser Weg zum Sozialismus. Die Mitgliedwebung der SED als zentrale Aufgabe für die Erringung der politischen Macht mit den Mitteln der Demokratie*, uscito su «Leipziger Volkszeitung» del 17 luglio 1947, pubblicato in ivi, pp. 77-78.

78 Circolare della Segreteria Centrale della SED n. 12/46 del 5 luglio 1946 per la conduzione delle elezioni comunali, in *Handbuch zur Durchführung der Gemeindewahlen 1946* cit., pp. 21-42.

79 Cfr. H. Weber, *Von der SBZ zur DDR 1945-1968*, Hannover, Verlag für Literatur und Zeitgeschehen, 1968, p. 33.

80 *Entschließung der 1. Delegiertenkonferenz der LDPD*, del 3-4 febbraio 1946, pubblicato in Weber (hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., p. 189.

81 Cfr. Suckut, *Zum Wandel von Rolle und Funktion der Christlich-Demokratischen Union Deutschlands* cit., p. 122.

82 W. Ulbricht, *Strategie und Taktik der SED*, in «Einheit», n. 5, ottobre 1946, pp. 266 ss.

83 Appello dei partiti antifascisti per le elezioni comunali, pubblicato su tutti i giornali il 22 giugno 1946 e in *Handbuch zur Durchführung der Gemeindewahlen 1946*, edito dalla presidenza del SED, Berlin, 1946, p. 8.

84 *Berliner einheitsfront ausgelöst*, in «Neues Zeitung», 2 dicembre 1946, pubblicato in Suckut, *Blockpolitik in der SBZ, DDR 1945-1949* cit., p. 174.

85 Protocollo della seduta della presidenza CDU del 25 ottobre 1946, riportato in ivi, pp. 29-30.

86 Cfr. H.-H. Liang, *Die Berliner Polizei in der Weimarer Republik*, Berlin [u.a.], de Gruyter, 1977.

87 Per i dati cfr. «Berliner Statistik», Hauptamt für Statistik von Groß-Berlin, Jg. 1947, Sonderheft 4.

88 Sui due partiti cfr. M. Walter, *National-Demokratische Partei Deutschlands (NDPD)*, in G.-R. Stephan, *Die Parteien und Organisationen der DDR: ein Handbuch*, Berlin, Dietz, 2002, pp. 366-401; Th. Bauer, *Blockpartei und Agrarrevolution von oben: die Demokratische Bauernpartei Deutschlands, 1948-1963*, München, Oldenbourg, 2003.

89 Dichiarazioni di Jakob Kaiser secondo il verbale della 29° seduta del comitato comune del Fronte unitario dei partiti antifascisti-democratici del 6 agosto 1947, in Weber (hg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., p. 317.

[90] Verbale della 29° seduta del comitato comune del Fronte unitario dei partiti antifascisti-democratici del 6 agosto 1947, in ivi, p. 318.

[91] Cfr. A. Malycha, *Die SED: Geschichte ihrer Stalinisierung 1946-1953*, Paderborn, Schöningh, 2000, p. 280.

[92] Il 21 maggio 1948 alla cerimonia pubblica nella Kollwitz-platz a Berlino, Grotewohl si pronunciò contro il partito unico e in difesa delle libere elezioni tra partiti indipendenti; cfr. ivi, p. 362.

[93] Le "raccomandazioni di Londra" adottate il 2 giugno 1948 dai Ministri degli Esteri degli Stati Uniti, Regno Unito, Francia e dei paesi del Benelux contenevano le istruzioni per i Ministri Presidenti dei *Länder* delle zone occidentali per la fondazione della Repubblica Federale Tedesca. Cfr. G. Wehner, *Die Westalliierten und das Grundgesetz 1948-1949: die Londoner Sechsmächtekonferenz*, Freiburg im Breisgau, Rombach, 1994.

[94] O. Grotewohl, *Unsere Partei die führende Kraft*, discorso conclusivo della 11° seduta della presidenza SED del 30 giugno 1948, pubblicato in Weber (hrsg.), *Parteiensystem zwischen Demokratie und Volksdemokratie* cit., pp. 96-97.

I volti delle idee. Dostoevskij disegnatore, calligrafo e critico d'arte

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Nel *Diario di uno scrittore* del novembre 1877, Dostoevskij ricostruisce la genesi del verbo *stuševat'sja* (scomparire, annientarsi, ridursi a nulla) entrato nel lessico letterario russo e apparso per la prima volta il 1° gennaio 1846 nelle «Otečestvennye Zapiski» nel suo racconto *Il sosia, avventure del signor Goljadkin*. Nella rappresentazione letteraria della scomparsa di un «omiciattolo sgradevole e furbo», Dostoevskij utilizza una parola inventata nella classe della Scuola superiore di ingegneria militare a Pietroburgo da lui frequentata e dove si insegnava a disegnare piani di fortificazioni, di costruzioni, di architettura militare. Dagli allievi si esigeva «severamente di saper disegnare bene un piano da soli, con le proprie mani, così che coloro i quali non avevano disposizione per il disegno dovevano sforzarsi controvoglia di imparare quest'arte a qualunque costo». Si «poteva uscire dalla classe superiore ufficiali per entrare in servizio come eccellenti matematici, fortificatori, ingegneri, ma se i disegni presentati erano piuttosto cattivi, il voto ad essi assegnato, entrando nel conto generale, poteva abbassar tanto la media che il candidato perdeva notevoli facilitazioni all'uscita»[1]. In una lettera indirizzata al padre, Dostoevskij confessa di apprendere con difficoltà l'arte del disegno: aveva preso buoni voti nelle materie teoriche, fatta eccezione per il disegno. In realtà, Dostoevskij (che ha anche affermato di essere «deboluccio in filosofia» mentre è stato annoverato, al pari di Nietzsche, tra i massimi esponenti della filosofia della tragedia) stava iniziando quel complesso e tormentoso cammino che lo condurrà a operare una sintesi paradossale tra la sua vocazione letteraria e l'apprendimento controvoglia dell'arte del disegno. Tale percorso è stato ricostruito magistralmente da Konstantin Baršt, in un pregevole libro pubblicato simultaneamente in russo e in italiano, esito di una ricerca quarantennale che, come rileva Stefano Aloe nella prefazione, consente una «immersione nei meandri segreti della creatività dostoevskiana»[2]. Baršt pubblica il reper-

torio grafico di Dostoevskij, traendolo dai taccuini dello scrittore che, «in tutta la varietà delle loro annotazioni ed espressioni grafiche, in tutta la pienezza della forma e del contenuto, non rappresentano solo il "manoscritto" nel senso ordinario del termine, ma una forma di registrazione dei suoi progetti artistici [...] forma che è insieme unica per la portata dell'informazione e caratterizzante per il tipo di pensiero creativo di Dostoevskij»[3]. Lo scrittore russo definiva i suoi taccuini «libretti di scrittura» (*pis'mennye knižki*) fondamentali per il concepimento delle idee artistiche, coniugando tra loro letteratura e arti grafiche.

In una lettera del 9 agosto 1838 indirizzata al fratello Michail (scrittore, pubblicista e traduttore con il quale Dostoevskij fondò, negli anni Sessanta del XIX secolo, due riviste «Vremja» ed «Epocha» anch'egli ritratto dallo scrittore), Dostoevskij descrive con un stile letterario e artistico l'incupimento del proprio umore nei giorni trascorsi nell'istituto per ingegneri. In questa lettera, Dostoevskij, anzitutto, coglie per la prima volta con acutezza lo spleen di Pietroburgo, che diventerà un *leitmotiv* della sua opera letteraria. Dostoevskij, inoltre, dipinge con le parole la sua condizione esistenziale sospesa tra cielo e terra. La terra gli appare come un purgatorio per spiriti divini che sono stati assaliti da pensieri peccaminosi: «Io sento che il nostro mondo è diventato un immenso Negativo e che ogni cosa nobile, bella e divina si trasforma in una satira». Nessuna idea si armonizza con l'intero, e il singolo è una figura alienata, la cui esistenza appare nel quadro della società solo come un'immagine straniata fino alla sua dissolvenza e alla sua distruzione. Come ad Amleto, a Dostoevskij appare lo spettro dell'uomo meschino e terribile. In questa atmosfera straniata e satura di spleen, Dostoevskij leggeva Hoffmann, Balzac, Hugo, Goethe: una *Bildung* gotica il cui simbolo era *Notre Dame de Paris* di Hugo. Dostoevskij conclude lapidariamente la lettera con un aforisma che sintetizza la sua condizione esistenziale di allora: «Ho un progetto, farmi pazzo»[4]. L'ingegneria, scienza infelice, induceva Dostoevskij a vedere il futuro con terrore e, senza ispirazione, intendeva abbandonare i suoi sogni poetici. Tuttavia, come attesta la lettera al fratello, i meravigliosi arabeschi giovanili erano destinati a trasformarsi in calligrammi, in esperimenti ecfrasici sorti dalla sincresi tra parola e immagine. Questa lettera chiarisce il senso di quanto Dostoevskij afferma nel *Diario di uno scrittore* a proposito della genesi della parola *stuševat'sja*: «Tutti i piani venivano disegnati e sfumati con l'inchiostro di China, tutti si sforzavano di raggiungere, tra l'altro, la capacità di sfumare bene una data superficie, dallo scuro al chiaro fino al bianco e al nulla; una buona sfumatura dava al disegno una certa eleganza». Tuttavia alla parola *stuševat'sja* Dostoevskij attribuisce un significato polisemico: tale parola enigmatica non è riferita solo all'arte del disegno, ma alla scomparsa come esperienza esistenziale e sociale fino al limite estremo della morte: sfumarsela significava, nel gergo studentesco, allontanarsi, scomparire, passare dallo scuro al chiaro, al nulla. *Stuševat'sja*, perciò, significa «annientarsi non all'improvviso, non scomparire nella terra, con tuoni e lampi, ma, per così dire, delicatamente, pianamente, impercettibilmente, sprofondandosi nel nulla. A quel modo in cui l'ombra della parte sfumata di un disegno si distende dal nero gradualmente passando al più chiaro fino al completamente bianco,

al nulla». La parola *stuševat'sja*, pur essendo apparsa nella sua accezione letteraria ne *Il Sosia*, era stata utilizzata da Turgenev in *Le memorie di un cacciatore*. Nel 1854, uscendo dalla *katorga* siberiana, Dostoevskij fu sorpreso di trovare *stuševat'sja* nella raccolta dei racconti di Turgenev (anch'egli ritratto dallo scrittore) che aveva guidato la persecuzione contro Dostoevskij dopo la lettura della *povest' Il sosia*. La seconda prova letteraria di Dostoevskij, dopo l'accoglienza trionfale da parte di Belinskij (soggetto di un ritratto dello scrittore) e della società letteraria di *Povera gente*, fu oggetto di scherzi, di epigrammi satirici e di un *pamphlet* in versi, tra i cui autori c'era Turgenev. Dostoevskij era paragonato a foruncolo spuntato sul naso della letteratura russa (non a caso l'immagine del viso-naso è un altro *leitmotiv* dei disegni di Dostoevskij).

Nel mondo letterario pietroburghese ci fu un repentino e inaspettato passaggio dalla venerazione dell'autore di *Povera gente* alla negazione del talento letterario di Dostoevskij che, dopo uno scontro con Turgenev, cominciò a isolarsi, sfumandosi fino a rifuggire la frequentazione del circolo di Belinskij. Al di là delle semplificazioni psicologiche sul tema del doppio, *Il sosia* è il primo esperimento letterario di Dostoevskij nel quale si fondono tra loro immagine e parola: la parola diventa arte figurativa, quale descrizione iconica dello sdoppiamento della figura e della voce di Goljadkin. Come ha rilevato Bachtin, *Il sosia* è la «prima confessione drammatizzata» dell'opera di Dostoevskij e nella narrazione prevalgono le immagini in movimento. Alla base dell'intreccio, sta il tentativo di Goljadkin, considerata l'assoluta mancanza di apprezzamento per la sua personalità da parte degli altri, di «sostituire l'altro con se stesso», di sfumarsi in un sosia. Goljadkin recita la parte dell'uomo indipendente e la sua coscienza alterata simula sicurezza e autosufficienza: lo scontro con il sosia acutizza lo sdoppiamento[5]. Come attesta lo stesso Dostoevskij (ne *Il sosia* e nel feuilleton pubblicato nel 1847 *Cronaca di Pietroburgo*), la vita quotidiana a Pietroburgo, la capitale più premeditata del mondo, quale fantasmagoria architettonica, assumeva il colorito cupo di una assurda routine imposta dallo Stato regolare fondato da Pietro il Grande. Nella galleria dei volti noti disegnati da Dostoevskij si staglia quello di Pietro il Grande quale maschera funebre di un potere illimitato che, dislocando il cuore dell'impero da Mosca a Pietroburgo, era all'origine di quella doppia identità della Russia che è un tema centrale dell'opera dello scrittore. Tale doppia identità è stata indagata da Dostoevskij da una duplice e polifonica prospettiva. Dal punto di vista letterario Pietro il Grande appare come una sorta di giacobino incoronato ed è, insieme a Napoleone, il modello dell'uomo straordinario al quale tutto è permesso esaltato da Raskol'nikov in *Delitto e castigo*. Dal punto di vista socio-politico, invece, la riflessione sul significato e sull'esito delle riforme di Pietro il Grande indusse Dostoevskij a formulare negli anni Sessanta del XIX secolo il programma del *počvenničestvo* – ritorno al suolo natale – quale riconciliazione tra le istanze civilizzatrici e il principio nazional-popolare. Dostoevskij ha ritratto anche il volto di Voltaire primo cantore delle gesta di Pietro il Grande, da lui definito un assoluto genio politico che aveva tratto la Russia dal suo nulla storico. Da Voltaire, Dostoevskij ha appreso quello spirito satirico che gli ha svelato il peculiare sensualismo ed epicureismo dell'illuminismo russo che ha oscil-

lato tra il festino e la morte e ha concepito la condizione dell'uomo in base antitesi binaria tiranno-vittima. I quattro anni di deportazione nella *katorga* siberiana hanno rivelato a Dostoevskij che le due concezioni dell'uomo avanzate dall'illuminismo europeo – l'idea di Rousseau sulla naturale bontà dell'uomo e l'idea di Helvétius sul suo naturale egoismo – erano inadeguate e basate su un razionalismo semplificatore[6].

In *Cronaca di Pietroburgo* compare per la prima volta la figura del sognatore che è il prodotto dell'isolamento, di una «tragedia silenziosa, segreta, cupa e selvaggia»[7]. Come sostiene Heinrich Böll, l'incredibile Pietroburgo, edificata sull'acqua, era il volto estraneo dell'occidentalizzazione che ha perseguitato Dostoevskij anche all'estero: nelle grandi città europee appariva allo scrittore russo lo spettro di Pietroburgo. I personaggi pietroburghesi ritratti da Dostoevskij, con la parola e il disegno, dubitano della propria realtà e sono dei «sognatori in pieno giorno», degli originali riluttanti «al commercio umano, persi quasi sempre nei loro soliloqui, che scambiano le proprie idee per azioni e – come avviene a Raskol'nikov quando assassina l'usuraia – le loro azioni per idee». I sogni dei personaggi dostoevskiani non sono solo *rêveries* romantiche, sono «sogni astratti e intellettuali», utopie suscitate dalla seduzione di Pietroburgo-Fata Morgana[8]. L'astrattezza teorica degli utopisti sognatori attestava, per lo scrittore russo, che l'autocoscienza russa si era scissa tra occidentalismo e slavofilismo e che la Russia aveva assunto una doppia e inestricabile identità che ne condizionava il destino, quale impero errante tra Occidente e Oriente. Stigmatizzando la concezione antiquaria della storia sostenuta dagli slavofili, Dostoevskij afferma di preferire il presente, l'idea del momento e la vita vivente. Dostoevskij si attesta sull'estrema frontiera della doppia identità della Russia con le sue reiterate antitesi binarie, che moltiplicano gli sdoppiamenti. Dostoevskij sembra anticipare quella critica della «malattia storica» ottocentesca, che aveva raggiunto l'acme con l'idealismo di Hegel (un filosofo che Dostoevskij lesse in Siberia e che divenne il suo idolo polemico per la sua fede nella razionalità e nell'evoluzione infinita dell'umanità fino alla scomparsa della sofferenza), contenuta nella seconda inattuale di Nietzsche *Sull'utilità e il danno della storia*. *Il sosia*, perciò, va letto sia come un racconto figurativo costruito secondo la tecnica del disegno appresa nell'Istituto per ingegneri, sia come l'esordio della riflessione istoriosofica di Dostoevskij sulla doppia identità della Russia. Alla visione antiquaria della storia russa, si contrapponeva, infatti, la visione altrettanto fantasmagorica degli occidentalisti: Goljadkin, descrivendo al suo sosia la vita mondana di Pietroburgo (con i suoi divertimenti, con le sue bellezze architettoniche apprezzate anche da illustri turisti inglesi che erano giunti nella capitale per ammirare la cancellata del Giardino d'Estate, con i suoi teatri e con i suoi club) afferma che la letteratura russa era in fiore e che la Russia stava procedendo «verso la perfezione»[9]. Nel *Sosia*, compare anche l'impostore, una figura idealtipica della scena politica russa ed emblema dell'usurpazione permanente del potere tirannico. Tra i volti celebri disegnati da Dostoevskij ci sono quelli di Shakespeare, di Cervantes e di Madame de Staël. Dai disegni di Dostoevskij si può trarre un'estetica della storia del pensiero filosofico e politico dei secoli XVIII-XIX con i suoi intrecci para-

dossali tra illuminismo russo ed europeo e tra l'idealismo tedesco le sue trasfigurazioni russe in senso nichilista.

Dai quaderni di appunti di Dostoevskij emerge un conglomerato complesso di segni grafici e verbali (anche in forma di esercizi calligrafici), quale sintesi polifonica per cui nello spazio della pagina coesistono simultaneamente arte e letteratura; i disegni non hanno una funzione ancillare: come afferma Baršt, i volti disegnati sui quaderni di appunti entrano nella visione poetica di Dostoevskij come «volti di un'idea»[10]. Dal canto suo, Bachtin rileva che Dostoevskij è un artista dell'idea, perché sa «raffigurare l'idea altrui conservandone tutto intero il significato, come idea, ma al tempo stesso conservando anche la distanza, senza affermare né confondere questa idea con la propria espressa ideologia. Nella sua opera l'idea diventa materia di raffigurazione artistica e lo stesso Dostoevskij diviene un grande artista dell'idea»[11]. I personaggi di Dostoevskij sono degli ideologi, non parlano di sé stessi e della loro più intima cerchia, ma della loro *Weltanschauung*. D'altro canto, però, la concezione del mondo non è disgiunta dalla «verità della persona» e scaturisce dalla concreta esperienza personale. La parola a due voci di Dostoevskij è translinguistica e si riferisce simultaneamente all'immagine che l'annuncia.

L'immagine dell'artista dell'idea si è presentata a Dostoevskij fin dagli anni 1846-1847 non solo ne *Il sosia* ma anche nel racconto *La padrona*, nel quale il protagonista Ordynov è un giovane studioso che, come Cartesio, forgia il suo discorso sul metodo: «Egli costruiva da sé il suo metodo; esso si evolveva in lui per anni, e nella sua anima sorgeva, via via, una ancora tenebrosa, confusa, ma in un certo qual modo meravigliosamente gioiosa immagine dell'idea (*obraz ideii*), incarnata in una forma nuova, trasfigurata, e questa forma cercava di uscire dalla sua anima, dilaniandola, egli ne sentiva, ancora timidamente, l'originalità, la verità e la personalità: l'estro creativo sollecitava già le sue forze, si andava elaborando e si rafforzava»[12]. Dostoevskij, in alcuni bozzetti fisiognomici, ritrae uno *jurodivyj* (un santo folle) ispirandosi al ritratto di Cartesio, quasi a volere sottolineare la follia del metodo nella fase della sua formulazione tenebrosa. Ivan Karamazov cita il *cogito ergo sum* cartesiano nel dialogo con il diavolo, perché al fondo della ragione c'è una passione folle e spietata.

La scrittura ideografica consente a Dostoevskij di antivedere sia i volti dei suoi personaggi prima della stesura del testo letterario, sia il contesto socio-culturale nel quale agiscono e nel quale si soprappongono i geroglifici gotici di Dostoevskij (nei suoi disegni lo scrittore reitera ossessivamente alcuni motivi gotici la finestra, l'arco a sesto acuto, il portale, la vetrata) e la fantasmagorica architettura pietroburghese. Nei disegni, Dostoevskij fonde l'architettura rurale russa con elementi delle cattedrali gotiche. Affermando l'indissolubilità di tutte le arti, Dostoevskij, come rileva Baršt, eleva lo stile gotico a paradigma di quella bellezza che salva il mondo. Lo stile di Dostoevskij è una sorta di espressionismo gotico, che si avvale di invenzioni linguistiche e di raffigurazioni trasfiguranti della realtà, per cui, pur essendo la vetrina imperiale di diversi stili architettonici in voga tra il XVIII e il XIX secolo, Pietroburgo appare a Dostoevskij come una finestra gotica sull'Europa, sospesa tra la verità estetica della bellezza e la menzogna estetica dei suoi palazzi. Come ha rilevato Lunačarskij, le opere di Dante e di

Dostoevskij obbediscono a una «ferrea volontà architettonica».

Non diversamente da Raffaello, artista da lui venerato, Dostoevskij confronta l'opera d'arte con la scrittura. Dostoevskij affronta la questione dell'arte sia come artista figurativo, sia come storico e critico d'arte, ponendo al centro della sua riflessione artistico-filosofica la bellezza. L'immagine della bellezza creata dall'uomo diventa un «idolo da adorare incondizionatamente». L'esigenza della bellezza, per Dostoevskij, si afferma e si sviluppa soprattutto quando l'uomo si trova «in discordia con la realtà, in una situazione di disarmonia e di lotta [...] è allora che si manifesta nell'uomo nel massimo grado il naturale desiderio di un mondo armonico e sereno, e nella bellezza c'è appunto l'armonia e la serenità». Visitando la mostra del 1861 all'Accademia delle Belle Arti, Dostoevskij si imbatté nel quadro di Edouard Manet *La Nymphe surprise*. Il quadro di Manet rappresenta una ninfa nuda che prende un bagno mentre è sorpresa da un satiro. Dostoevskij afferma che l'opera di Manet era l'epitome della degenerazione delle avanguardie artistiche contemporanee orientate ad esibire il cadavere della bellezza. Manet aveva conferito al corpo della ninfa il colorito di un «cadavere di cinque giorni». D'altro canto, però, una donna moderna abbigliata di crinolina non poteva aspirare a essere una musa, perché era il «culmine della bruttezza»: un autentico artista, secondo Dostoevskij, doveva dipingere qualcosa «di più durevole di un figurino alla moda»[13]. La Bellezza è un'esperienza estetico-religiosa, nella quale l'Invisibile si rivela nel visibile. La potenza di purificazione della bellezza si ravvisa nella concezione tragica dell'esistenza, come attesta Dostoevskij nei *Demoni*: l'umanità per vivere non ha bisogno né della scienza, né del pane solo la bellezza le è indispensabile, perché «senza bellezza non ci sarà più niente da fare in questo mondo! Qui è tutto il segreto, tutta la storia è qui!». La Madonna Sistina di Raffaello compare nei *Demoni* come regina delle regine e ideale dell'umanità contrapposto alle idee del nichilismo utilitarista russo che considerava lo «strepito dei carri che portano pane all'umanità» più utile del dipinto di Raffaello. Il principe Myškin, protagonista dell' *Idiota*, afferma che «il mondo sarà salvato dalla bellezza». Myškin è il Don Chisciotte russo (lo scrittore ha ritratto anche Don Chisciotte), una figura antitetica, come ha rilevato Turgenev, a quella degli amleti nichilisti: Don Chisciotte è il cavaliere-monaco del popolo, mentre il nichilista Amleto è un aristocratico monaco dispregiatore della plebe[14]. Tuttavia la bellezza è l'enigma dell'ambivalenza, perché può salvare o dannare. Dostoevskij, infatti, afferma che anche i nichilisti amano la bellezza, perché hanno un bisogno irresistibile di un idolo e se lo creano per adorarlo. Il 1° aprile del 1867 Dostoevskij si recò a Dresda e appena giunto visitò la Pinacoteca per ammirare la Madonna Sistina. Nelle sue memorie, la moglie Anna Grigor'evna descrive l'impazienza di Dostoevskij che voleva raggiungere immediatamente la sala nella quale era esposta la Madonna Sistina, perché il quadro di Raffaello rappresentava per lui «l'espressione più elevata del genio umano»; sembrava che la Madonna, con il bambino in braccio, si «librasse in aria per andare incontro ai passanti»[15]. L'adorazione della Madonna Sistina è la rivelazione dell'ambivalenza della bellezza: la Madonna di Raffaello non è solo la raffigurazione dell'Eterno Femminino, perché Dostoevskij ricono-

sce nel sorriso della Madonna i «segni del dolore». Nella tristezza del volto divino, Dostoevskij ravvisa la prefigurazione della tragedia della crocefissione, del sacrificio inesorabile come è raffigurato da Hans Holbein nel *Cristo morto nel sepolcro* che Dostoevskij ammirò nel museo di Basilea. L'aspetto del Cristo di Holbein è terribile: il volto è tumefatto e abbandonato alla decomposizione. Il quadro di Holbein suscitò in Dostoevskij una sensazione opprimente che descrisse nell'*Idiota*. Guardando il quadro di Holbein si può perdere la fede, perché nel volto di Cristo non c'è nessuna bellezza ma solo sofferenza, quale raffigurazione realistica di una morte spaventosa che induce a dubitare la resurrezione di un cadavere martoriato. La frase enigmatica del principe Myškin sulla bellezza che salva il mondo pone la questione ultima e insoluta della vita e della morte quale simultanea coesistenza tra il Cristo morto di Holbein e la Madonna Sistina di Raffaello.

Nel 1874, Dostoevskij ricevette in dono l'icona della *Madonna di Dio gioia di tutti gli afflitti*, archetipo della Madonna di Raffaello. L'icona fu collocata nello studio di Dostoevskij, nel suo ultimo appartamento pietroburghese nel vicolo Kuznečnyj. Nell'ottobre del 1879, Dostoevskij, in occasione del suo compleanno, ricevette in regalo da Vladimir Solov'ëv, amico dello scrittore e filosofo dell'Eterno Femminino, una riproduzione fotografica di grande formato della Madonna Sistina che era appartenuta a Sof'ja Tolstaja vedova dello scrittore Aleksej Tolstoj. Come ricorda la moglie Anna Grigor'evna, nell'ultimo suo anno di vita Dostoesvkij sostava assorto e commosso davanti alla Madonna Sistina, «così assorto da non accorgersi che io ero entrata».

Dostoevskij ha dato un volto ai personaggi dei suoi romanzi, affermando di «disegnare nella mente l'immagine piena» dell'idea artistica. Il pensiero creativo in atto è, poi, trasferito sulla pagina come icona-parola. Il disegno, perciò, non è una trasposizione su carta dell'immagine speculativa, ma, come sottolinea Baršt, uno studio analitico, un'infinita correzione. L'idea ha un volto: l'idea-volto di Dostoevskij si colloca in un contesto polifonico ed è l'antitesi dell'idealismo monologante di Platone ed Hegel. L'ideazione di Fëdor Karamazov è accostata alla caricatura di Hegel e il dialogo tra Ivan Karamazov e il suo doppio, il diavolo, è una parodia polemica dell'ideale divino-razionale sostenuto dall'hegelismo. I ritratti di Dostoevskij sono l'identificazione iconografica dei volti dei personaggi, quale incessante dialogo tra immagine e parola. Dostoevskij ha elaborato, sia attraverso i disegni sia attraverso la parola, una sorta di filosofia del ritratto come *obraz* (aspetto) che indaga sull'apparire estetico della persona. In *L'adolescente*, Versilov afferma che le fotografie non somigliano all'originale, perché ogni singolo individuo molto di rado somiglia a stesso ed è riproducibile tecnicamente solo il suo sosia stupido. I ritratti appaiono numerosi nei manoscritti di *Delitto e castigo*, dei *Demoni*, dell'*Adolescente*, dei *Fratelli Karamazov*. In *Delitto e castigo*, Dunja, la sorella del protagonista Raskol'nikov, appare come il tipo femminile assolutamente bello, come la Madonna Sistina, della quale parla Svidrigajlov, un libertino non dissimile dal marchese de Sade, che sceglie le sue prede in base alla rassomiglianza con il quadro di Raffaello. Dostoevskij opera una paradossale sintesi tra la teologia della bellezza epitomata dall'icona e l'antiteologia della bellezza nichilista e sadiana, secondo la quale

è bello ciò che piace ai sensi[16]. Considerata dal punto di vista del sensualismo edonistico, la bellezza è ambivalente: prima di suicidarsi, Svidrigajlov sogna una bambina congelata che mostra un sorriso impudente e ripugnante e un volto da prostituta mostruoso e offensivo. In *Delitto e castigo*, con i personaggi di Sonja (che unisce la bellezza alla pena, la bellezza come nota del tremendo), di Dunja e della bambina congelata, Dostoevskij mostra gli stati progressivi di alterazione della bellezza, nel suo trasfigurarsi fino a sfumarsi e diventare nulla. Il giudice istruttore Porfirij Petrovič inizialmente è senza volto, perché rappresenta la macchina punitiva dello Stato; in seguito assume il volto del «motteggiatore geniale». Tra le calligrafie compare il nome di Malebranche, del quale Dostoevskij ha letto *La ricerca della verità*. Malebranche, pensatore viaggiatore, svela il sistema chimerico delle cose e la loro occasionalità. Tale occasionalismo compare nella sua versione nichilista con Raskol'nikov, il quale, contro la vita quotidiana intesa come stagnazione e come trionfo dell'*aurea mediocritas*, concepisce il delitto come catastrofe della *routine*. L'azione delittuosa è preceduta dalla teoria che divide l'umanità tra uomini straordinari e pidocchi formulata dallo stesso Raskol'nikov in un articolo. Il delitto è una manifestazione dell'amor proprio, dell'amore per la grandezza. Tuttavia l'esecuzione del delitto dimostra l'occasionalismo dell'idea e dell'azione, perché ogni dottrina può essere confutata e l'esperimento napoleonico e filosofico-criminale di Raskol'nikov è destinato a naufragare: lo stesso Raskol'nikov si autodefinisce un «pidocchio estetico». Nelle calligrafie di Dostoevskij compare il nome di Napoleone, l'idolo di Raskol'nikov, e quello di Pozzo di Borgo, un corso acerrimo nemico di Napoleone, che era diventato ambasciatore russo in Francia e in Inghilterra. La stessa idea di Svidrigajlov scaturisce dall'egocentrismo e dal mancato riconoscimento dell'altrui vita e libertà. Tuttavia, nella sua fisionomia, Svidrigajlov è più somigliante a Napoleone III, che Dostoevskij considerava un personaggio caricaturale ed emblematico della stagnazione borghese soddisfatta di sé e priva di qualsiasi grandezza, nonostante le ridicole e sbagliate ambizioni imperiali. L'idea-volto deve necessariamente passare attraverso il «crogiolo dei dubbi», fino a trasfigurasi o a sfigurarsi come nel caso di Raskol'nikov. Ne *L'Idiota* la fisionomia del principe-Cristo Myškin è contrapposta a quella di Rogožin, filosofo del sottosuolo dall'anima passionale. L'uomo del sottosuolo è l'incarnazione dell'imperativo categorico kantiano nella sua versione rapace e si contrappone alla mitezza di Myškin. Nel demonismo russo non compare lo spirito di Arimane che nella religione zoroastriana rappresenta il mondo delle tenebre che distrugge tutto ciò che è positivo e fecondo. Lo spirito di Arimane compare nel *Manfred* di Byron e, secondo Dostoevskij, il byronismo russo è una delle scaturigini del nichilismo. Al demonismo nichilista, Dostoevskij, anche attraverso i suoi ritratti, contrappone le figure degli *starec* e dei santi teologi come Tichon di Zadonsk e Gregorio Nazianzeno, teologo della bellezza e pensatore paradossale. Per Gregorio di Nazianzeno, è meglio un mondo di tutti delinquenti di un mondo nel quale gli innocenti sono le vittime predestinate della rapacità malvagia.

L'idea esistenziale che domina il personaggio è espressa graficamente da Dostoevskij e fa riferimento ai modelli etico-ontologici elaborati da Kant, Cartesio,

Malebranche e Voltaire. In gioventù, Dostoesvkij aveva studiato la fisiognomica di Franz Joseph Gall. Nei *Demoni*, Dostoevskij inserisce con il personaggio di Karmazinov la figura del grande scrittore che è un caricatura di Turgenev (ma anche di Herzen e Belinskij). Turgenev è rappresentato come un avversario, perché le sue idee ultraoccidentaliste avrebbero condotto la Russia alla catastrofe. Turgenev è ritratto come una «maschera di pietra, priva di vita e di profondità psicologica». Negli anni Settanta del XIX secolo, per Dostoevskij, diminuisce il grado di raffigurativitá dei personaggi e l'importanza della funzione del disegno come studio fisiognomico.

Come rileva Baršt, Dostoevskij traccia un confine netto tra il lavoro del poeta e quello dell'artista. I disegni sono parte integrante del lavoro del poeta indirizzato a dare un volto all'idea. Il lavoro del poeta è particolarmente impervio e il disegno è determinante per definire la figura di un personaggio. Il lavoro dell'artista, invece, consiste nella stesura del «tessuto verbale» dell'opera. Baršt inserisce Dostoevskij nell'eletta schiera dei poeti-pittori russi come Gogol', Lermontov, Leskov con le loro sembianze sconvolte[17]. Per i poeti-pittori russi è centrale il retaggio dell'icona intesa come visione archetipica, come la «rocca delle figure celesti»: le icone sono la fedele raffigurazione delle idee sovrasensibili e rendono pubbliche le visioni inaccessibili. L'iconostasi, che nelle chiese ortodosse delimita lo spazio sacro, è il «confine fra il mondo visibile e il mondo invisibile». Il cammino verso la forma verbale passa attraverso il segno iconico. Il poeta-pittore studia le fisionomie e indovina il pensiero del viso: mentre la fotografia omologa i volti con una sorta di alone di stupidità, il ritratto è il simbolo della disposizione interiore di un individuo e incrementa lo spazio semantico della parola.

Ponendosi al di là della diatriba tra gli utilitaristi nichilisti e i fautori dell'arte per l'arte, Dostoevskij afferma che l'arte è sempre «reale e attuale; essa non è mai esistita e, qual che è più importante, non potrà mai esistere in un modo diverso». L'esigenza della bellezza è la prima ipostasi di una ricerca estetica che appare tormentata e attraversata da momenti di disperazione e di «sterminata angoscia, di profondo e indefinibile disgusto». In questi momenti, insorge, per contrappunto, l'«entusiasmo byroniano» per gli ideali di bellezza creati «dal passato e dal passato lasciati in eterno retaggio». L'angoscia del presente, per Dostoevskij, non deriva dall'impotenza della vita attuale, ma «dall'ardente sete di vita e dal nostalgico desiderio di un ideale da conquistarsi nella sofferenza».

L'angoscia per il presente è celata dall'entusiasmo per il passato, che deve essere sottratto al monopolio dei «disgustosi vermi antologici» che hanno perso il senso della realtà e si sono comodamente sistemati nel passato tra le pagine di qualche asfittica antologia. D'altro canto, l'esaltazione del progresso è spesso affidata alle opinioni prese in prestito da intelligenze meschine. La bellezza che salva, per Dostoevskij, è normalità e salute ed è un *work in progress* comune di diversi e polifonici talenti: «Se in un popolo si conserva l'ideale della bellezza e l'esigenza della bellezza, ebbene in lui è viva anche l'esigenza della salute e della norma, il che costituisce di per sé la garanzia della luminosa evoluzione di quel popolo. Un uomo singolo – fosse anche Shakespeare – non è in grado di concepire nella sua interezza l'eterno

e universale ideale dell'umanità e pertanto non può nemmeno prescrivere all'arte le vie che deve seguire né gli scopi che deve proporsi»[18]. Compito dell'artista è ridestare l'entusiasmo estetico e il sentimento della bellezza, scendendo «come una rugiada benefica» sull'animo delle giovani generazioni. Quale bellezza salverà il mondo? La bellezza che suscita passioni distruttive o l'Eterno Femminino raffigurato dalla Madonna Sistina? Dostoevskij pone questa duplice suspense interrogativa che è ancora un'opera aperta.

[1] F.M. Dostoevskij, *Dnevnik pisatelja 1877-1881*, Id. *Sobranie sočinenij v pjatnadcati tomach*, Sankt-Peterburg, Nauka, 1995, t. 14, pp. 335-340.

[2] K. Baršt, *Disegni e calligrafia di Fëdor Dostoevskij. Dall'immagine alla parola*, Bergamo, Lemma Press, 2016, pp. III-XII.

[3] Ivi, p. 12.

[4] F.M. Dostoevskij, *Pis'ma 1834-1881*, in Id. *Sobranie sočinenij v pjatnadcati tomach*, Sankt-Peterburg, Nauka, 1996, t. 15, pp. 11-13.

[5] M. Bachtin, *Problemi dell'opera di Dostoevskij*, in *Michail Bachtin e il suo circolo. Opere 1919-1930*, Milano, Bompiani, 2014, pp. 1282-1285.

[6] I. Serman, *Dostoevskij e l'Illuminismo*, in S. Graciotti, V. Strada (a cura di), *Dostoevskij e la crisi dell'uomo*, Firenze, Vallecchi, 1991, p. 57.

[7] F.M. Dostoevskij, *Peterburskaja letopis*, in Id., *Sobranie sočinenij v pjatnadcati tomach*, Leningrad, Nauka, 1988, t. 2, pp. 5-33.

[8] H. Böll, *Fëdor Michailovič Dostoevskij e Pietroburgo (da un copione televisivo di Heinrich Böll)*, in *Dostoevskij e la crisi dell'uomo*, cit., pp. 417-418.

[9] F.M. Dostoevskij, *Dvojnik. Peterburskaja poema*, Id., *Sobranie sočinenij v pjatnadcati tomach*, Leningrad, Nauka, 1988, t. 1, pp. 204-205.

[10] Baršt, *Disegni e calligrafia di Fëdor Dostoevskij. Dall'immagine alla parola*, cit., pp. 101-104.

[11] M. Bachtin, *Dostoevskij. Poetica e stilistica*, Torino, Einaudi, 1968, p. 111.

[12] F.M. Dostoevskij, *Chozjajka. Povest'*, in Id., *Sobranie sočinenij v pjatnadcati tomach*, cit., t. 1, p. 339.

[13] F.M. Dostoevskij, *Vystavka v Akademii Chudožestv za 1860-1861 god*, Id. *Polnoe sobranie sočinenij v tridcati tomach*, Leningrad, Nauka, 1979, t. 19, pp. 314-320.

[14] Cfr. I. Turgenev, *Amleto e Don Chisciotte*, Genova, Il Melangolo, 2004.

[15] A.G. *Dostoevskaja*, *Vospominanija*, Moskva, Chudožestvennaja Literatura, 1981, pp. 158-160.

[16] P.N. Evdokimov, *Teologia della bellezza. L'arte dell'icona*, Cinisello Balsamo, San Paolo, 1990, pp. 59-64.

[17] Baršt, *Disegni e calligrafia di Fëdor Dostoevskij. Dall'immagine alla parola*, cit., p. 319.

[18] F.M. Dostoevskij, *G-n_bov i vopros o iskusstve*, in Id., *Sobranie sočinenij v pjatnadcati tomach*, Leningrad, Nauka, 1993, t. 11, pp. 47-87.

Primo piano: Luca Mencacci
The Best Man. Le campagne elettorali viste da Hollywood

Soveria Mannelli, Rubbettino, 2016, EAN 9788849848977, Euro 14, pp. 230

PAOLO ARMELLINI

Il punto di vista dell'industria cinematografica americana può rappresentare un punto di vista privilegiato per affrontare il tema delle elezioni presidenziali degli Stati Uniti d'America. Infatti come mostra oggi il libro di Luca Mencacci *The Best Man. Le campagne elettorali viste da Hollywood*, ci si può avventurare nei labirinti di una materia ostica per la scienza politica contemporanea come il tema del presidenzialismo statunitense e del voto che permette l'insediamento del capo di stato della nazione più potente del mondo attraverso la cultura popolare dei film che ne hanno raccontato la storia dal secondo dopoguerra ad oggi. L'impresa dell'autore è al tempo stesso profonda e originale, perché ci offre un panorama dei più importanti film sulle elezioni americane, leggendo però le sceneggiature dei film attraverso la lente dello scienziato della politica che sfoglia le immagini e i dialoghi in essi presenti come libri vòlti a farci avvicinare ad un contenuto ricco e complesso come il rapporto fra la società politica americana e le sue più importanti istituzioni. L'opera si situa dunque al crocevia di diverse discipline come la scienza politica e l'estetica, la sociologia e la storia del cinema, con un occhio privilegiato all'evoluzione del fenomeno elettorale e dell'organizzazione dei partiti americani.

Facendo però un passo indietro, autorizzati in questo da precise osservazioni di Mencacci sull'ambiguità della storia americana riguardo al rapporto fra l'idealismo di una politica ispirata alle virtù repubblicane che sorreggono eticamente le sue strutture istituzionali e il realismo che si esplica nei metodi spicci e crudeli che la politica deve assumere nel concreto tentativo di realizzarle, è necessario fare riferimento ad alcuni presupposti come la concezione federalista che sta dietro al disegno costituzionale americano. Per alcuni autori esso è sorretto da una precisa teologia politica la quale affonda le proprie radici nella rilettura protestante e puritana del patto della Bibbia fra Dio e il popolo prescelto. Esso può sentirsi capace di mantenere le promesse di un contratto (*covenant*), perché, come il popolo di Israele era stato liberato dal giogo egiziano per ricevere il decalogo e abitare la terra promessa, così il popolo americano può intraprendere la sua impresa perché libero dal giogo britannico che lo ancorava all'antico regime, per dare luogo al so-

gno americano di una libera e democratica repubblica di uomini dotati di medesimi diritti inalienabili. Da questo è nato i federalismo statunitense, che ha dovuto affrontare le critiche di chi ha ritenuto impossibile realizzare una repubblica di grandi dimensioni, quando essa sembrava soprattutto agli occhi degli europei possibile solo in stati di modeste dimensioni. Gli americani con la creazione di diverse istituzioni come il Congresso (Camera dei deputati e Senato, Presidente e Corte suprema di giustizia) hanno sperimentato in modo avventuroso ma duraturo un modo di realizzare la democrazia, che ha mostrato nuovi vizi insieme a nuove virtù.

Tocqueville ha sostenuto nella sua *Democrazia in America* del 1835-40 l'idea che l'uomo democratico americano non ha combattuto come quello europeo contro l'aristocrazia portatrice dei valori fondamentali dei regni, ma ha dato luogo alla democrazia in una prospettiva di non contrapposizione ai valori religiosi, che invece hanno dato sostanza etica a quell'esperimento vivificandone le strutture. Il pericolo è però di tipo nuovo se si pensa per un verso al peso che hanno in essa le maggioranze, le quali possono con le loro decisioni piegare le minoranze e le differenze, e per l'altro al conformismo sociale, che nel pieno della secolarizzazione diffonde la mentalità consumistica dell'industrializzazione. Nelle democrazie moderne allora il pericolo più grande risiede nella nuova mentalità sociale largamente diffusa che coincide col materialismo, la quale fa coincidere la felicità pubblica con l'aumento dei consumi materiali, sradicando l'uomo dal suo rapporto con la tradizione, che gli ricorda come la sua origine sociale lo sostiene e lo nutre, curandolo dal nuovo pericolo dell'atomismo sociale. Mencacci cita opportunamente *La folla solitaria* di David Riesman, in cui si vede come nell'epoca dell'industrializzazione l'unica preoccupazione di masse ed *élites* sia la mera soddisfazione di quei beni materiali che ci fanno dimenticare della dimensione verticale della nostra esistenza. Eppure l'America è nata rivendicando la possibilità di pregare Dio in libertà, proprio nella netta separazione fra Stato e Chiesa. La rivoluzione americana è così legata alla sua costituzione scritta e da duecento anni mai nella sostanza cambiata, con cui si è dato luogo al *covenant* di un piano destinato a offrire soluzioni locali, statali, sopranazionali e mondiali a domande politico-istituzionali emerse in un momento delicato della modernità che deve fare i conti con il modello di sovranità entrato in crisi con la sua reificazione operata dallo Stato accentrato proprio della gabbia d'acciaio della burocrazia moderna. Esso pensa a tutto paternalisticamente con le sue politiche del benessere e produce l'omogeneità dei valori e dei bisogni. Tutti sono egualmente elettori con gli stessi diritti e tutti sono al contempo consumatori eterodiretti dalla nuova industria culturale. Anche il cinema è uno strumento di svago e di consenso. Forse addirittura è diventato anche il più efficace per la politica.

In questo clima culturale la politica americana è stata contraddistinta da una aggiornata forma di dialettica, quella fra il nuovo centralismo delle istituzioni federali rappresentative e le istanze di pluralismo e democrazia più vicine al popolo, le quali rivendicano una maggiore diffusione del potere sul territorio. È proprio la tensione fra la concentrazione del potere e la sua distribuzione nel pluralismo delle fazioni che se lo contendono sul territorio a provocare inintenzionalmente una virtuosa crescita dell'etica democratica, pur con tutti i suoi limiti, poiché nessuna associazione, movimento, gruppo o partito può mai vincere in modo tale da annullare su tali grandi dimensioni i diritti e le libertà delle altre pur agguerrite fazioni. Lo stato nazionale sovrano tende sempre e comunque a sacrificare le componenti linguistiche, etniche, culturali e religiose minoritarie a favore della sua immagine unitaria di nazione. Questa forma di Stato entra in crisi sin dalla fine del Settecento

per l'insorgenza di istanze autonomistiche, ma anche di nuove prospettive tecniche ed economico-sociali. Le direzioni sono state sostanzialmente due. La prima consiste nella creazione di unità di governo più piccole vicine alle persone e ai territori e la seconda nella invenzione di centri di potere più ampi relativi ai problemi che sconfinano al di là dei territori. Esso deve proteggere e non calpestare i diritti e le libertà naturali. Nell'antico regime aveva prevalso la concezione dello Stato come un tutto organico che preesiste all'individuo, nella concezione puritana viene prima l'individuo che ha valore in sé e poi viene lo Stato che si limita a tutelarlo. Il protestantesimo ha liberato secondo questi coloni britannici il credente dalla subordinazione alla Chiesa e al principio d'autorità e ha ridato responsabilità al singolo e alla sua autodeterminazione come persona autonoma.

Il federalismo è legato così alla parola *foedus*, che in latino significa patto fiduciario fra due contraenti aventi gli stessi diritti di persona giuridicamente libera. Esso in inglese è stato reso con la parola *covenant* (*coming together*), che il filone riformato del protestantesimo ha trasposto sul piano politico come nuovo patto fra uomo e Dio secondo lo schema dell'alleanza fra il popolo eletto e il Dio monoteista della Bibbia. L'alleanza del Sinai rimane la prefigurazione e l'antecedente del nuovo contratto sociale, che è un accordo tra pari con eguali diritti inalienabili ispirati dall'essere il popolo prescelto da Dio per realizzare il sogno di una democrazia costituzionalmente retta da una carta scritta, che prevede delle istituzioni a guardia del pluralismo sociale e politico. Il puritanesimo dei perseguitati che erano fuoriusciti dai regni autoritari dell'Europa, in primis dalla Gran Bretagna, aggiunge il carattere radicale di una forma di governo costituzionale, in cui il diritto del popolo di scegliersi i propri governanti è supportato dal diritto di liberarsi dal possibile dispotismo sempre in agguato. Il protagonista diventa l'individuo dotato di diritti inalienabili, fra cui quello di voto che è assegnato indistintamente a tutti a prescindere da lingua, sesso, etnia e condizione socio-economica. Lo stesso diritto di essere eletto in Parlamento è riconosciuto in senso universale, dato che l'istituzione votata a fare le leggi è la suprema autorità che rispecchia la volontà sovrana del popolo. Certo, poi ci sono le capacità dei singoli che si esplicano nel raggiungimento delle condizioni economiche più elevate le quali permettono di organizzare le campagne elettorali, e qui la filmografia politica illustrata da Mencacci ci presenta i molti lati oscuri dell'evoluzione del fenomeno elettorale. Ma a fondamento di tutto ciò rimane la libertà di coscienza che va protetta soprattutto dalle vessazioni religiose. In materia di fede c'è in America libertà e non uniformità confessionale.

Dalla interpretazione del film *Lo Stato dell'Unione* diretto da Frank Capra nel 1948, con la campagna elettorale per le presidenziali è presa in esame, per esempio, la questione della rappresentanza. La prassi vuole che il Presidente USA debba informare il Congresso della situazione economico-sociale e della direzione da intraprendere. Essa si svolge fra gennaio e febbraio, periodo in cui il Presidente della Camera dei deputati invita al Congresso per questo motivo il Presidente per la sua relazione. Nel film la trama prevede che per il partito repubblicano non si riesca a trovare il candidato. Il vecchio politico di professione John Conover deve portare alla Casa Bianca un candidato scelto da Kay Thorndyke (Angela Langsbury), che è una ricca e ambiziosa ereditiera divenuta l'amante di tale Grant Matthews (Spencer Tracy), che è un industriale facoltoso e preparato. Il film dispiega così la dialettica fra i due protagonisti, ove Conover rappresenta il politico di lungo corso, vòlto a cercare accuratamente con tutti i mezzi il consenso e a mantenere una carriera che lo porti ai vertici del suo partito (Grand Old Party). Egli risulta

esperto, competente, malizioso, perché conosce pragmaticamente i meandri della politica in senso tecnico. Matthews è invece un industriale che si è fatto da sé, ispirandosi a quel sogno americano che vede i migliori premiati dal ricoprire le più alte cariche pubbliche, perché sono stati capaci nella vita di raggiungere un successo privato con la creazione di imprese rigogliose. Il primo è dominato da un realistico pragmatismo quanto il secondo è pervaso dall'idealismo tipico delle prime comunità americane. Nel 1948, nella realtà, al potere c'è Truman, che alla sconfitta di medio termine oppone una campagna populista colla retorica della lotta di classe contro i repubblicani che difendono rendite di posizione sul piano economico. L'industriale rappresenta nel film dunque colui che vuole ricomporre le fratture sociali con una ricerca di un equilibrio fra salario e profitto, fra lavoro e capitale, mentre il politico di professione è antipatico perché col metodo del *divide et impera* sgretola il paese contrapponendo gli interessi delle varie categorie sociali al fine di racimolare voti nelle più diverse classi sociali. L'imprenditore responsabile è contro la società dei consumi, che sono possibili solo per chi può permettersi tutto, mentre egli è colui che aspira a sanare le contraddizioni ed elevare la democrazia nel mondo secondo un disegno perfetto. Il conflitto è tra la tensione ideale e la politica dei *bosses* locali, che hanno un profondo risentimento contro gli individui carismatici, considerati dei demagoghi in quanto uomini nuovi che disprezzano l'esperienza maturata all'ombra del lavoro oscuro svolto per il partito. Il boss è democratico o repubblicano solo per opportunismo; i suoi principi morali e politici sono sfumati; la sua intelligenza pratica è sensibile alla volatilità delle preferenze. Egli, che così è stato ben descritto da Max Weber sulla base di una attenta lettura di *American Commonwealth* di James Bryce, si oppone agli *outsiders*, anche se paradossalmente si deve affidare proprio a quei candidati carismatici che combattono ogni forma di corruzione che si annida dentro le strutture burocratiche, le quali nelle democrazie parlamentari stanno all'origine del malaffare se ne travalicano i confini. Se Matthews diventerà presidente lo deve però a Conover, che potrà continuare a godere dei suoi privilegi occupando i posti chiave nel partito solo se Matthews è a sua volta un vincente. Egli si guadagna le simpatie della gente ma non quelle di chi è capace di tessere le fila del perverso gioco delle candidature coi vertici dei sindacati e con le *lobbies* degli industriali. Matthews vuole eliminare i politici di professione, ma la campagna elettorale si vince con la dura e sporca ricerca di delegati utili per la *nomination*. L'ambizione prevale sulle buone intenzioni.

Un capitolo del libro è dedicato al fenomeno del cospirazionismo, così come emerge in *Manchurian candidate* con Denzel Washington come principale protagonista. Il film è un remake di *Va' e uccidi* di tanti anni prima. La trama prevede che un reduce di guerra soffra di incubi e allucinazioni. Coi suoi commilitoni che hanno avuto esperienza di una dura vita militare condivide un fatto. Presi tutti prigionieri, un esperimento medico li ha trasformati in potenziali *killers*, o sotto il comando indotto dall'ipnosi o teleguidati da un chip trapiantato nel corpo. La multinazionale Manchurian Global si vuole impossessare della presidenza e ordina a B. Marco di uccidere il Presidente per permettere al Vicepresidente di tenere la carica per tutto il tempo necessario al fine di prepararsi alla sua candidatura. Mencacci ricorda come nella storia degli Stati Uniti sono stati assassinati molti Presidenti: A. Johnson sostituisce nel 1865 A. Lincoln, A. Arthur ha preso il posto di J. Garfield nel 1881, T. Roosvelt è subentrato a W. McKingley nel 1901, L. Johnson nel 1963 ha sostituito J.F. Kennedy. Nel film il delitto non va a buon fine e il Presidente si salva: la morale insegna che le congiure possono rivelarsi inutili e spesso

risultano addirittura dannose alla causa che si vorrebbe servire. La cospirazione, secondo l'interpretazione presente in *Congetture e confutazioni* di K. R. Popper, è legata alla paranoia che tutto nella società sia mosso da un oscuro gioco di *élites* dominanti, sconosciuto alle masse. Ogni cosa nel tessuto sociale è il risultato di un proposito perseguito da pochi individui e da potenti gruppi di affari. Si ha a che fare con l'ignoto, il metafisico e il misterioso sottratto a qualsiasi forma di controllo e di verifica empirica. La congiura invece rimane legata alla riservatezza prudente di chi avvia e conclude un disegno con persone le quali hanno giurato fedeltà ad un preciso progetto. Il complotto è mosso da supposte entità metafisiche collettive per definizione vaghe, che non vogliono il potere momentaneo, ma dominare il mondo nella sua complessità. In essa risulta estinta la dialettica del pluralismo in conflitto. Ora, secolarizzando le omeriche cospirazioni degli dèi, che potevano, secondo il loro carattere e le loro singolari passioni, anche soddisfare i desideri di chi li pregava con maggiore intensità e offriva loro i sacrifici graditi, i saggi dei nuovi complotti sono nuovi dèi sempre insoddisfatti che vogliono conquistare tutto, come i monopolisti, gli imperialisti e i grandi capitani dell'industria e della finanza. Con Popper quindi l'autore distingue congiura da complotto, che è un fenomeno che esula dall'indagine scientifica della politica attenta ai fatti empirici. Ogni fatto storico-sociale deve essere ricondotto a una volontà premeditata di qualcosa di concreto; non esistono invece effetti misteriosi di cause sconosciute all'indagine; le azioni umane sono contraddistinte dall'imperfezione, perché sono libere e lasciano spazio ad una serie di conseguenze inintenzionali, che prevedono la revisione dei fatti e la correzione futura, quando c'è bisogno. Il cospirazionista deve cercare un senso logico in avvenimenti storici articolati in cui è presente l'imprevedibile. Secondo i cospirazionisti la democrazia è vuota, consumata da una folla solitaria descritta così bene da David Riesman, mentre il potere è in mano a gruppi finanziari ed economici che in modo misterioso e spregiudicato agiscono nell'ombra per brama di potere.

Mencacci trova così modo di illustrare con il cinema un'estetica del chiaroscuro che anima la politica americana, ove il sistema partitico risulta ormai incapace di difendere le libertà democratiche dai poteri forti dei gruppi di pressione prevalenti e dalle *lobbies* finanziarie, che sono vere e proprie società segrete e anonime votate al lavaggio del cervello. Ma questo è un destino ineluttabile o solo una delle costanti della politica, accanto a quelle che difendono la partecipazione autenticamente democratica? Qui sta il problema di fondo del lavoro di Mencacci sul futuro delle elezioni americane viste dal punto di vista della più importante e popolare filmografia.

Dodici proposte di lettura

A CURA DI ANTONELLA BETTONI, RONALD CAR, NINFA CONTIGIANI, LUIGI IACCHÈ, MONICA STRONATI

A

Piero AIMO
Comuni e Province: Ottocento e Novecento. Storie e istituzioni

Pavia, Pavia University Press, 2017, pp. 276
ISBN 978869520549, Euro 22

L'antologia di scritti viene pubblicata nella Collana "Raccolte d'Autore" dell'Università di Pavia dove l'A. è stato professore ordinario di Storia costituzionale nella Facoltà di Giurisprudenza dal 1996 al 2013. Lo scopo della raccolta è quello di facilitare la fruizione di testi che altrimenti sarebbero di non facile accesso, soprattutto ai fini della didattica. Il volume è, coerentemente, scaricabile online [http://www.paviauniversitypress.it/catalogo/comuni-e-province-ottocento-e-novecento-storie-di-istituzioni/511]. I saggi, già editi in tempi diversi ma con titoli parzialmente differenti, hanno come filo conduttore la storia delle autonomie locali in Italia tra Otto e Novecento. Anche la scelta dei saggi, organicamente collegati, muove dalla necessità di sopperire alla scarsa attenzione dei manuali destinati alla didattica su alcuni temi, come il ruolo dei sindaci, le modalità e caratteristiche del suffragio amministrativo, l'apporto della dottrina giuridica anche di provenienza tecnico-professionale, in generale l'evoluzione del governo locale e la configurazione del principio dell'autonomia locale in Italia. Temi affrontati dall'A. evitando una ricostruzione meramente descrittiva degli interventi normativi per privilegiare l'effettivo funzionamento degli enti locali e degli apparati statali. È convinzione dell'A. che la vita reale delle istituzioni non possa essere ridotta alla storia delle idee, per quanto di grandi pensatori. Per questa ragione tra le fonti studiate ci sono anche le Riviste giuridiche, nelle quali si può rintracciare il quadro generale della cultura giuridica, in particolare quel sapere giuridico di carattere pratico che ha immediate ricadute sulle amministrazioni municipali.

M.S.

B

BARTOLO da Sassoferrato
Trattato sulla tirannide

a cura di D. Razzi, prefazione di D. Quaglioni, trad. di A. Turrioni

Foligno, Il Formichiere, 2017, pp. 133
ISBN 9788898428700, Euro 12

Un piccolo e còlto editore di Foligno, "Il Formichiere" di Marcello Cingolani, ha promosso, nella neonata "Piccola Biblioteca del Pensiero giuridica" raccolta da Diego Quaglioni, un'operazione culturale importante: la traduzione in italiano del più celebre dei trattati politico-giuridici di Bartolo da Sassoferrato. Che questo classico del pensiero politico e del costituzionalismo medievale emerso dalla straordinaria vicenda storica delle città comunali italiane e dalla crisi della loro "libertas" possa giungere ad un pubblico più ampio (anche sotto forma di adozione in corsi universitari) è "cosa buona e giusta". Il traduttore Attilio Turrioni ha saputo rendere con efficacia e precisione il testo originale del "De tyranno" tratto dall'edizione critica di Diego Quaglioni (*Politica e diritto nel Trecento italiano. Il "De tyranno" di Bartolo da Sassoferrato (1314-1357)*. Con l'edizione critica dei trattati *"De Guelphis et Gebellinis", "De regimine civitatis" e "De tyranno"*, Firenze, Olschki, 1983, pp. 171-213). L'edizione è curata da Dario Razzi, magistrato nato a Sassoferrato e studioso di Bartolo, che introduce alla lettura e correda di note il testo rinviando alle fonti romanistiche, canonistiche e scritturali utilizzate dal grande giurista marchigiano.

Ancora oggi capita di leggere studi sulla tirannia con nessuno o con rapidi accenni all'opera di Bartolo. Eppure il trattato è stato anche tradotto in inglese grazie all'edizione di Chicago del 1986 (a cura di Erich Cochrane e Julius Kirshner). La lettura della traduzione italiana ci conferma ancora una volta il valore dell'opera, la sua originalità, il carattere fondativo per la riflessione medievale e moderna. Bartolo denuncia l'avanzata della "schiavitù tirannica" nelle città italiane e ne analizza e disegna, nella consueta forma della *quaestio*, i caratteri distintivi. Bisogna stabilire anzitutto chi è colui che "non governa secondo diritto", perché non ha titolo o, se lo ha in origine, lo perde a seguito di abuso o violazione del presupposto originario. Bartolo passa in rassegna le diverse ipotesi, le discute, critica la prassi, da parte degli imperatori e, nei territori della Chiesa, dei pontefici, di legittimare *ex post* (si pensi ai Visconti o ai Malatesta) gli usurpatori venendo a patto con essi. Ma non si limita solo ai tiranni "visibili" perché si occupa anche della tirannia "velata", quando il tiranno usa "maschere" per celare la propria natura, con una acuta riflessione sul paradigma del "potere occulto".

L.L.

C

Francesco Campobello
La Chiesa a processo. Il contenzioso sugli enti ecclesiastici nell'Italia liberale

Napoli, Edizioni Scientifiche Italiane, 2017, pp. 291
ISBN 9788849532593, Euro 32

L'autore ha ricostruito, attraverso l'analisi della giurisprudenza sul contenzioso tra gli enti ecclesiastici e l'appena unito Regno d'Italia, il complesso rapporto Stato-Chiesa. Egli ha opportunamente valutato in effetti, che non tanto l'analisi della costruzione legislativa (ovvero le intenzioni dei promotori, il dibattito parlamentare) fossero ancora da approfondire, quanto piuttosto l'eventuale "autonomia della magistratura dal potere politico" tradita dalle motivazioni delle sentenze, come pure quali argomentazioni fossero state usate e se, per dare attuazione o, per limitare l'intervento legislativo (p. 13). Il percorso è giustamente ancorato alla legislazione sabauda. In effetti, è sulla scia di una scelta "riconfermata" da tutti i discendenti della casata Savoia che è passata la politica religiosa della stessa nei primi anni dell'Italia unita. Una posizione di laicità piena fu assunta, affrontando sul piano giuridico e non teologico l'invadenza della Curia roma-

na, proponendosi un atteggiamento di distinzione netta tra appartenenza religiosa della casata, saldamente ancorata al cattolicesimo dai tempi della scelta di campo contro i riformati protestanti, e politica religiosa della stessa, pragmatica e senza finzioni.

Pur non mancando cenni sulla situazione degli stati preunitari, il centro del volume (cap. II, III, V) si concentra sugli anni dall'Unità al Concordato del 1929 ripercorrendo i primi interventi legislativi, il momento della mancata riconciliazione (pure in un primo momento auspicata) passando per la legge Crispi sulle Istituzioni pubbliche di beneficenza, per passare poi all'articolata risposta giurisprudenziale, che a specchio sembra riproporre i nodi che erano stati legislativi: la questione della personalità giuridica, le soppressioni e concentrazioni, gli incameramenti di beni, la tassazione, i Legati pii, i Capitoli collegiali, le controversie nei confronti dei terzi. Ciò ancora una volta senza mancare di valutare la premessa sabauda nell'applicazione delle Corti piemontesi (cap. IV).

Il volume si chiude con una esperienza in controtendenza, quella dell'Opera Pia Bartolo che invece al conflitto giurisdizionale contrappose "l'acuta scelta dei termini e delle condizioni dell'atto fondativo" e a ragione parrebbe poiché tale ente ha superato di gran lunga l'età liberale essendo giunto fino ai giorni nostri (cap. VI).

N.C.

F

Alberto Febbrajo, Giancarlo Cosi (eds.)
Sociology of Constitutions. A Paradoxical Perspective

New York, Routledge, 2016, pp. 290
ISBN 9781472479594, £ 110

Negli ultimi decenni, parallelamente allo sviluppo della globalizzazione e dei fenomeni di transnazionalizzazione, la sociologia del diritto ha assunto il tema delle costituzioni come uno dei campi privilegiati di analisi. Promosso e curato da due ben noti sociologi italiani, Alberto Febbrajo e Giancarlo Cosi, questo volume, sulla scia della teoria generale sistemica di Niklas Luhmann (evidente anche nell'appendice dedicata al concetto di costituzione nell'opera del grande sociologo tedesco), raccoglie contributi di alcuni importanti sociologi, costituzionalisti e storici, europei e non (tra i quali G. Teubner, C. Thornhill, C. Pinelli, K.-K. Ladeur, M. Neves).

La sociologia delle costituzioni vuole demitizzare la centralità della costituzione statale come unica e indiscutibile matrice dell'ordine giuridico nazionale, dalla quale far discendere innumerevoli conseguenze in termini di legittimazione, validità, efficacia. Potremmo dire che sono le costituzioni del Novecento, creatrici dell'ordine politico e sociale democratico, ad essere viste in crisi, per aver perso, almeno in parte, il loro ruolo strategico sia rispetto alla società civile che al potere politico.

La sociologia delle costituzioni si interroga sull'impatto dei nuovi fenomeni (per es. lo sviluppo delle organizzazioni transnazionali, gli interessi economici sovranazionali, i sistemi di regolazione internazionale) sulla tenuta e sul ruolo delle costituzioni "tradizionali" e, al contempo, sulle diverse dimensioni del "costituzionalismo globale" (al quale il *Giornale di storia costituzionale* ha dedicato il numero monografico "Ripensare il costituzionalismo nell'era globale", 32, II, 2016). Certamente uno dei problemi è quello relativo all'inquadramento dell'oggetto di indagine. Infatti "It is actually easier to say what the constitution *was* rather than what the constitution *is*. The absence of a clear positive definition is an important reason for the increased ambiguity than the concept now shares with other leading concepts of traditional dogmatics". Di fronte alla frammentazione della pro-

spettiva costituzionale, appare necessario lavorare a fondo sulla vecchia e sulla "nuova" semantica costituzionale, muovendo da quei paradossi che denunciano contraddizioni ma stimolano anche a trovare nuove soluzioni. È proprio quello che prova a fare questo interessante volume.

L.L.

G

Paul Garfinkel
Criminal Law in Liberal and Fascist Italy

Cambridge, Cambridge University Press, 2016, pp. 536
ISBN 9781107108912, Euro 82

Il volume di Paul Garfinkel, storico americano presso la canadese Simon Frazer University, si presenta come un vasto affresco di storia del diritto penale in Italia tra età liberale e fascismo. Risultato di una ricerca seria, di lungo corso, frutto di un grande scavo, e di una conoscenza delle fonti posseduta solo da pochi storici anglosassoni. Si tratta di un lavoro di revisione storiografica, ricco di numerosi profili di originalità. Lo si vede subito dall'introduzione, dove la figura che balza all'attenzione è quella di un autore che non ti aspetteresti, Ugo Conti (1864-1942), penalista di militanza radicale. Nelle storie italiane Conti è pressoché assente perché gli storici del diritto, secondo Garfinkel, hanno caratterizzato la riforma penale in Italia come una lotta incessante tra le due Scuole, quella classica della fondazione del diritto penale in Italia, e poi quella positiva che ne arrivò a "minacciare" la supremazia. Insomma, Conti non rientra in questo schema. E' piuttosto un "ibrido", "classico" per la sua tradizionale visione della pena e della colpevolezza, "positivista" se si considera la sua teoria dei "complementi di pena", le misure di sicurezza, la pericolosità sociale. A p. 5 l'Autore pone le domande fondamentali alle quali cerca di rispondere nel corso della trattazione. Il libro viene presentato come testo di "rottura", e come la prima monografia sulla "Liberal and Fascist penal law reform and legal culture". La ricerca si concentra sui reati comuni (e non su quelli politici, oggetto di buona parte degli studi attuali) e privilegia la dimensione internazionale e transnazionale dei fenomeni.

I primi tre capitoli contengono la più accurata analisi che sia mai stata dedicata alla rappresentazione e alla "conta" del fenomeno criminale in Italia dopo l'Unità, analizzando in maniera brillante le statistiche e mettendo in luce la rilevanza di personaggi come Curcio, Bodio, Bosco. Figure poco note, ma importanti nella costruzione del canone che Garfinkel chiama "difesa sociale moderata". In questa parte emerge tutto il ruolo del sistema penale rispetto al processo di "civilizzazione" della nuova Italia, un paese, che stando alle statistiche, appare come il più violento d'Europa. *Nation building* e *State building* si collegano qui strettamente al problema penale. E' all'interno di questo quadro che l'A., come detto, inserisce il discorso più innovativo del libro, ovvero quello relativo al concetto di "difesa sociale moderata", ovvero "A varied and dynamic mix of ideas about how to repress and prevent 'dangerous' common crime…" (p. 6). Questo terreno "mediano" porta l'A. a ridimensionare il ruolo dei positivisti. La difesa sociale nasce ben prima di Lombroso. E nasce avendo come terreno privilegiato quello concretissimo delle classi pericolose, delle misure di prevenzione, del recidivismo, della pericolosità sociale. Garfinkel dedica, non a caso, due ampie "monografie" a due temi poco studiati, la delinquenza giovanile e l'alcolismo, mostrandone invece tutta la rilevanza.

L'impostazione originale dell'A. lo porta a ripensare, giustamente, la Scuola positiva, e a vedere nel progetto di codice Ferri (1919-1925) non il trionfo del positivismo (tesi consueta), ma, al contrario, l'estremo fallimento per via della sua ec-

cessiva radicalità sul tema della responsabilità morale.

Anche la parte dedicata al fascismo (cap. 7, 1925-1931) mette al centro due tesi "revisioniste". Il codice Rocco come codice nato fascista e come compromesso tra le due Scuole. Garfinkel fa quello che raramente è stato fatto: studia il codice in relazione ai precedenti pre-fascisti e soprattutto al contesto internazionale. L'accuratissima ricostruzione del processo di formazione del codice Rocco mostra come ci sono diversi fasi. E solo tra il 1929 e il 1930 inizia la 'fascistizzazione' del codice (difesa della personalità dello Stato, della religione, della morale ecc.). Il progetto del 1927, sottoposto all'attenzione dei professori e dei pratici, incontra l'interesse e il sostanziale consenso dei giuristi perché era un tentativo di sistematizzare le idee della difesa sociale moderata secondo il *mainstream* internazionale.

Per dare ampio risalto alla tesi di fondo del suo libro, Garfinkel tende ad enfatizzare la visione storiografica della storia del diritto penale italiano come guerra all'ultimo sangue tra le due Scuole e del codice Rocco come terreno di "mediazione". Questa è stata la visione dominante per lungo tempo (anzitutto tra i penalisti), ma essa ha abbandonato la storiografia più recente, soprattutto per merito dei lavori di Mario Sbriccoli e della sua scuola. Nondimeno la tesi di Garfinkel, supportata da una ricerca che per certi versi non ha eguali, appare di grande interesse ed utilità. "This study aims to encourage a complete rethinking of the traditional interpretation of Italian penal reform and legal culture in which the impact of criminological positivism has long been overstated" (p. 11). E, ancora, "The term 'moderate social defense' not only helps to give order, coherence, and clarity to what was the dominant strain of penal-reform ideas in Italian legal culture in this period" (p. 13). Esso collega meglio l'esperienza italiana a quella internazionale e offre un valido strumento di lavoro.

L.L.

Paolo Grossi
*L'*invenzione *del diritto*

Roma-Bari, Laterza, 2017, pp. 214.
ISBN 9788858129234, Euro 24

Dopo *Ritorno al diritto* (Laterza, 2016), ecco una nuova raccolta di saggi (in numero di nove) che trae il titolo da alcuni dei contributi (qui presenti) scritti negli ultimi anni. Il maestro fiorentino, storico del diritto e dal 2009 giudice costituzionale (dal 2016 presidente della Corte costituzionale), prosegue il suo "viaggio" per *recuperare* il giuridico alla sua pluralità e complessità. L'*invenzione* del diritto è formula cara a Grossi per mettere in luce quell'attività da "rabdomante" che dovrebbe essere propria del giurista. Ridurre il diritto al solo fenomeno legislativo e normativistico significa, appunto, privare il diritto delle sue radici infisse nel tessuto sociale, economico, politico. Cercare e trovare il diritto – che si tratti del legislatore o, più ancora, dei giuristi teorici e pratici – è l'attività *inventiva* che l'A. rinviene soprattutto al livello costituzionale e a quello della ordinaria funzione giudicante. Autori come Giuseppe Capograssi, Santi Romano, Costantino Mortati e altri sono ancora una volta evocati come padri nobili di quella "ricerca" del diritto che dal principio del Novecento ha relativizzato l'esclusivismo dello Stato sovrano e ha aperto, nel segno di panorami più complessi e anche contraddittorii, il clima post-moderno inteso come "tempo in cui entrano in crisi i valori portanti dell'edificio politico-giuridico accuratamente progettato, definito, costruito dalla modernità; un tempo che si origina negli ultimi decenni dell'Ottocento, si sviluppa durante il corso del Novecento e che stiamo tuttora vivendo" (p. 9).

Prima che diventasse giudice costituzionale, Grossi aveva già rivolto la sua attenzione al fenomeno costituzionale, e in specie alla Costituzione italiana, come terreno privilegiato del "ritorno al di-

ritto", dopo le esecrabili esperienze del legislatore nazista e fascista. La Costituzione ha saputo rinvenire, "riconoscere", quei valori, bisogni, interessi circolanti nella realtà storica del dopoguerra e soprattutto nel progetto di ricostruzione della società civile. Il documento costituzionale, scritto non da "angeli" ma da uomini colti e profondamente immersi nella dura realtà del loro tempo, non certo scevri da visioni e posizioni anche di "parte", seppero "inventare" una Costituzione capace di registrare la cifra giuridica essenziale della nuova Italia democratica. La Costituzione fu un "atto di ragione", "quasi che si trattasse di qualcosa già *scritto* e che i *Patres* avevano *letto* e trascritto in un testo" (p. XII). La legalità, appunto costituzionale, è stata come riplasmata, facendola uscire dal calco mitologico della modernità giuridica per farla entrare nella concretezza di una storicità autentica. Nell'avveramento di questo indirizzo, al principio incerto, la Corte costituzionale ha svolto un ruolo di primissimo piano quale "autentico organo respiratorio dell'ordinamento giuridico italiano, organo sommamente garantistico per il cittadino che trova in essa il presidio delle sue libertà fondamentali" (p. 38).

Il volume è arricchito dalla bibliografia degli scritti di Paolo Grossi (1956-2017), a cura di Marco Paolo Geri.

L.L.

Sandro Guerrieri
Un Parlamento oltre le nazioni. L'Assemblea comune della CECA e le sfide dell'integrazione europea (1952-1958)

Bologna, il Mulino, 2016, pp. 330
ISBN 9788815264893, Euro 25

Il processo di integrazione europea stenta, per usare quello che sembra decisamente un eufemismo. I flussi migratori, solo in parte imprevisti, ma pervicacemente resistenti e continui, hanno tradito – nonostante più di settanta anni di vita comunitaria – la difficoltà a fiaccare efficacemente gli interessi nazionali proprio quando – apparente paradosso – ce ne sarebbe più bisogno, ovvero nei momenti problematici ed emergenziali.

Il volume di Guerrieri si inscrive nel solco degli studi sul federalismo europeo, ma ponendosi come un lavoro che guarda alle potenzialità e alle delusioni delle origini, agli anni della Ceca e delle strade ancora da intraprendere, o comunque ancora da esperire. Ciò senza infingimenti, ma allo stesso tempo senza abbandonarsi alla delusione.

La vicenda federalista è infatti ripercorsa con lo sguardo attento all'interrogativo di fondo, quello che ancora oggi ci assilla di fronte ai molteplici arresti di essa, che mettono sempre più in torsione le intenzioni dei fondatori: se fosse o non fosse possibile realizzare nel tempo una vera e propria democrazia su scala europea, se fosse davvero possibile superare le barriere nazionali, e costituire un popolo europeo, seppure non subito ma nel corso del tempo. Sono infatti domande che sembrano riecheggiare anche oggi le scelte funzionaliste (o forse troppo prudenti?) di allora, quando a partire dalla dichiarazione Schuman del 9 maggio 1950 redatta sotto la guida di Jean Monet, con il metodo funzionalista fu impostata l'esperienza europea e limitata l'Assemblea.

Sin dall'inizio il Parlamento europeo, la sua elezione (diretta dal 1979), la sua organizzazione, le sue competenze sono state indizi di allontanamento o di avvicinamento all'auspicato approdo di un comune interesse europeo, ma sin dall'inizio il nodo problematico è stato il rapporto di quel Parlamento con l'Esecutivo europeo e il continuo riaffiorare delle volontà dei governi nazionali.

In particolare, il volume si propone di "esaminare la struttura, la dinamica interna, gli obiettivi e la capacità di influenza della prima forma storica assunta dal Parlamento europeo: l'Assemblea comune della Comunità europea del Carbone e dell'Acciaio" (p. 16), avviato appunto con il

Trattato CECA del 1951, non più in vigore dal 2002.

Da questo punto di vista il volume ripercorre le tappe fondamentali di un'esperienza laboratoriale, economica e politica, un'esperienza che ancora a ridosso della recente fine del secondo conflitto mondiale mostrò intanto che dopo trincee e steccati, scontri e invasioni militari, si poteva immaginare di percorrere una strada comune, seppure cominciando soltanto dalla liberalizzazione dei mercati. Ecco allora il capitolo iniziale "sull'apertura del dibattito sulla creazione di un'Assemblea europea", il secondo sulle finalità del piano Schuman, il trattato CECA, la sessione costitutiva dell'Assemblea e le caratteristiche dei primi gruppi che la composero, il terzo dedicato alla progettualità di una difesa comune (Trattato CED del 1952-53) e di seguito il cuore dell'Istituzione parlamentare con la sua organizzazione, il modo di lavoro, la struttura amministrativa, il ruolo dei gruppi politici sovranazionali, le principali direttive d'azione. Insomma, il contributo effettivo e le potenzialità inespresse, per arrivare a concludere con un vero e proprio bilancio sull'Assemblea comune.

N.C.

H

Ran Hirschl
Comparative Matters. The Renaissance of Comparative Constitutional Law

Oxford, Oxford University Press, 2014, pp. 320
ISBN 9780198714514, £ 34,49

Nel volume, premiato dalla American Political Science Association come miglior libro del 2015, Ran Hirschl riassume le linee base del proprio lavoro scientifico proponendolo come fondamento per un innovativo approccio al campo di studi di diritto costituzionale comparato. Per l'autore, questo va ripensato, o piuttosto, riportato nel novero di un più ampio studio comparato di tematiche politico-sociali, entro cui la prospettiva giuridica dovrebbe assumere una funzione ancillare. Solo così sarebbe possibile risolvere il problema della indeterminatezza (o finanche incoerenza) epistemologica e metodologica di cui soffre a suo dire il diritto costituzionale comparato. Contro una scienza giuridica incentrata sulla validità normativa e sulla costruzione del significato normativo degli atti, egli propone dunque il rinascimento di un pensiero costituzionale-comparato mirante alla comprensione della realtà sociale. Mentre l'odierna scienza giuridica considera l'approccio comparato intrinsecamente legato alle attuali dinamiche di globalizzazione degli ordinamenti nazionali, Hirschl ne riscopre una lunga e nobile storicità. Nell'affascinante capitolo dedicato al diritto di matrice religiosa dell'epoca della prima modernità, l'autore traccia un'analogia tra l'attuale confronto tra ordinamenti nazionali e la dottrina sovranazionale dei diritti umani con i modi in cui il diritto ebraico si era adattato ai diversi contesti sociali della diaspora, per poi delineare il conflitto tra il diritto canonico medievale e le particolarità degli emergenti sistemi giuridici nazionali. La modernità si apre con l'opera dei pionieri del diritto pubblico comparato: Bodin che confrontava diritto romano, diritto canonico e quello del regno di Francia in un'epoca segnata dalla guerra di religione tra cattolici ed ugonotti; John Selden che intravvedeva nel diritto ebraico la matrice per un diritto universale. Al momento della definitiva fondazione del diritto pubblico comparato si giunge infine con *Lo spirito delle leggi* di Montesquieu. Per Hirschl, *L'Esprit* indica esattamente a cosa dovrebbero ambire gli studi comparati: il diritto comparato deve fungere da colonna portante di uno studio socio-giuridico; il materiale giuridico comparato deve essere valutato alla stregua di «indicatore, causa ed esito dello sviluppo della società».

R.C.

O

Oxford University Press
A History of the United States' Constitutional Law [interactive timeline]

Oxford, Oxford University Press, 2017
<http://oxcon.ouplaw.com/page/constitutional-timeline-usc>

Oxford University Press ha pubblicato il 17 agosto 2017 una nuova collezione online con contenuto interattivo dedicata alla storia del diritto costituzionale degli Stati Uniti d'America.

La collezione è organizzata in ordine cronologico e può essere interrogata inserendo date specifiche o eventi particolari.

Il contenuto della collezione comprende i documenti originali che costituiscono il diritto costituzionale degli Stati Uniti: gli Articles of Confederation e i 27 emendamenti che sono stati successivamente ratificati. Contiene anche tutti i documenti costituzionali dei cinquanta Stati ed alcune sentenze fondamentali della Suprema Corte. Comprende inoltre i documenti che hanno influenzato la formazione del diritto costituzionale statunitense come la *Magna Carta* e il *Bill of Rights* inglese del 1689.

La collezione di fonti è poi arricchita e completata da contenuti online, articoli di periodici e capitoli di libri che si occupano di tali documenti, pietre miliari della storia costituzionale statunitense. Agli utenti è inoltre consentito di esplorare documenti e articoli contenuti nella collezione online Oxford Constitutional Law, articoli di enciclopedia contenuti nella Oxford Public International Law, pubblicazioni accademiche contenute nella Oxford Scholarship online, articoli e volumi presenti nella Oxford Reference, introduzioni pubblicate nella serie Very Short Introductions, e articoli di periodici raccolti nella Oxford Academic e nell'OUP Blog.

La collezione, pubblicata all'interno della Oxford Constitutional Law, data la completezza delle fonti normative e giurisprudenziali contenute e la ricchezza della letteratura raccolta, costituisce un importante strumento di lavoro per quanti si occupano della storia costituzionale americana.

A.B.

S

Claudia Storti (a cura di)
Le legalità e le crisi della legalità

Torino, Giappichelli, 2016, pp. xxx-250
ISBN 9788892107014, Euro 28

Il volume, pubblicato dalla Società italiana di Storia del diritto, raccoglie i saggi di studiosi del diritto antico, moderno e contemporaneo attorno alle legalità. Un tema classico ma soggetto ad un continuo ripensamento e volutamente declinato al plurale per cogliere i diversi significati assunti nel tempo e nello spazio. Sullo sfondo ricorre la questione delle "crisi" della legalità e della connessa certezza del diritto. Lo scopo di conseguire la certezza del diritto, infatti, è all'origine della legalità intesa come antitesi alla giurisprudenzialità del diritto e, di conseguenza, strumento di accentramento della titolarità della produzione normativa nel potere politico. Il nuovo, esclusivo, ruolo del potere politico introduce un'altra questione, quella dei limiti all'autorità dei poteri pubblici ma soprattutto riproduce un discorso antico, quello dello scollamento tra la conformità alla legge e la giustizia. L'esempio più manifesto è la propagandata legalità, falsa, del regime fascista che però aveva ereditato dallo Stato liberale una legalità con il «vizio occulto», cioè di essere liberale ma non democratica. Nello stampo della legalità meramente formale «si può colare oro e piombo», come lo stesso Calamandrei dovette constatare, eppure la legalità continuerà ad essere un principio troppo carico di mitologia per potervi rinunciare. Un'altra legalità esiste, come titola l'ultimo saggio del volume, e questa seguirà certamente ad una crisi, nel senso

di occasione per un profondo ripensamento. Il nostro è un tempo di "crisi" e di trasformazioni in atto, è dunque necessario uno sforzo critico e di analisi rigorosa delle legalità, un approccio che si può trovare in questo libro.

M.S.

T

Mark Tushnet, Mark A. Graber, Sanford Levinson (eds.)
The Oxford Handbook of the U.S. Constitution

Oxford, Oxford University Press, 2016, pp. 1095
ISBN 9780190654535, £ 94

Questo ponderoso volume consacrato alla Costituzione americana contiene quarantotto contributi. Dopo l'introduzione dei curatori, le cinque parti che ne formano la struttura affrontano i profili storici, giuridici, di scienza politica, i diritti e numerosi percorsi tematici di approfondimento (per es. costituzionalismo, poteri di emergenza, interpretazione, culture costituzionali ecc.). Gli autori rappresentano quanto di meglio oggi la cultura americana possa offrire in ambito costituzionalistico offrendo una panoramica completa, aggiornata, ricchissima sul tema della costituzione storica e di quella vivente.

Nell'Introduzione, dal forte impianto storico, i curatori evocano come *start point* i *The Federalist Papers* visti come il primo *Handbook* sulla costituzione americana *in fieri*. Come è noto gli straordinari autori Alexander Hamilton, James Madison and John Jay, che sotto la firma di Publius pubblicarono gli articoli su alcuni giornali per "convincere" la maggioranza dei delegati alla Convenzione newyorkese a ratificare il testo, criticarono la prima costituzione americana, gli Articoli della Confederazione e affermarono la bontà del nuovo testo che rafforzava in senso federale il governo. Quella che divenne la costituzione americana, il più longevo e prestigioso testo costituzionale della storia moderna e contemporanea, non era però la "machine that might go by itself". Le aspettative furono in parte disattese, imperfezioni strutturali ed eventi inattesi resero tutto più complicato. Iniziava così la storia concreta della costituzione americana, segnata, per più di due secoli, da grandi sfide, innovazioni, interpretazioni, adattamenti e qualche insuccesso.

Publius avrebbe certamente apprezzato il fatto che un *Handbook of the United States Constitution* sia stato pubblicato nel 2016, ben più di duecento anni dopo la ratifica del testo. Ma, mentre i tre autori del *Federalist* avrebbero trovato familiari molti temi, su altri aspetti avrebbero dovuto constatare dei cambiamenti radicali. Quei cambiamenti che l'*Handbook* cerca di ricostruire da varie angolazioni, offrendo al lettore uno strumento utile, forse imprescindibile per avvicinarsi all'esperienza costituzionale americana di oggi.

L.L.

V

Armin Von Bogdandy, Peter M. Huber, Sabino Cassese (eds.)
The Max Planck Handbooks in European Public Law. The Administrative State. Volume 1

Oxford, Oxford University Press, 2017, pp. 683
ISBN 9780198726401, £ 150

Armin von Bogdandy e Peter Michael Huber hanno già promosso e curato il formidabile *Handbuch Ius Publicum Europaeum* (Heidelberg, Müller), una di quelle imprese editoriali che è difficile vedere realizzate al di fuori della Germania. Ora, con Sabino Cassese, i due studiosi tedeschi pubblicano il primo volume dei *Max Planck Handbooks* dedicato allo Stato amministrativo, in lingua inglese e con una diversa struttura espositiva. Il nuovo *Ius publicum europaeum*, analogamente a quello più antico, è oggi un *mixtum compositum*, una struttura complessa

formata dal diritto pubblico dell'Unione europea, dalla Convenzione europea sui diritti umani e dalla relativa giurisprudenza, dal diritto dei singoli Stati (legislativo, giurisprudenziale ecc.). Mai come oggi, gli studiosi e i pratici, che sono i testimoni ma anche gli attori di questo processo costruttivo, devono possedere la visione del quadro generale delle questioni, coltivando, auspicabilmente, i terreni della storia, della comparazione e della teoria generale. Questo primo volume dedicato alla "forma" dello Stato amministrativo presenta grande interesse per chi coltiva la storia costituzionale e la storia del diritto pubblico. Nel concreto dei singoli saggi, la dimensione storica è sempre presente, adempiendo ad una funzione tutt'altro che esornativa.

Il volume è formato da diciotto saggi. I primi quattro rivestono un carattere introduttivo avendo per oggetto l'idea odierna del diritto pubblico europeo (von Bogdandy), la storia del concetto di *ius publicum europaeum* (von Bogdandy, Hinghofer-Szalkay), una panoramica generale sullo Stato amministrativo in Europa (Cassese), uno sguardo allo stato amministrativo in America (Novak). I successivi nove contributi sono dedicati all'analisi di nove esperienze europee (Austria, Francia, Germania, Grecia, Ungheria, Italia, Spagna, Svizzera, Gran Bretagna). Questi saggi "nazionali" hanno lo stesso titolo, ovvero "Evolution and *Gestalt* of". È bene sottolineare l'uso pregnante del termine tedesco *Gestalt*, che, come sappiamo, traducibile come "forma" contiene però un campo semantico più vasto.

Infine seguono cinque saggi che affrontano alcuni temi trasversali come il rapporto tra diritto amministrativo e diritto costituzionale, il concetto giuridico di statualità, la dimensione tipologica del diritto amministrativo in Europa, la trasformazione dello Stato e del diritto amministrativi, l'europeizzazione del diritto pubblico.

Formato da contributi scritti dai più autorevoli studiosi europei e americani, il volume offre uno strumento imprescindibile di consultazione e di studio.

L.L.

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Abstracts

Ulrike Müßig, *Coke's 'Tales' about Sovereignty / I "racconti" di Coke sulla sovranità*

During the seventeenth century, longstanding tensions in the relationship between royal prerogative and the rule of common law came to a head. The results of these struggles led to the constitutional limitation of royal prerogative in the Bill of Rights 1689 arising from the Glorious Revolution of 1688 that brought an end to the Stuart dynasty. Yet the ground for these conflicts had been prepared well in advance, as the Westminster Parliament and, in particular, the common law judiciary developed a concept of the rule of common law that overrode and held primacy over the personal exercise of power of the king and framed the sovereignty of Parliament on the basis of Parliament's institutionalization as the highest common law court. Key to this was the jurist Sir Edward Coke who, over the course of decades and in spite of monarchical attempts to sideline him, crafted a web of history and legal arguments that championed artificial reason and confirmed Parliament's leading position in a judicial as well as political sense. As this article demonstrates, Coke's argumentations were creative inventions, and his ideas of supremacy of law and Parliamentary sovereignty were based more on well-told "tales" than legal correctness. In doing so, however, Coke shaped the course of the constitutional conflicts with Stuart absolutism, thereby setting English common law on a unique and treasured path that protected it from arbitrary intrusion and, ultimately, heavily influenced the British idea of the rule of common law that continues to this day.

Durante il XVII secolo, le lunghe tensioni tra prerogative regie e *rule of common law* si sono attenuate. I risultati di queste lotte hanno portato alla limitazione costituzionale delle prerogative regie nel *Bill of Rights* del 1689 frutto della *Glorious Revolution* del 1688, che ha messo fine alla dinastia Stuart. Tuttavia questi conflitti furono preparati in anticipo, visto che il Parlamento di Westminster e, in particolare, il giudiziario hanno sviluppato un concetto di *rule of common law* che aveva la precedenza e il primato sul potere personale del re e inquadrato la sovranità del Parlamento sulla base dell'istituzionalizzazione del Parlamento come principale tribunale comune. La svolta in tal senso fu data dal giurista Sir Edward Coke che, nel corso di decenni e malgrado i tentativi monarchici di estrometterlo, elaborava una dottrina imperniata su fatti storici e argomentazioni giuridiche che

sostenevano la "ragione artificiale" del *common law* e confermavano la posizione di primo piano del Parlamento sia in senso giuridico che politico. Come vuole dimostrare questo articolo, le argomentazioni di Coke sono state invenzioni creative e le sue idee sulla supremazia del diritto e sulla sovranità del Parlamento si basavano più su "racconti" ben informati che su formulazioni giuridiche. In tal modo, tuttavia, Coke è riuscito a modellare i conflitti costituzionali durante l'assolutismo degli Stuart, ponendo così il *common law* lungo un sentiero unico e apprezzato che lo protegge da intrusioni arbitrarie e, in ultima analisi, ha fortemente influenzato l'idea del *rule of common law* che continua fino ad oggi.

Keywords / Parole chiave: Parliamentary sovereignty, judicial sovereignty, common law courts, precedence of law, Court of Chancery, Star Chamber, Court of High Commission, prerogative writs / Sovranità del Parlamento, sovranità giudiziaria, common law courts, primato del diritto, Court of Chancery, Star Chamber, Court of High Commission, prerogative writs.

John W.F. Allison, *The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective / La sovranità formale del Parlamento di Westminster in Gran Bretagna e in Europa da una prospettiva storica*

In the historical backdrop to domestic British debates about Brexit has been tension between two contrasting and competing conceptions of the Westminster Parliament's sovereignty. In issue has been whether or how parliamentary sovereignty has been subject to constraint, to limitations of form or substance, in strict legal theory or in practical politics. The tension was the product of a doctrinal dichotomy that Albert Venn Dicey introduced in the late-nineteenth century. He introduced it in attempting to juridicalise or juridify the constitution in his foundational and multi-edition textbook *The Law of the Constitution*. The dichotomy was, on the one hand, of a formal legal conception of Parliament's sovereignty as limitless in theory and, on the other hand, of a substantive political conception of its sovereignty as limited in actuality. The tension between these legal and political conceptions has been manifest since then in various formal exercises of Parliament's sovereignty that have impaired its substance. They include parliamentary enactments that conferred self-government in the process of decolonisation, that granted the executive powers to amend parliamentary legislation through "Henry VIII clauses", and that delegated various governing powers in devolution. The tension has also been manifest in the enactment of the European Communities Act 1972, by which the Westminster Parliament made domestic legal provision for the UK's original inclusion in the European Communities. The tension was exacerbated by the unqualified assertion of the unconditional supremacy of Community law by the ECJ, both before and after the 1972 enactment. Through judicial minimalism or false economy – failure to acknowledge, explain and address pressing issues at stake – in the response of the highest British court to the ECJ's assertion of supremacy, problems in the Westminster Parliament's legal and political sovereignty were left unresolved and vulnerable to serious objection. They contributed to making the UK's continued membership of the EU precarious and unstable. The doctrinal and constitutional options and implications for the UK are challenging, as are various searching questions for the EU.

Nel contesto storico relativo al dibattito interno britannico sulla Brexit ci sono state tensioni tra due concetti contrastanti e concorrenti di sovranità del Parlamento di Westminster. In discussione era se e come la sovranità parlamentare è stata soggetta a vincoli e limiti di forma o sostanza nella teoria giuridica in senso stretto o nella politica pratica. La tensione era il prodotto di una dico-

tomia dottrinale che Albert Venn Dicey introdusse nel tardo diciannovesimo secolo. La introdusse nel tentativo di giuridicizzare o giuridificare la costituzione nel suo testo fondativo *The Law of the Constitution* che ebbe numerose edizioni. La dicotomia consisteva, da una parte in una concezione giuridica formale della sovranità del Parlamento come teoricamente senza limiti e dall'altra di una concezione politica sostanziale della sua sovranità come realmente limitata. La tensione tra queste due concezioni giuridica e politica si manifestò fin da allora in vari esercizi formali della sovranità del Parlamento che hanno compromesso la sua sostanza. Essi includono promulgazioni parlamentari che conferivano auto-governo nel processo di decolonizzazione, che attribuivano ampi poteri legislativi all'esecutivo attraverso le "clausole di Enrico VIII", e che delegavano numerosi poteri di governo attraverso devoluzioni. La tensione è risultata manifestamente anche con la promulgazione della Legge sulle Comunità europee del 1972 (European Communities Act 1972), mediante la quale il Parlamento di Westminster predispose provvedimenti legali interni per l'originaria inclusione del Regno Unito nelle Comunità europee. La tensione fu esacerbata dalla affermazione categorica della supremazia incondizionata del diritto comunitario formulata dalla Corte Europea di Giustizia, sia prima che dopo la promulgazione del 1972. Attraverso il minimalismo giudiziario o falsa economia – fallimento nel riconoscere, spiegare e rispondere efficacemente a problemi urgenti in gioco – nella risposta dell'Alta Corte di Giustizia britannica all'affermazione di supremazia della Corte Europea di Giustizia, i problemi nella sovranità legale e politica del Parlamento di Westminster vennero lasciati irrisolti ed esposti a gravi obiezioni. Essi contribuirono a rendere l'adesione ininterrotta del Regno Unito precaria e instabile. Le opzioni e le implicazioni dottrinali e costituzionali per il Regno Unito sono una sfida, così come sono argomenti di ricerca per l'Unione Europea.

Keywords / Parole chiave: parliamentary sovereignty, Brexit, Dicey, form or substance, legal and political, supremacy of Community law, judicial minimalism / sovranità parlamentare, Brexit, Dicey, forma o sostanza, supremazia legale e politica del Diritto comunitario, minimalismo giudiziario.

Lord Robert Reed, *Re-thinking the UK Constitution / Ripensando la costituzione britannica*

According to the traditional Diceyan conception of the UK constitution, Parliament's legislative freedom is limited only by political realities, and no statute is of greater legal significance than any other. However, Parliament does not operate in a constitutional vacuum. Certain established rules govern the interpretation of legislation. In particular, if Parliament wishes to override certain fundamental principles, it must make its intention unmistakably plain. In recent years, the nature of the UK constitution has been re-examined by the Supreme Court of the United Kingdom. There has been an emphasis upon constitutional principles in the common law and on a distinction between ordinary statutes and "constitutional statutes". The Court, building upon precedents from the 1990s, has developed the idea of common law constitutional rights. This idea has proven important as regards the relationship between domestic and EU law, which was considered in the cases of *HS2* and *Pham*. In *HS2*, the Court recognised that some constitutional principles are more important than others and that there are some limits to the extent to which EU law can be accorded primacy over domestic constitutional law. These developments raise questions concerning the hierarchical ordering of enactments of constitutional importance and the resolution of conflicts between constitutional principles. Thus, the Supreme Court is in the process of developing a richer view of the modern UK constitution which requires consideration of the complex interactions between a body of constitutional principles. Parliamentary sovereignty is one of those principles, but it does not exist in isolation.

Secondo il concetto tradizionale di costituzione britannica elaborato da Dicey, la libertà legislativa del Parlamento è limitata soltanto da realtà politiche, e nessuno norma è di maggiore importanza giuridica rispetto a qualsiasi altra. Tuttavia, il Parlamento non opera in un vuoto costituzionale. Alcune regole stabilite governano l'interpretazione della legislazione. In particolare, se il Parlamento desidera negare alcuni principi fondamentali, deve manifestare la sua intenzione in modo inequivocabile. Negli ultimi anni, la natura della costituzione britannica è stata riesaminata dalla Corte Suprema del Regno Unito. È stata posta enfasi sui principi costituzionali nel common law e su una distinzione tra leggi ordinarie e "leggi costituzionali". La Corte, costruendo su precedenti dagli anni 90, ha sviluppato l'idea di diritti costituzionali di common law. Questa idea si è rivelata importante relativamente alla relazione tra diritto interno e diritto dell'UE, che venne considerato nei casi *HS2* e *Pham*. In *HS2*, la Corte ha riconosciuto che alcuni principi costituzionali sono più importanti di altri e che ci sono limiti entro i quali accordare primato giuridico alle norme UE sulle norme costituzionali interne. Questi sviluppi suscitano domande concernenti la gerarchia di promulgazione di norme di importanza costituzionale e la risoluzione di conflitti tra principi costituzionali. Pertanto la Corte Suprema sta sviluppando una visione più ricca della costituzione britannica moderna che richiede siano prese in considerazione le interazioni complesse all'interno di un corpo di principi costituzionali. La sovranità parlamentare è uno di questi principi, ma non esiste indipendentemente.

Keywords / **Parole chiave**: parliamentary sovereignty, constitutional statutes, constitutional principles, EU law, primacy, implied repeal / sovranità parlamentare, carte costituzionali, principi costituzionali, diritto europeo, primato, abrogazione implicita.

Luigi Lacchè, *The Sovereignty of the Constitution. A historical Debate in a European Perspective / La sovranità della costituzione. Un dibattito storico in una prospettiva europea*

This paper aims to focus on certain "sovereignty issues" that were at the heart of European liberal thought in the nineteenth century and, more specifically, during the Restoration (1814-1848). In particular, it will concentrate on the "Doctrinaires" and their political-constitutional thought, especially in France, but will consider also other European experiences. Neutralizing two "threats", popular sovereignty (and its constituent power) as mere "sovereignty of numbers" and the "rule of force" and, on the other side, the archetypical "monarchical sovereignty", they sought to identify a philosophical underpinning (the "sovereignty of reason") and more concretely to elaborate a theory of the "sovereignty of constitution" based historically on the *Charte constitutionnelle*, especially after 1830, and considered to be a framework of national sovereignty. The "epicenter" of this debate was France, but it had a wider European relevance. Indeed, it contributed, in different ways, during the nineteenth century, to the forging of a doctrine of the Constitution based on the "new" sovereignty of the State.

Questo lavoro si concentra su alcuni "problemi di sovranità" che furono al centro del pensiero liberale in Europa nel diciannovesimo secolo e, più specificamente, durante l'età della Restaurazione (1814-1848). In particolare, si porrà l'attenzione sui "dottrinari" e sul loro pensiero politico-costituzionale, in Francia, ma prendendo in considerazione anche altre esperienze europee. Volendo "neutralizzare" due "minacce", la sovranità popolare (e il suo potere costituente) vista come "sovranità del numero" e il "governo della forza" e, dall'altra parte, l'archetipo, ovvero la "sovranità monarchica", i dottrinari cercarono di identificare un presupposto filosofico (la "sovranità della ragione") e più concretamente di elaborare una teoria della "sovranità della costituzione" basata storicamente

sulla *Charte constitutionnelle*, in specie dopo il 1830, considerata come ossatura della sovranità nazionale. L'"epicentro" di questo dibattito fu la Francia, ma esso ebbe una più ampia rilevanza a livello europeo. Infatti, contribuì, in diversi modi, nel corso del diciannovesimo secolo, alla costruzione di una dottrina della Costituzione basata sul "nuovo" concetto di sovranità dello Stato.

Keywords / Parole chiave: French doctrinaires, sovereignty of reason, sovereignty of Constitution, European relevance, sovereignty of the State / Dottrinari francesi, sovranità della ragione, sovranità della costituzione, rilevanza europea, sovranità dello Stato.

Andreas Timmermann, Ulrike Müßig, *Sovereignty doctrines in the constitutional debates around the Cádiz* Cortes*: Transition of monarchical sovereignty to national sovereignty? / Le dottrine della sovranità nei dibattiti costituzionali dentro le* Cortes *di Cadice: la transizione dalla sovranità monarchica alla sovranità nazionale?*

Like many European countries, Spain experienced a constitutional awakening in the early nineteenth century, resulting in the Cádiz Constitution of 1812. The Spanish constitution-making process, however, was unique, as it occurred within the context of the Napoleonic French invasion and occupation, the abdication of the Bourbon monarchy, and the establishment of a Spanish Bonaparte dynasty. As a result, the *Cortes* of Cádiz, convened in 1810 with the intention of providing a legitimate Spanish alternative "government in exile" to the installed Napoleonic regime, faced numerous challenges, ranging from the immediate – a state of war and besiegement by the French – to the technical, such as questions regarding the definition of sovereignty, and where that sovereignty could be vested. This article examines the workings of the constitutional committee of the *Cortes*, leading up to the constitutional debates of 1812 and the subsequent drafting of the constitution. It demonstrates that the constitution sought to mitigate not only the imposed foreign dominion of the French, but also the danger of the reimposition of Bourbon absolutism. Guided and influenced by the theories of Francisco Martínez Marina, the constitutional committee combined liberalism with traditional Spanish conservatism in its attempts to find unique solutions to the Spanish political crisis. Ultimately, while the 1812 constitution could not avoid the restoration of Bourbon absolutism in 1814, its legacy provided the basis for Spanish constitutions to come, as well as a "laboratory" for testing ideas of sovereignty and legitimacy that would prove central to the subsequent struggles for independence in Spanish America.

Come molti Paesi europei, la Spagna sperimentò un risveglio costituzionale all'inizio del diciannovesimo secolo, con la Costituzione di Cádiz del 1812. Il processo costituzionale spagnolo, però, fu unico, in quanto si verificava nel contesto dell'invasione e dell'occupazione napoleoniche, dell'abdicazione della monarchia borbonica e dell'istaurazione di una dinastia napoleonica. Di conseguenza, le *Cortes* di Cádiz, riunite nel 1810 con l'intento di fornire un legittimo "governo in esilio" alternativo al regime napoleonico, affrontarono numerose sfide, che vanno da questioni incidentali – uno stato di guerra e assedio da parte dei francesi – a questioni tecniche, quali ad esempio quelle relative alla definizione della sovranità e dove si potesse attribuire quella sovranità. Questo articolo esamina i lavori del comitato costituzionale delle *Cortes*, precedenti ai dibattiti costituzionali del 1812 e alla successiva redazione della Costituzione. Essi dimostrano che la Costituzione ha cercato di attenuare non solo il dominio straniero imposto dei francesi, ma anche il pericolo della restaurazione dell'assolutismo borbonico. Guidato e influenzato dalle teorie di Francisco Martínez Marina, il comitato costituzionale combinava il liberalismo con il conservatorismo spagnolo allo scopo di

trovare soluzioni uniche alla crisi politica spagnola. In ultimo, se la Costituzione del 1812 non poteva evitare il ripristino dell'assolutismo borbonico nel 1814, la sua eredità sarà la base per le future costituzioni spagnole, così come un "laboratorio" entro cui testare idee di sovranità e legittimità che saranno centrali nelle successive lotte per l'indipendenza dell'America spagnola.

Keywords / **Parole chiave**: Cádiz *Cortes*, Francisco Martínez Marina; Spanish liberalism; Napoleon, monarchical sovereignty, national sovereignty / *Cortes* di Cadice, Francisco Martínez Marina, liberalismo spagnolo, Napoleone, sovranità monarchica, sovranità nazionale.

Bodie Alexander Ashton, *Constitutionalism as a force of popular loyalty: Constitutional and unconstitutional Württemberg in the early nineteenth century / Costituzionalismo come forza di lealtà popolare: Württemberg costituzionale e incostituzionale nel primo diciannovesimo secolo*

States in the geographical region of Germany during the nineteenth century often faced crises of identity. This was especially true at the turn of the eighteenth to the nineteenth century, as their borders were drawn and redrawn within the context of wars, revolutions, and the shifting loyalties of governments. Nowhere was the potential for confusion and unrest greater than in the southwestern province of Württemberg which, by dint of its alliance with Napoleon and eventual defection to the Sixth Coalition, was able to double in population and geographical size. However, Württemberg was able to avoid an existential crisis of identity, and new subject populations from formerly autonomous imperial cities and defunct provinces were successfully integrated into the state. This article argues that the specific reason for this was Württemberg's constitutional heritage, which was unique in the region and, indeed, on the Continent. This heritage actually comprised two constitutions (the 1514 Treaty of Tübingen and the 1819 Ludwigsburg Constitution), separated by a period of unconstitutional rule by the first Württemberg king, Friedrich, between 1805 and 1819. Though it was often unevenly applied, and recognising the fact that constitutionalism in *word* was hardly continuous, the conceptual *spirit* of constitutionalism provided Württembergers both a focused objective in times of discontent (in terms of constitutional reform or reinstatement), as well as a positive force of identity formation in times of satisfaction (in terms of pride in the liberties afforded by this unique apparatus). As a result, the Württemberg state throughout the post-Napoleonic era was an epicentre of European liberalism, while creating a comprehensive and overwhelmingly successful civic patriotic identity based on constitutionalism. In the final analysis, it was this *Verfassungspatriotismus* that made Württemberg arguably the most stable and «safe» state in an otherwise chaotic era.

Gli stati nella regione geografica della Germania durante il diciannovesimo secolo erano spesso di fronte a crisi di identità. Ciò era specialmente vero a cavallo fra il diciottesimo e il diciannovesimo secolo, in quanto le loro frontiere vennero disegnate e ridisegnate a seguito di guerre, rivoluzioni e mutevoli lealtà di governi. In nessun luogo il potenziale di confusione e instabilità fu maggiore che nella provincia sudoccidentale del Württemberg che grazie alla sua alleanza con Napoleone e successiva defezione a favore della Sesta Coalizione, fu in grado di raddoppiare popolazione e dimensione geografica. Comunque il Württemberg fu capace di evitare una crisi esistenziale di identità, e le nuove popolazioni sottomesse da città imperiali precedentemente autonome e da province estinte vennero integrate con successo nello stato. Questo articolo argomenta che la ragione specifica perché ciò avvenne consisteva nel patrimonio culturale del Württemberg, che era unico nella regione e certamente nel continente. Questo patrimonio in realtà comprendeva due costituzioni (il Trattato di Tubinga del 1514 e la Costituzione di Ludwigsburg del 1819), separate da

un periodo di governo non costituzionale del primo re del Württemberg, Federico, tra il 1805 e il 1819. Sebbene fosse spesso applicato in modo non uniforme, e riconoscendo il fatto che il costituzionalismo *a parole* fu raramente continuativo, lo *spirito* concettuale del costituzionalismo fornì agli abitanti del Württemberg sia un obiettivo mirato in tempi di malcontento (in termini di riforma o ripristino costituzionale), sia una forza positiva di formazione di identità in tempi di soddisfazione (in termini di orgoglio per le libertà permesse da questo apparato unico). Come risultato lo stato del Württemberg, durante l'era post Napoleonica, fu un epicentro del liberalismo europeo, creando un'identità civile patriottica di enorme successo, basata sul costituzionalismo. In ultima analisi, fu questo *Verfassungspatriotismus* (patriottismo costituzionale) che probabilmente rese il Württemberg lo stato più stabile e «sicuro» in un'era altrimenti caotica.

Keywords / **Parole chiave**: Constitutional patriotism, Württemberg, identity, liberalism, Germany / Patriottismo costituzionale, Württemberg, identità, liberalismo, Germania.

Ida Ferrero, *Rethinking the electoral and constitutional system: the works of Palma and Brunialti on the Norwegian constitution / Per una riforma del sistema elettorale e costituzionale: i contributi di Palma e Brunialti sulla costituzione norvegese*

The Norwegian constitutional system attracted the attention of Italian scholars for a long period of time. The works of two important jurists like Luigi Palma and Attilio Brunialti showed that the features of the Norwegian constitution embodied a case study that offered many hints for the legal debate. Norway was an interesting example and model of study for its electoral system – in an historical setting in which there existed widespread concern about the effects of the extension of the right to vote – both regarding the transition towards a parliamentary system of government and the role of the monarchy.

Il sistema costituzionale norvegese attirò l'attenzione di studiosi e politici italiani per un arco di tempo considerevole. I lavori di due importanti studiosi di diritto costituzionale come Attilio Brunialti e Luigi Palma mostrano come la Norvegia offrisse un interessante modello di studio e di confronto sia riguardo al sistema elettorale – in un momento storico in cui non mancavano timori per le conseguenze dell'allargamento del suffragio – sia circa la transizione verso un governo di tipo parlamentare e la posizione della Corona.

Keywords / **Parole chiave**: Norwegian constitution, Attilio Brunialti, Luigi Palma, electoral legislation, parliamentary government / Costituzione norvegese, Attilio Brunialti, Luigi Palma, legge elettorale, governo parlamentare.

Matteo Zamboni, *The Treatment of Italians Abroad in the Legal Opinions of the Consiglio del Contenzioso Diplomatico of the Italian Ministry of Foreign Affairs (1861-1907) / Il trattamento degli italiani all'estero nella giurisprudenza del Consiglio del contenzioso diplomatico del ministero degli affari esteri del regno d'Italia (1861-1907)*

The paper seeks to reconstruct the development of international law rules concerning the protection of individuals through the discussion of fresh sources concerning a number of cases of diplomatic protection of Italian nationals residing abroad between the proclamation of the Kingdom

of Italy and the outbreak of WWI. The primary sources of the research are the legal opinions delivered by the *Consiglio del contenzioso diplomatico* (an advisory committee of statesmen, international lawyers and diplomats established at the Italian Ministry of Foreign Affairs in 1857) for the use of the Italian Government acting on behalf of its nationals in these disputes. The legal opinions delivered for the other Governments involved in the cases, as well as the reports of the *Institut de droit international* and other international law works of the time on the subject of the treatment of foreigners and diplomatic protection are likewise taken into consideration. These opinions, these reports and these works, albeit oscillating between political considerations and scientific aspirations (or, arguably, for this very reason), offer a valuable insight into one of the branches of public international law that developed more distinctly between the second half of the XIX Century and the beginning of the XX Century.

L'articolo ricostruisce lo sviluppo delle norme di diritto internazionale relative alla tutela degli individui attraverso l'analisi di fonti inedite relative ad alcuni casi di protezione diplomatica di cittadini italiani residenti all'estero dalla proclamazione del Regno d'Italia sino allo scoppio della prima guerra mondiale. Le fonti primarie della ricerca sono i pareri elaborati dal Consiglio del contenzioso diplomatico (una commissione di alti burocrati, giuristi, in particolare internazionalisti, e diplomatici) su richiesta del Governo italiano, che avrebbe dovuto agire per la protezione diplomatica dei propri sudditi. Oltre ai pareri, l'articolo prende in considerazioni le consulenze fornite dagli organi consultivi dei ministeri degli affari esteri degli altri paesi coinvolti in simili casi, i progetti e le risoluzioni dell'Institut de droit international e le opere pubblicate dalla dottrina coeva. Tali fonti, per quanto costrette fra esigenze di politica estera e ambizioni scientifiche (o, forse, proprio per questa ragione) offrono una prospettiva originale su una delle branche del diritto internazionale pubblico che più si è sviluppata fra la seconda metà del diciannovesimo secolo e l'inizio del secolo successivo.

Keywords / Parole chiave: Italians Abroad, Diplomatic Protection, Aliens, Institut de Droit International, Italian School of International Law, Nationality / Italiani all'estero, Protezione Diplomatica, Stranieri, Institut de Droit International, Scuola Italiana di Diritto Internazionale, Nazionalità e Cittadinanza.

Luigi Nuzzo, *Quel che resta della sovranità. Concessioni e governo del territorio a Tianjin / The remains of the sovereignty. Settlements and land governance in Tianjin*

Aperta al commercio con le potenze Occidentali con la convezione di Pechino del 1860, Tianjin è l'unica città cinese in cui coesistettero fino a nove diverse concessioni straniere. Questo articolo si prefigge l'obiettivo di ricostruire l'ambigua origine dei primi tre insediamenti occidentali, il *settlement* inglese, la concessione francese e la "so called" concessione americana, sottolineando la rilevanza della dimensione coloniale nel processo di costruzione e definizione del moderno diritto internazionale. Tianjin costituisce, quindi, un ottimo punto di osservazione per comprendere come sia stato possibile trasformare una sperduta località dell'impero cinese in un nuovo spazio sociale al cui interno definire inedite relazioni tra diritti e discorsività giuridiche differenti. Allo stesso tempo essa può essere assunta anche come un modello per leggere le discussioni giuridiche sull'eccezionalità degli spazi non occidentali e le loro popolazioni e per seguire le proiezioni extraeuropee del diritto internazionale occidentale.

Opened as a treaty port in 1860 with the Beijing convention, Tianjin is the only Chinese city where up to nine foreign concessions coexisted. This article focuses on the ambiguous origin of the first three Western settlements (the English, the French and the American concession), underlining the importance of the colonial dimension in the definition of modern international law. As a matter

of fact, Tianjin is an excellent point of observation to understand how it was possible to transform a remote Chinese city into a new social space within which it is possible to define new relationships between different legal systems. At the same time, Tianjin can also be assumed as a model for reading the legal discussions about the exceptionality of the non-Western spaces and their populations, and to follow the projections of Western international law beyond the borders of the West.

Parole chiave / Keywords: Diritto internazionale, colonialismo, Cina (XIX secolo), Tianjin / International Law, colonialism, China (XIX century), Tianjin.

Giacomo Demarchi, *Sovranità, autonomia, democrazia:* El Estado integral *spagnolo del 1931 come laboratorio del regionalismo contemporaneo / Sovereignty, autonomy, democracy: the spanish* Estado integral *of 1931 as a laboratory of contemporary regionalism*

Il costituzionalismo democratico della prima metà del ventesimo secolo ha cercato di superare il monismo e la centralità del concetto di sovranità con la democratizzazione dello stato. Con questa finalità il concetto di autonomia fu lo strumento principe per dare spazio al pluralismo territoriale, politico e sociale nella cornice dello stato di diritto. La costituzione tedesca del 1919 e la austriaca del 1920 furono le apripista di un processo che ebbe nella costituente spagnola del 1931 un importante momento di svolta, specie sul problema territoriale. Scopo di questo saggio è ricercare le fonti e le radici culturali del modello dell'*Estado Integral* della seconda Repubblica, per meglio comprendere la funzione di democratizzazione che il regionalismo avrebbe dovuto assumere nel costituzionalismo occidentale.

The democratic constitutionalism in the first half of the twentieth century has tried to overcome the monism and the centrality of the concept of sovereignty with the state democratization. With this purpose the concept of autonomy was the main tool to give space to the territorial, political and social pluralism in the framework of the rule of law. The German constitution of 1919 and the Austrian 1920 were the forerunners of a process that had in the Spanish Constituent of 1931 an important turning point, especially on the territorial problem. Purpose of this essay is to seek out the sources and the cultural roots of the *Estado integral* model of the second Republic, in order to better understand the democratization function that the regionalism should have assumed in Western constitutionalism.

Parole chiave / Keywords: Seconda Repubblica spagnola, Regionalismo, Autonomia, Storia costituzionale comparata, Processi costituenti del XX secolo / Second Spanish Republic, Regionalism, Autonomy, Comparative Constitutional History, Constituent Processes of the Twentieth Century.

Luigi Lacchè, *On the Italian Style: The Eclectic Canon and the Relationship of Theory to Practice as key-elements of Italian Legal Culture (19th-20th Centuries) / Sullo "stile italiano". Il canone eclettico e il rapporto tra teoria e pratica come elementi chiave della cultura giuridica italiana (secc. XIX-XX)*

This paper, following some of John Merryman's suggestions regarding the "Italian style" concept, aims to shed new light on Italian legal culture between the nineteenth and the twentieth century. The article seeks to identify in particular the "anthropological-cultural" dimension of the Italian jurist's experience. For this purpose I propose a new interpretative concept, namely, the "eclectic

canon". It has to do with the general category of «eclecticism» but it is something different and more than this. It is an approach that can help us to appreciate the complexity of Italian legal culture by transcending the oft-told "tale" in two chapters (French influence first (1800-1870), German influence subsequently: 1870-1920). We are concerned here with a *cultural foundation* pre-existing the so-called Schools (Exegèse, Historische Schule, Philosophical or Benthamit School…). The eclectic canon is not a school but rather a *deep stratum*. It does not produce a system or a legal order. It deals above all with the *habitus*, or the ways of being a jurist.

Italian style entails the tempering of different stances. In effect, another consequence of the eclectic canon – constantly noted by most Italian jurists – would be that of the combination of theory and practice in the actual design of legal culture.

L'articolo – partendo da alcune suggestioni di John Merryman sul concetto di "Italian Style" – intende fare nuova luce sulla cultura giuridica italiana tra il XIX e il XX secolo. Il lavoro cerca infatti di identificare la dimensione "antropologico-culturale" dell'esperienza del giurista italiano. Per far ciò si propone un nuovo concetto interpretativo, ovvero quello di "canone eclettico". Tale concetto ha a che fare con la categoria generale di "eclettismo" ma va ben oltre quest'ultima. Si tratta di un approccio che può aiutarci ad apprezzare la complessità della cultura giuridica italiana andando oltre il consueto "racconto" in due "capitoli" (l'influenza francese dapprima (1800-1870), l'influenza tedesca dopo: 1870-1920). Nel saggio si affronta così il tema della *fondazione culturale* che preesiste alle cd. "scuole" (Esegesi, Scuola storica, scuola filosofica o benthamiana). Il canone eclettico non è una "scuola", bensì, piuttosto, uno *strato profondo*. Esso non produce un sistema o un ordine giuridico. Riguarda invece, soprattutto, l'*habitus*, o i modi di essere del giurista.

Lo "stile italiano" implica il temperamento di differenti caratteri. Inoltre, un'altra conseguenza del "canone eclettico" – costantemente osservato dalla maggior parte dei giuristi italiani – è la combinazione di teoria e pratica nell'effettivo assetto della cultura giuridica.

Keywords / **Parole chiave**: Italian style, Legal culture, Legal Tradition, eclecticism, eclectic canon, deep stratum, nineteenth century / Stile italiano, cultura giuridica, tradizione giuridica, eclettismo, canone eclettico, strato profondo, Diciannovesimo secolo.

Ronald Car, *La chimera* Antifa-Block. *Alla ricerca della forma di governo per una "Weimar migliore" nella Zona di Occupazione Sovietica / The* Antifa-Block *chimera. In search of the form of government for a "better Weimar" in the Soviet Occupation Zone*

Tra il 1945 e 1948, nella Zona di Occupazione Sovietica gli esponenti politici superstiti dell'era di Weimar erano accomunati dall'intento di rifondare la democrazia tedesca riparando agli errori del passato che a loro giudizio avevano aperto la via al nazismo. Su iniziativa comunista fu varata una istituzione governativa inedita – l'*Antifa-Block* – che, correggendo le disfunzionalità del parlamentarismo di Weimar, avrebbe dovuto gettare le fondamenta strutturali per una "Germania migliore". Affinché la democrazia parlamentare non venisse nuovamente erosa dalle contraddizioni della società di classe, il processo decisionale fu vincolato alla regola dell'unanimità. Inoltre, per garantirsi contro l'instabilità delle coalizioni governative e l'ostruzionismo che avevano delegittimato i governi degli anni Venti, si negò ai partiti il diritto di porsi all'opposizione costringendoli ad una "solidarietà costruttiva". L'avvio della Guerra Fredda nel 1948 permise alla corrente stalinista della SED di alterare le regole dell'*Antifa-Block* tramutandolo nello strumento con cui il partito-Stato SED monopolizzò il potere in modo apparentemente democratico. Rimane aperta la questione

delle potenzialità dell'istituto in sé, in particolare se partiti divisi da interessi sociali contrapposti erano in grado di coniugare il pluralismo politico a una collaborazione unanime. La denuncia di ogni opposizione in nome della "democrazia armata" poteva essere una risposta valida alla crisi del parlamentarismo di Weimar? Ed infine, le (relativamente) libere elezioni locali e regionali del settembre-ottobre 1946 avevano dato prova che la solidarietà coatta dell'*Antifa-Block* poteva contenere il conflitto politico che accompagna le procedure democratiche di voto?

Between 1945 and 1948, in the Soviet zone of occupation the surviving party leaders of the Weimar era tried jointly to re-establish German democracy by correcting the mistakes of the past that in their opinion had opened the way for Nazism. On Communist initiative an unprecedented governmental institution was launched – the *Antifa-Block* – which, by correcting the dysfunctions of Weimar parliamentarianism, should have laid the structural foundations for a "better Germany". To avoid the erosion of parliamentary democracy caused by the contradictions of class society, the decision-making process was bound to the unanimous rule. In addition, to ensure against the instability of governmental coalitions and the obstructionism that had delegitimized the governments of the 1920s, the parties were denied the right to abandon the government and forced to "constructive solidarity." The launch of the Cold War in 1948 allowed the Stalinist wing of the SED to alter the rules of *Antifa-Block* and turn it into the instrument with which the SED state-party monopolized power in a seemingly democratic way. The question of the potential of the institute in itself remains open, especially the issue if parties divided by opposed social interests were able to combine political pluralism and unanimous cooperation. The denunciation of any opposition in the name of "armed democracy" was a valid response to the Weimar parliamentary crisis? And lastly, did the (relatively) free local and regional elections of September-October 1946 prove that the solidarity of *Antifa-Block* could contain the political conflict that accompanies democratic voting procedures?

Parole chiave / Keywords: Antifa-Block, SED, Weimar, Otto Grotewohl, Walter Ulbricht, Zona di Occupazione Sovietica / Antifa-Block, SED, Weimar, Otto Grotewohl, Walter Ulbricht, Soviet occupation zone.

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A. King (edited by), *The British Prime Minister*, London, Macmillan, 1985², pp. 195-220.
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S. Vassallo, *Brown e le elezioni. Il dietrofront ci insegna qualcosa*, in «Il Corriere della Sera», 9 ottobre 2007, p. 42.
G. Doria, *House of Lords: un nuovo passo sulla via della riforma incompiuta*, in «federalismi.it», n. 4, 2007, <http://federalismi.it>, settembre 2010.

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Benjamin, *Über den Begriff* tr. cit., pp. 15-20, 23.
Bonacina, *Storia e indirizzi del conservatorismo politico* cit., p. 19.
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Il referaggio dei pari assiste i Direttori e i Redattori nel compiere le scelte redazionali e attraverso la comunicazione redazionale con gli autori può anche aiutare gli autori a migliorare l'articolo.

Ogni referee scelto che si senta inadeguato a esaminare la ricerca riportata in un manoscritto o che sappia che gli sarà impossibile esaminarlo prontamente deve comunicarlo ai Direttori del *Giornale* e esentare se stesso dal processo di esame.

Ogni manoscritto ricevuto e da sottoporre a valutazione deve essere trattato come documento confidenziale. Esso non deve essere mostrato o discusso con altri eccetto quelli autorizzati dai Direttori e Redattori.

L'esame del manoscritto deve essere condotto in maniera obiettiva. Critiche personali concernenti l'autore sono inappropriate. I referees devono esprimere i loro pareri chiaramente con argomenti a loro supporto.

I referees devono individuare lavori rilevanti pubblicati che non sono stati menzionati dall'autore. Affermare che osservazioni, deduzioni, o tesi siano state precedentemente già sostenute deve essere accompagnato dalla citazione pertinente. I referees devono anche portare all'attenzione dei Direttori e Redattori ogni somiglianza sostanziale o sovrapponibilità tra il manoscritto sotto esame e ogni altro paper pubblicato di cui essi abbiano conoscenza personale.

Informazioni privilegiate o idee ottenute attraverso il referaggio devono essere considerate confidenziali e non usate a vantaggio personale. I referees non dovrebbero accettare di esaminare manoscritti che possano far nascere conflitti di interesse risultanti da relazioni o rapporti competitivi o collaborativi o di altra natura con gli autori, le società o le istituzioni connesse con il paper.

DOVERI DEGLI AUTORI

I principi etici su cui si basano i doveri degli Autori del *Giornale di Storia costituzionale* si ispirano a http://www.elsevier.com/framework_products/promis_misc/ethicalguidelinesforauthors.pdf.

Gli autori di manoscritti che riferiscono i risultati di ricerche originali devono dare un resoconto accurato del metodo seguito e dei risultati ottenuti e devono discuterne obiettivamente il significato e valore. I dati sottostanti la ricerca devono essere riferiti accuratamente nell'articolo. Questo deve contenere sufficienti riferimenti tali da permettere ad altri di ripercorrere la ricerca eseguita. Affermazioni fraudolente o scientemente inaccurate costituiscono comportamento non etico e sono inaccettabili.

Gli autori devono assicurare di aver scritto lavori interamente originali, e se gli autori hanno usato il lavoro e/o le parole di altri ciò deve essere citato in modo appropriato.

Di norma, gli autori non pubblicano manoscritti che presentano la stessa ricerca in più di un periodico o pubblicazione primaria.

Deve sempre essere dato riconoscimento appropriato del lavoro degli altri. Gli autori devono citare le pubblicazioni che hanno influito nel determinare la natura del lavoro da essi svolto.

La paternità di un manoscritto deve essere limitata a coloro che hanno dato un contributo significativo alla concezione, pianificazione, esecuzione o interpretazione dello studio riportato. Tutti coloro che hanno dato un contributo significativo dovrebbero essere elencati come co-autori. Nel caso in cui ci siano altri che hanno partecipato in alcuni aspetti sostanziali del progetto di ricerca, essi dovrebbero essere menzionati o elencati come contributori.
L'autore con cui è in contatto il *Giornale* dovrebbe assicurarsi che tutti i co-autori siano inclusi nell'articolo, e che tutti i co-autori abbiano visto ed approvato la versione finale del contributo e siano d'accordo a sottoporlo al *Giornale* per la sua pubblicazione.

Quando un autore scopre un errore significativo o una inesattezza nel proprio articolo pubblicato, ha l'obbligo di notificarlo prontamente ai Direttori, Redattori o Editori del *Giornale* e di cooperare con i Direttori per ritrattare o correggere l'errore.

BOARD OF EDITORS OF THE GIORNALE DI STORIA COSTITUZIONALE / JOURNAL OF CONSTITUTIONAL HISTORY

STYLE SHEET FOR THE AUTHORS

1. The editorial staff accepts articles in the main European languages.
2. The articles must have an electronic format (a '.doc' file or a '.rtf' file) and should not exceed 60,000 characters (including spaces). They can be sent to the following email address giornalestoriacostituzionale@unimc.it or copied onto a CD or a DVD and sent to the postal address of the Board of Editors: Giornale di Storia costituzionale / Journal of Constitutional History, Dipartimento di diritto pubblico e teoria del governo, Università degli Studi di Macerata, piazza Strambi, 1 – 62100 Macerata, Italy.
3. Every article must include:
   - title, eventual subtitle, name and surname of the author, her / his academic title, name and address of the institution to which she / he belongs, email address;
   - abstract (no longer than 2,500 characters) and 5 keywords, written both in the language of the article and in English.
4. The eventual iconographic material should be sent in separate files named in such a way as to indicate their sequence. Images ('.tiff' or '.jpeg' format) should have a definition of, at least, 300 dpi and a width at their base of, at least, 70 mm; graphs and tables should be sent in their original format with a width no larger than 133 mm. The captions relating to every image, table or graph have to be inserted in a separate text file.

EDITORIAL RULES

Titles. The use of capital letters or small capital letters is to be avoided. The titles of articles and abstracts are to be written in English as well. Subheadings and sub-subheadings must be numbered with progressive Arabic numerals. Please avoid to put a full stop at the end.

Manuscript preparation. The manuscript must have basic stylistic features. The editors only require the recognisability of the elements of which the contribution is made up: the title, the subheadings and sub-subheadings, the body of the text, the quotations, the endnotes and the position of the eventual explicative material (images, graphs, tables). All the layout that is not necessary for the comprehension of the content must be avoided, in that it makes less easy file processing. Automatic text formatting, justifying lines, using numbered (or bullet) lists provided by a programme, using the hyphen or striking the enter key in order to divide words into syllables must be avoided. Automatic division into syllables must be avoided as well; it is sufficient to justify the left margin. Use the enter key only in order to end a section. Respect the function and the hierarchy of inverted commas (" ") and quotation marks (« »); limit the use of italics and, if possible, avoid the use of bold type or underlined parts.
Choose common fonts (Arial, Times, Verdana) and indicate – in a note for the editorial board – the eventual use of special type. For further instructions see below.

Quotations. Lengthy quotations (more than 3 or 4 lines) must be separated from the body of the text (preceded and followed by a blank line), should not be in inverted commas or quotation marks, should be written with types of a smaller size and never in italics.
Short quotations should be incorporated in the text body and put in quotation marks « »; eventual quotations which are within a quotation must be put in inverted commas " ", and never in italics.

Endnotes. Endnotes are essentially destined to mere bibliographical reference and to explicative purposes. We recommend limiting the number of endnotes. In any case, the number of characters (including spaces) of the endnotes should not exceed a third of the total number of characters of the text (therefore in a standard text of 60,000 characters, including spaces, endnotes should not exceed 20,000 characters, including spaces).
Note numbers in the text should be automatically created, should precede a punctuation mark (except in the cases of exclamation and question marks and of suspension points) and be superscripted without parentheses.
Even if it is a question of endnotes (and not footnotes), note numbers in the text should never be created superscripting numbers manually, but always using the specific automatic function of the writing programme (for example in Word for Windows 2003 in the menu Insert > Reference). A full stop always ends the text in the notes.

Bibliographical references. Bibliographical information of a quoted work belongs in the notes.
In the first quotation of the work, complete data must be indicated, that is the below-mentioned elements following the order here established.

– if it is a **monograph**: initial of the name (in capital letters) followed by a full stop and surname of the author (with only the initial in capital letters and never in small capital letters); title in italic type; place of publication; publishers; year

of publication (eventual indication of the quoted edition superscripted). All these elements must be separated from one another by a comma. A comma must also separate the name of the authors, if a work has been written by more than one person. In the case in which the author has a double name, the initials should not be separated by a space. 'Edited by' must be written between parentheses in the language in which the quoted text is written, immediately after the name of the editor and the comma must be inserted only after the last parenthesis. If only a part of the work is quoted, the relative page (or pages) must be added. If it is a work of more than one volume, the indication of the number of the volume (preceded by 'vol.') must be given and it should be placed before the numbers of the pages. Examples:
F. Jahn, *Deutsches Volksthum*, Lübeck, Niemann & Co, 1810.
L. Pegoraro, A. Rinella, *Le fonti del diritto comparato*, Torino, Giappichelli, 2000.
R.D. Edwards, *The Best of Bagehot*, London, Hamish Hamilton, 1993, p. 150.
A. King (edited by), *The British Prime Minister*, London, Macmillan, 1985², pp. 195-220.
AA.VV., *Scritti in onore di Gaspare Ambrosini*, Milano, Giuffrè, vol. III, pp. 1599-1615.

– if it is a **translated work**: initial of the name (in capital letter) followed by a full stop and surname of the author (with only the initial in capital letter and never in small capital letters); original title of the work in italic type; year of publication between parentheses, followed by a semicolon; the following abbreviations: It. tr. or Fr. tr. or Sp. tr. etc. (which precede and introduce the title of the translation); title of the translation in italic type; place of publication; publishers; year of publication. Examples:
W. Benjamin, *Über den Begriff der Geschichte* (1940); It. tr. *Sul concetto di storia*, Torino, Einaudi, 1997.
J.S. Mill, *Considerations on Representative Government* (1861); It. tr. *Considerazioni sul governo rappresentativo*, Roma, Editori Riuniti, 1999.

– if it is an **article published in a miscellaneous work**: initial of the name (in capital letters) followed by a full stop and surname of the author of the article (with only the initial in capital letters and never in small capital letters); title of the article in italic type; initial of the name (in capital letters) followed by a full stop and surname of the editor / author of the volume (with only the initial in capital letters and never in small capital letters) preceded by 'in' and eventually followed by ('edited by'); title of the volume in italic type; place of publication; publishers; year of publication; pages of the articles. Examples:
G. Miglio, *Mosca e la scienza politica*, in E.A. Albertoni (a cura di), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, Milano, Giuffrè, 1987, pp. 15-17.
O. Hood Phillips, *Conventions in the British Constitution*, in AA.VV., *Scritti in onore di Gaspare Ambrosini*, Milano, Giuffrè, vol. III, pp. 1599 s.

– if it is an **article which appeared in a periodical**: initial of the name (in capital letters) followed by a full stop and surname of the author of the article (with only the initial in capital letters and never in small capital letters); title of the article in italic type; name of the periodical in quotation marks (« ») preceded by 'in'; number of the volume of the periodical (if present) written in Roman numerals; number of the issue preceded by 'n.' (not by n°., N., num. etc.); year of publication; page number(s). In the case of quotation from a newspaper, after the name of the newspaper indicate the complete date. In the case of reference to articles published in online periodicals, the exact 'http' address of the text must be given, or alternatively, of the main page of the website which publishes it. Examples:
G. Bonacina, *Storia e indirizzi del conservatorismo politico secondo la dottrina dei partiti di Stahl*, in «Rivista storica italiana», CXV, n. 2, 2003.
A. Ferrara, M. Rosati, *Repubblicanesimo e liberalismo a confronto. Introduzione*, in «Filosofia e Questioni Pubbliche», n. 1, 2000, pp. 7 ss.
S. Vassallo, *Brown e le elezioni. Il dietrofront ci insegna qualcosa*, in «Il Corriere della Sera», 9 ottobre 2007, p. 42.
G. Doria, *House of Lords: un nuovo passo sulla via della riforma incompiuta*, in «federalismi.it», n. 4, 2007, <http://federalismi.it>, settembre 2010.

Bibliographical data must be complete only for the first quotation; the following quotations are shortened, indicating only the surname of the author / editor; the title (or part of it) in italic type followed by the abbreviation 'cit.' or 'cit. tr.' (in the case of translated works); the number of pages. Here we give some examples for the different typologies of works:

Jahn, *Deutsches Volksthum* cit., pp. 45, 36.
Pegoraro, Rinella, *Le fonti del diritto* cit., p. 200.
King, *The British Prime Minister* cit., p. 195.
Benjamin, *Über den Begriff* cit. tr., pp. 15-20, 23.
Bonacina, *Storia e indirizzi del conservatorismo politico* cit., p. 19.
Ferrara, Rosati, *Repubblicanesimo* cit., pp. 11 and following pages.
Doria, *House of Lords* cit.

In the case of reference to the same work and the same page (or pages) quoted in the preceding endnote '*Ibidem*' (in italic type) can be used, without repeating any of the other data; if instead reference is made to the same work quoted in the preceding endnote, but to a different page, 'Ivi' can be used followed by the page number.

FURTHER INSTRUCTION FOR THE PREPARATION OF THE MANUSCRIPT

References within the issue. They should never refer to page numbers; instead sections of the text, full articles and paragraphs or images (opportunely numbered) can be referred to.

Pages. In bibliographical references, referring to the number or the numbers of the pages must always be preceded by (respectively) 'p.' or 'pp.' and reported entirely; therefore, for example, 'pp. 125-129' and not 'pp. 125-9'. In the case in which it is a question of non consecutive pages, numbers must be separated by commas: for example: 'pp. 125, 128, 315.' in order to indicate the following page or pages, as well please use 'f.' or 'ff.' respectively (hence without the preceding 'and').

Dates. Reporting dates, the author can adopt the criterion which he believes to be the most adequate, as long as he rigorously respects the internal uniformity of the article. In the case where abbreviated forms are used, please use the preceding apostrophe and not the single inverted comma (for examples '48 and not '48).

Abbreviations and acronyms. Abbreviations must always be without the dot between the letters and, the first time they are quoted, they must be followed by the full name and by the eventual translation in brackets. It is not necessary to explain common use abbreviations (like USA, NATO, ONU, UE, etc.).

Suspension points. Are always three in number, therefore they should not be inserted in the text writing three full stops, rather inserting its symbol. When they indicate suspension – as every punctuation mark – they should be separated by a space from the following word and attached to the word that precedes them (for example: … *I do not remember any more*…). They do not require the final full stop.
When they indicate elision, therefore a cut or a gap in the text, the symbol must be included in square brackets, like this […].

Dashes and hyphens. The dash is used, followed or preceded by a space, in order to open and close an incidental sentence. When the dash that closes the incidental sentence coincides with the closing of the whole sentence, it is omitted and only a full stop is inserted. Eg.: …*text – incidental sentence that closes also the whole sentence*. The hyphen is used only for compound words formed by entire words (eg.: tree-house) and in order to unite two numerical quantities (eg.: pp. 125-148); always without spaces before and after.

Quotation marks and inverted commas. Quotation marks « » are used in order to indicate direct speech, short quotations, and, in bibliographical references, for the titles of the periodicals. The inverted commas " ", instead are used for words of common use to which the author would like to give a particular emphasis (or which are used regardless of their habitual meaning). Moreover, in the quotation of titles of newspapers, periodicals, magazines or chapters or sections of paragraphs of a book (eg.: … as indicated in the paragraph "La Germania assassinata" of the *Storia dell'età moderna*…). Finally, when it is necessary to use inverted commas within a sentence which is already in quotation marks. The hierarchy is the following: «… "… '…' …" …». Punctuation marks (except the exclamation or the question mark when they are part of the quotation) should always be placed after the closing quotation marks or inverted commas.

Web reference. When referring to online contents, the complete address (including the protocol 'http://' or 'ftp://' etc. possibly without breaking it) must be indicated and must be included between the signs < >; the date of consultation or verification of the address should always be indicated. Another essential element is the title (or name) of the website / page or a brief description of the contents that could be found at the quoted address. Therefore, for example, a correct reference can be formulated as follows: Sezione novità delle Edizioni Università di Macerata, <http://eum.unimc.it/novità>, June 2010.

PUBLICATION ETHICS AND PUBLICATION MALPRACTICE STATEMENT

DUTIES OF EDITORS

Our ethic statements concerning the duties of the editors of the *Journal of Constitutional History* are based on COPE (Committee on Publication Ethics), *Best Practice Guidelines for Journal Editors*: http://publicationethics.org/files/u2/Best_Practice.pdf.

The editors of the *Journal* are responsible for deciding which of the articles submitted to the *Journal* should be published. They are guided by the policies of the *Journal*'s International Board and constrained by the laws in force.
They actively work to improve the quality of their *Journal*.

The editors evaluate manuscripts for their intellectual content without regard to race, gender, sexual orientation, religious belief, ethnic origin, citizenship, or political orientation of the authors.

The editors and any editorial staff must not disclose any information about a submitted manuscript to anyone other than the corresponding author, reviewers, potential reviewers, other editorial advisers, and the publisher.

Unpublished materials disclosed in a submitted manuscript must not be used in an editor's own research without the express written consent of the author.

DUTIES OF REVIEWERS

Our ethic statements concerning the duties of reviewers are based on http://www.njcmindia.org/home/about/22.

Peer review assists the editor in making editorial decisions and through the editorial communications with the author may also assist the author in improving the paper.

Any selected referee who feels unqualified to review the research reported in a manuscript or knows that its prompt review will be impossible should notify the editor and excuse himself from the review process.

Any manuscripts received for review must be treated as confidential documents. They must not be shown to or discussed with others except as authorized by the editor.

Reviews should be conducted objectively. Personal criticism of the author is inappropriate. Referees should express their views clearly with supporting arguments.

Reviewers should identify relevant published work that has not been cited by the authors. Any statement that an observation, derivation, or argument had been previously reported should be accompanied by the relevant citation. A reviewer should also call to the editor's attention any substantial similarity or overlap between the manuscript under consideration and any other published paper of which they have personal knowledge.

Privileged information or ideas obtained through peer review must be kept confidential and not used for personal advantage. Reviewers should not consider manuscripts which can give birth to conflicts of interest resulting from competitive, collaborative, or other relationships or connections with any of the authors, companies, or institutions connected to the papers.

DUTIES OF AUTHORS

Our ethic statements concerning the duties of authors are based on http://www.elsevier.com/framework_products/promis_misc/ethicalguidelinesforauthors.pdf.

Authors of reports of original research should present an accurate account of the work performed as well as an objective discussion of its significance. Underlying data should be represented accurately in the article. This should contain

sufficient detail and references to permit others to replicate the work. Fraudulent or knowingly inaccurate statements constitute unethical behaviour and are unacceptable.

The authors should ensure that they have written entirely original works, and if the authors have used the work and/or words of others that this has been appropriately cited or quoted.

Usually, authors should not publish manuscripts presenting the same research in more than one *journal* or primary publication.

Proper acknowledgment of the work of others must always be given. Authors should cite publications that have been influential in determining the nature of the reported work.

Authorship should be limited to those who have made a significant contribution to the conception, design, execution, or interpretation of the reported study. All those who have made significant contributions should be listed as co-authors. Where there are others who have participated in certain substantive aspects of the research project, they should be acknowledged or listed as contributors.
The corresponding author should ensure that all co-authors are included on the article, and that all co-authors have seen and approved the final version of the article and have agreed to its submission to the *Journal* for its publication.

When an author discovers a significant error or inaccuracy in his/her own published work, it is the author's obligation to promptly notify the *Journal* editor or publisher and cooperate with the editor to retract or correct the paper.

Michael Stolleis

Introduzione alla storia del diritto pubblico in Germania (XVI-XXI sec.)

eum biblioteca Giornale di Storia costituzionale